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Henrik Ringbom *Editor*

Regulatory Gaps in Baltic Sea Governance

Selected Issues

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Regulatory Gaps in Baltic Sea Governance

Selected Issues

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Series Foreword

The MARE Publication Series first paid attention to the complexities of the Baltic Sea and its human dimensions in 2016. The volume edited by Michael Gilek, Mikael Karlsson, Sebastian Linke and Katarzyna Smolarsz, entitled ‘Environmental governance of the Baltic Sea’ investigated a key set of environmental challenges and the ways in which they are currently being addressed. The present volume, in contrast, edited by Henrik Ringbom, examines the same regional sea, but takes a socio-legal perspective. The multiple layers of regulation that co-exist are the starting point of analysis, with attention subsequently turning to the gaps and uncertainties that emerge at their interstices. This focus on regulatory hotspots and their transmutations is instructive and makes for interesting analysis. We are therefore delighted to be able to include this volume in our series. As series editors, we also hope to publish similar in-depth analyses of other regional seas around the world in the future. Although each regional sea is expected to have unique features and challenges, it is also reasonable to assume that there are many similarities, which would allow for cross-regional learning, especially related to environmental, socio-political and legal governance.

The MARE Publication Series commenced in 2004 with Amsterdam University Press, but moved to Springer Academic Publishers in 2012. It has hitherto contained eighteen edited and single-authored volumes on a variety of regions and topics in the field of people, coasts and seas. Fritz Schmuhl and other staff of Springer have facilitated the production process, for which we are again more than grateful.

The series editors,
University of Tromsø, Tromsø, Norway — Svein Jentoft
University of Amsterdam, Amsterdam, Netherlands — Maarten Bavinck

Preface

This publication forms part of a research project on the regulatory ‘anatomy’ and governance structures of the Baltic Sea and for the Baltic Sea region. The BaltReg-project (2015–2018), run by Åbo Akademi University, is a joint interdisciplinary law and public administration research project, funded by the Academy of Finland, to analyse the interaction and interrelationship between the different layers of regulation in the region.

The interest in improving the understanding of the regulatory structures for the Baltic Sea has also been highlighted in the active cooperation between Åbo Akademi University and University of Turku, both located at the heart of the Baltic Sea in the city of Turku. Through the Baltic Sea Area Legal Studies (BALEX) network (www.balex.fi), the two universities and their partners around the region constantly seek to improve interdisciplinary understanding of how different regulatory measures affect the Baltic Sea.

Even if the Baltic Sea can arguably be described as the world’s most heavily regulated sea area, there is surprisingly little analysis of how different regulatory layers interact and how the various governance regimes and institutions, laws and organisations that govern the area work together. This book addresses the legal interaction between various regulatory layers through the selection of a number of case studies on issues that are of particular relevance for the Baltic Sea. Later publications in the project will place more emphasis on the inter-relationship between law and other steering mechanisms.

The book represents the outcome of a small-scale international seminar, entitled ‘Regulatory Voids and Legal Hotspots in the Baltic Sea’, which was convened in Turku on 28–29 April 2016 and in which all authors participated. On behalf of the organisers of the event, I wish to extend my thanks to everybody who contributed. Particular thanks are also due to Springer Verlag for their helpfulness and support in securing the smooth publication of the volume and to the anonymous reviewers for

their helpful and insightful comments. The seminar, as well as this book, are at the same time a celebration of Professor emeritus Peter Wetterstein's life-long work and devotion to maritime and environmental legal studies. Finally, thanks are owed to Finska Vetenskapssocieteten (the Finnish Society of Sciences and Letters) for their financial support for the seminar and to LL.M. Åsa Gustafsson for her excellent editorial assistance throughout the book project.

Turku/Åbo, Finland Henrik Ringbom
20 January 2017

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Chapter 1
Introduction

Henrik Ringbom

Abstract The introductory chapter explains the purpose and context of the book and briefly introduces the contributing articles.

Keywords Regulatory Gaps · Baltic Sea · Multi-level governance · Environmental regulation · Regulatory layers

The Baltic Sea region is unique in many ways, in terms of its geographical and climatic conditions and environmental challenges, but also in terms of its economic and political characteristics and governance structures. The area has undergone significant changes over recent decades, due to changing political landscapes and economic development in the region, as well as through the enlargement and increased activities of the European Union.

The focus of this publication is the uniqueness of the Baltic Sea from a legal perspective. Up to six layers of regulation (general international law, regional conventions, EU law, national laws, local and municipal rules plus a whole range of non-binding norms and other 'soft law' arrangements) act in parallel in the region. However, a large number of regulatory layers does not in itself ensure consistency or effectiveness. When the regulatory landscape is approached from the point of view of individual substantive topics, it is apparent that the norms of different regulatory layers entail both overlaps, gaps and uncertainties. The rules of different layers are inter-related through a complex and constantly evolving relationships, which vary from one subject area to another, thus needing to be assessed case-by-case.

This book focuses on certain gaps or other legal 'hotspots' in the Baltic Sea region. The individual chapters study issues that are deemed to be particularly topical from a Baltic regional perspective, addressing maritime issues that are decidedly international in scope, yet entail legal uncertainties at international or domestic

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level. The texts represent legal analyses in their own right, covering a broad spectrum of public and private law issues as they are addressed in international, EU and national laws. In terms of substance, the issues range from a geographic review of the key regulatory gaps and topics in the Baltic Sea area (Chaps. 2 and 3) to a closer review of issues that are decidedly international in nature - and highly relevant for the Baltic Sea region - yet not comprehensively regulated at the international or EU level (Chaps. 4, 5, 6, 7, 8, 9 and 10). The selected issues represent different starting points in terms of how well the topic is regulated and which regulatory layer dominates.

In addition to presenting a set of legal analyses of topical issues for the region, which in itself is a meritorious objective in view of the relative scarcity of legal studies about the Baltic Sea, the publication also seeks to study the regulatory 'anatomy' of the selected issues in some more detail. Through the legal analyses the chapters explore how regulatory gaps are formed, how they are filled, how the rules of the different layers work together and interact with each other in the selected areas. Accordingly, the secondary ambition is to explore, through the chapters, whether more general conclusions can be drawn about the nature of the regulatory gaps and multi-layerism in order to produce a better understanding of how regulations on multiple levels operate in practice.

To begin with, the Baltic Sea is one of the most complete sea areas in the world in terms of maritime delimitation. In his chapter, Erik Franckx illustrates that, apart from a few issues which are still to be settled, the whole sea area is now delimited. Rights and duties relating to different uses of the sea and its resources are thus distributed between the coastal states through a range of international agreements signed by the coastal states concerned. The 'high seas' areas of the Baltic Sea have disappeared in the process along with any other area beyond national jurisdiction. There are no more 'no man's lands' in the Baltic Sea or its seabed, which strengthens the picture - and jurisdictional reality - that questions related to the regulation and usage of the Baltic Sea and its resources are now for the Baltic Sea littoral states themselves to regulate and resolve.

Nevertheless, settling the boundaries of the maritime zones does not resolve all issues relating to the maritime zones. As the chapter by Pirjo Kleemola-Juntunen demonstrates, fundamental questions relating to the rights and usage of marine areas remain, even in the Baltic Sea. Through her analysis of the Baltic Sea's international straits (i.e. the Danish Straits and the Strait of Åland) she illustrates how fundamental questions related to the rights and obligations of passage are still disputed. The very nature of the straits in question is still not agreed on by all the relevant states. In this case, Dr. Kleemola-Juntunen finds that part of the answer to establishing the true legal nature of the states lies in history and that it is necessary to go back to the pre-UNCLOS sources to establish the legal nature of the straits.

What is commonly regarded as the most serious environmental threat to the Baltic Sea is the excessive influx of nutrients into the sea, or eutrophication. Despite widespread acknowledgment of the crucial correlation between emissions of nutrients into the Baltic Sea and the health of the sea, there is relatively little clear-cut regulation for such emissions. Eutrophication is not a concern at global level and

there are no global regulatory instruments to deal with this issue. By contrast, the topic has received considerable interest within the Helsinki Commission, HELCOM, which is specifically tasked to deal with the environmental challenges of the Baltic Sea and the EU. The way this matter is approached in regulation illustrates several complexities in the more modern eco-system and goal-oriented way of addressing environmental threats. As Brita Bohman shows in her chapter, on the one hand, the rules that follow from the Helsinki Convention are relatively unspecific. Many of the concrete targets are laid down in the Baltic Sea Action Plan, the legal status of which is not entirely clear. On the other hand, EU regulation in this area is increasingly eco-system-based, striving for generic goals such as a 'good environmental status' and hence allowing significant liberties to set the goals and measures region by region. Bohman illustrates the complexities in this regulatory situation, which is marked by a series of principles, targets and cross-references, where it is often unclear which body - if any - has a mandate to translate the target-oriented goals to more enforceable obligations and to follow up their implementation.

The second most important category of environmental threat to the Baltic Sea relates to pollution from various forms of chemicals. In this area, the present book analyses the regulatory gap that relates to chemical mixtures. Existing legislation on chemicals – even modern variants, such as the EU's REACH Regulation – is largely focused on individual substances, one-by-one, where the risk of the substance is based on its effect as the only toxic substance in an otherwise pristine environment. This focus fails to target combined toxicity when different chemicals are mixed, creating different types of regulatory gaps and imperfections. For example, the toxicity of a mixture of chemicals may very well exceed the toxicity of each individual compound and small, individually non-toxic concentrations might equally well add up to create severe toxicity of the overall 'cocktail'. The extent and significance of this regulatory gap, as well as the legal efforts to manage chemical mixes, are discussed in the chapter written by Lena Gipperth.

The remaining substantive issues considered in the book relate to different aspects of the seabed in the Baltic Sea. While the main jurisdictional rights and obligations relating to the seabed are laid down in UNCLOS, our examples illustrate that those provisions alone are rarely sufficient to address concrete issues. Accordingly, many of the topics addressed in the book have been complemented by more specific international rules at global, regional or EU-level, but the additional layers of laws have not always contributed to greater regulatory clarity.

One example is the regulation of historic shipwrecks, many of which are remarkably well preserved in the Baltic Sea, hence justifying a specific regional attention to this topic. Jan Aminoff explores the regulatory situation in his article and notes that in the absence of any widespread ratification of the 2001 UNESCO Convention on historical wrecks, there are significant gaps and uncertainties in the international regulation of wrecks. Thematically wrecks fall into a cross-section between the law of the sea, salvage law, public and private law, which caters for a variety of solutions to fill such legal gaps at national and Nordic level.

A different aspect of wrecks is addressed in the chapter by Markku Suksi, where he assesses the rights and obligations of public authorities to take action against

wrecks and cargo. Until recently this matter has been subject to important regulatory voids and uncertainty at both international and domestic levels, but several recent and important developments have sought to close or at least reduce those gaps. Even following such amendments, the Finnish legislation on wrecks contains a variety of acts, authorities and alternative procedural bases for the actions of authorities. Gaps have not been entirely removed, but at least reduced in scope, thanks to guidance by international rules. Significant variations still exist between national legislations in this area, not least among EU member states, as the matter has not been subject to regulation at the EU-level.

The regulation of subsea pipelines is explored in the chapter by Peter Wetterstein which addresses various questions related to civil liability and compensation departing from the Nord Stream gas pipeline that traverses the Baltic Sea. For such pipelines, too, UNCLOS provides the overall jurisdictional framework, by ensuring that states have significant rights to lay pipelines on the exclusive economic zones and continental shelves of other states, subject to certain obligations. For the rest of the issues, there is no international legal framework in place for this type of projects. Despite its inherently transnational nature, the construction of Nord Stream is based on a series of bilateral negotiations and agreements between the operator and the coastal (shelf) state concerned, including environmental impact assessments under the Espoo Convention. The absence of broad regulation for the Baltic Sea on this issue means that not only the process relating to the construction of a pipeline, including permits and relevant criteria, will vary from one state to another, but also that the subsequent legal status of the pipeline and related risks differ from one state to another. In his chapter, Peter Wetterstein illustrates how these divergences in national laws affect the application of civil liability in the case of damage caused by such pipelines.

The final substantive chapter concerns carbon capture and storage under the seabed. This represents an example of a field which – despite its recent appearance – is subject to a wealth of international and regional rules. In contrast to other areas discussed above, there is currently not much practical experience regarding this in the Baltic Sea. Accordingly, the chapter by David Langlet approaches the matter in tentative terms, considering the extent to which such activity is permitted on the Baltic seabed, and assessing the different tools available for prioritising between the different and conflicting uses. This leads to more recent environmental legislation, notably at EU-level, which focuses on processes and procedures, including marine spatial planning, and thereby more general questions relating to multi-level regulation of the Baltic Sea.

The selection of topics provides an interesting sample of different regulatory starting points for dealing with issues that are of particular relevance to the Baltic Sea. The final chapter provides a brief summary of the findings in terms of governance and assesses whether more general conclusions can be drawn from the material. Henrik Ringbom and Marko Joas make certain general observations related to the interaction between various kinds (and layers) of laws. In addition, the concluding section briefly addresses the broader question of how other forms of (multi-level) governance structures find the space to operate within and between the

existing (international, regional and national) rules. As it is probably not controversial to assume - as a starting point - that gaps and uncertainty in regulation increases operating space for other (non-legal) policy tools and steering mechanisms to influence the behaviour of states, sub-national governments and individuals, the findings on regulatory gaps will be of significance for analysing the interaction between law and other policy instruments in Baltic Sea governance in the later stages of the BaltReg project.

Chapter 2
Gaps in Baltic Sea Maritime Boundaries

Erik Franckx

Abstract Does the submission that the Baltic Sea is the world's most regulated international marine area also apply to maritime boundary delimitations? Probably so, according to this chapter, which addresses existing and past boundary agreements in the Baltic Sea. Following a general review of the law applicable to maritime boundary delimitation, it is concluded that even if the Baltic Sea is already fully covered by coastal zones, and that the areas of high seas or deep seabed have thus disappeared, there are still some outstanding issues and overlapping claims. Nevertheless, such a degree of completeness is unique in international comparison and, what is more, all boundary agreements in the Baltic Sea have been settled by negotiations, outside courts and tribunals.

Keywords Maritime delimitation · Law of the sea · Baltic Sea · Border agreements

2.1 Introduction

The present article is the reflection of an oral presentation given at an international seminar organized by the Åbo Akademi University, entitled "Regulatory Voids and Legal Hotspots in the Baltic Sea" held at Turku, Finland, 28–29 April 2016. Even though the purpose of this seminar was to analyze the interaction between the different layers of legal regulation applicable to the Baltic Sea, i.e. international, regional, European Union, national, and local levels, the present contribution will mainly address the first level (international) and to a lesser extent the fourth level (national legislation). As the determination of maritime boundaries are normally unilateral acts undertaken by the coastal states, the impression might be created that

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the national level prevails in this particular domain. However, as clearly stated by the International Court of Justice in 1951:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[1]

It is in other words the international level that the present contribution will focus upon. It will consequently also be on this particular level that the regulatory voids will be looked for. The paper intends to find out whether the generally accepted submission that the Baltic Sea is probably the world's most regulated international marine area, also applies to maritime boundary delimitations in the area. Within international law, the inner concentric circles of relevance here are the law of the sea, maritime delimitation law and finally the Baltic Sea as the latter constitutes the geographical field of application covered by the present publication.

Four sections will be subsequently addressed. Firstly, the broader international legal framework will be highlighted, including the applicable primary sources and the legal principles to be found there concerning maritime delimitation. Secondly, the focus will shift towards the Baltic Sea and the way these general legal principles have been applied in practice there. Thirdly, the remaining gaps will be uncovered, which will allow the paper to finally assess where exactly the Baltic Sea stands at present compared to other marine areas around the globe.

2.2 Applicable Primary Sources and Legal Principles

Contrary to some other branches of international law, the international law of the sea stands out for being well-codified.[2] This did not come easy, however, as a partial attempt undertaken by the League of Nations utterly failed during the 1930.[3] For the United Nations, however, the codification of the law of the sea has been a major success story. This organization was not only able to codify this particular branch of

[1] *Fisheries Case*, Judgment of 18 December I95I (1951) International Court of Justice (ICJ) Reports 1951, 116, 132.

[2] T. Treves "Law of the Sea" in R. Wolfrum (ed) *Max Planck Encyclopedia of Public International Law Online* (Oxford, Oxford University Press, 2011) paras. 11–21 (available at <www.mpepil.com>), who uses the following title above these paragraphs: "The Law of the Sea as a Codified Branch of International Law."

[3] It concerned only the regime of the territorial waters, but mainly due to the divergent opinions that existed at that time concerning the breadth of that maritime zone, the conference failed to adopt a convention on this subject. For an authoritative account of the law of the sea as it existed at that time, see the three volumes of G.C. Gidel *Le droit international public de la mer: le temps de paix* (Mellottée, Chateauroux, 1932–1934).

international law a first time in 1958,[4] but it did so a second time in 1982,[5] producing a single document which today is generally referred to as the Constitution for the Oceans,[6] as envisaged by its drafters in 1982.[7]

The first place to look for legal rules governing maritime delimitation is consequently the 1958 conventional system as well as the UNCLOS. Three types of delimitation are involved when considering the different maritime zones codified in 1958 and 1982: The first concerns the starting point for measuring these zones, i.e. the baseline; the second relates to their outer limit; and the third, finally, concerns the eventuality that these maritime entitlements of adjacent or opposite states overlap.[8] Only the third type of delimitation just enumerated will be addressed here. Since there are nine coastal states in the Baltic Sea, as defined by the World Hydrographic Organization,[9] and because its width is nowhere more than 400 nautical miles between countries having to delimit their maritime zones *inter se*, this entails that a good number of maritime boundaries need to be delimited.[10]

It is important to note that the rules to be found in the 1958 conventional system are not totally identical to those included in the UNCLOS. While there is no difference in substance between art. 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and art. 15 of the UNCLOS,[11] both governing the delimitation

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[4] Four conventions were adopted at that time: Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 (1966) 516 *United Nations Treaty Series* (UNTS) 205, 206–22; Convention on the Continental Shelf of 29 April 1958 (1965) 499 UNTS 311, 312–320; Convention on the High Seas of 29 April 1958 (1964) 450 UNTS 11, 82–102; and Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958 (1967) 559 UNTS 285, 286–300 all available at <https://treaties.un.org/doc/Treaties/1966/03/19660320%2002-16%20AM/Ch_XXI_01_2_3_4_5p.pdf>. Hereinafter 1958 conventional system.

[5] United Nations Convention on the Law of the Sea of 10 December 1982 (1998) 1833 UNTS 3, 397–581 available at <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>. Hereinafter UNCLOS.

[6] See remarks of the Secretary-General of the United Nations, Ban Ki-moon, made at the occasion of the commemoration of the thirtieth anniversary of the opening for signature of the UNCLOS, on 10 December 2012, before the General Assembly available at <http://www.un.org/press/en/2012/sgsm14710.doc.htm>.

[7] Remarks by Tommy T.B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, on 10 December 1982 available at <https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>.

[8] As noted in K. Gustafson Juras, J.E. Noyes and E. Franckx *Law of the Sea in a Nutshell* 2nd (West Publishing Company, St. Paul, Minnesota, 2010) 97.

[9] International Hydrographic Organization *Limits of Oceans and Seas (Special Publication N° 28)* 3rd (Imp. Monégasque, Monte-Carlo, 1953) 4–5 available at <http://www.iho.int/iho_pubs/standard/S-23/S23_1953.pdf>. Norway is thus not included for present purposes.

[10] The Russian enclave of Kaliningrad adds to its complexity.

[11] UNCLOS, note 5 at art. 15 reads: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which

of the territorial sea, this is not the case for the respective provisions relating to the delimitation of the continental shelf.

The 1958 Convention on the Continental Shelf contains a provision that closely resembles the one on the delimitation of the territorial sea, even though a difference is made this time between opposite and adjacent states,[12] the sole difference as to the substance of the rule being that historic title is no longer explicitly mentioned as a special circumstance that can offset the application of the median or equidistant line.[13] The UNCLOS has however "de-codified" the delimitation rule concerning the continental shelf,[14] because any concrete guidance as to the method to be applied has been eliminated in favor of a provision that only requires an equitable solution to be achieved.[15] Seminal in this development was the decision of the ICJ in the *North Sea Continental Shelf* cases of 1969, clearly indicating not only that art. 6 of the 1958 Convention on the Continental Shelf did not codify existing international law,[16] but also that this provision had not resulted in the creation of a new norm of customary international law since its codification,[17] which the ICJ later accepted with respect to the provision concerning the delimitation of the territorial sea as included in the 1958 Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS in virtually identical terms.[18]

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is at variance therewith." Only minor drafting changes are to be noted when this article is compared to the corresponding article of the 1958 Convention on the Territorial Sea and Contiguous Zone, note 4 at art. 12.

[12] The median line applies between opposite states, whereas equidistance governs the delimitation between adjacent states.

[13] 1958 Convention on the Continental Shelf, note 4 at art. 6 reads: "1) Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 2) 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."

[14] The term "décodification" was coined in this respect by T. Treves "Codification du droit international et pratique des États dans le droit de la mer" (1990) 223 *Recueil des cours de l'Académie de droit international de la Haye* 9, 104.

[15] UNCLOS, note 5 at art. 83 reads: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

[16] *North Sea Continental Shelf Cases*, Judgment of 20 February I969 (1969) ICJ Reports 3, 36–41 paras. 60–69.

[17] Ibid., 41–45 paras. 70–81.

[18] *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrein*, Merits, Judgment of 16 March 2001 (2001) ICJ Reports 40, 94 para. 176. This finding of the ICJ seems therefore to drastically reduce the persuasive force of the remarks made by a country like

In accordance with the UNCLOS, the delimitation provision of the newly created exclusive economic zone simply follows the one on the continental shelf in that parties need to arrive at an equitable solution.[19] The fact that both the continental shelf and the exclusive economic zone extend to a minimum of 200 nautical miles under the UNCLOS, further explains why a different delimitation rule than the one applicable to the territorial sea, limited to a maximum of 12 nautical miles, proved sensible to the UNCLOS III negotiators.[20]

If the delimitation provisions of the territorial sea and continental shelf under the 1958 conventional system in other words had much in common, namely the application of the equidistance/special circumstances principle,[21] they became totally detached under the UNCLOS. The ICJ noted in the *North Sea Continental Shelf* cases that a difference existed between the *in casu* non-applicable conventional delimitation norm with respect to the continental shelf, incorporating the equidistance/special circumstances principle, and the corresponding rule of customary international law, rather emphasizing the equitable principles/relevant circumstances approach.[22] As the *North Sea Continental Shelf* cases clearly indicated that equidistance does not always lead to an equitable result, especially in the presence of convex and concave coastlines, it should not come as a surprise that during the negotiations of the third United Nations Conference on the Law of the Sea (UNCLOS III), governed by the rule of consensus, adherents of both approaches finally settled for the lowest common denominator, i.e. a formula in which any explicit reference to controversial notions such as “equidistance”, “equitable principles”, “special circumstance” and “relevant circumstances” was carefully avoided.[23]

As a consequence, the exact relationship between the 1958 conventional system and the UNCLOS deserves some attention in this respect especially as codified rules do not necessarily reflect customary international law. According to the UNCLOS, the latter document prevails between states parties over the relevant instruments of the 1958 conventional system.[24] If the countries involved in a maritime delimitation are states parties to the relevant instrument of the 1958 conventional system but at

Belgium in its declaration when signing the UNCLOS, stating that “it regrets that the concept of equity, adopted for the delimitation of the continental shelf and the exclusive economic zone, was not applied again in the provisions for delimiting the territorial sea.”

[19] UNCLOS, note 5 at art. 74.

[20] D.R. Rothwell and T. Stephens *The International Law of the Sea* 2nd (Hart Publishing, Oxford, 2016) 421.

[21] S. Yanai “International Law Concerning Maritime Boundary Delimitation” in D.J. Attard, M. Fitzmaurice and N.A.M. Gutiérrez (eds) *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea* (Oxford University Press, Oxford, 2014) 304, 306–307.

[22] *North Sea Continental Shelf Cases*, note 16 at 53 para. 101, where the ICJ states: “[D]elimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances.”

[23] As stressed by M.D. Evans “Maritime Boundary Delimitation” in D.R. Rothwell, A.G.O. Elferink, K.N. Scott and T. Stephens (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 254, 258.

[24] UNCLOS, note 5 at art. 311(1).

least one of them is not a party to the UNCLOS, art. 6 of the Convention on the Continental Shelf might in theory still be applicable between them even though the content of this article may not necessarily correspond with customary international law on the subject.[25] As all nine coastal states in the Baltic Sea ratified the UNCLOS between 1994[26] and 2005,[27] they are all bound as a matter of treaty law by arts. 15, 74 and 83 of that document.

Given the absence of any concrete guidance as to the method to be followed in arts. 74 and 83, the reference to an equitable solution appears to direct the countries with different views on the equitableness of the matter to third party settlement. Much more than through the practice of states–not bound to base their delimitation agreements on law–, the law on maritime delimitation has been mainly shaped through the decisions of courts and tribunals as a kind of judge-made common law.[28] Totally in line with the general trend, moreover, only very few Baltic Sea coastal states have excluded maritime delimitation from compulsory third party settlement as permitted under art. 298 (1)(a)(i) of the UNCLOS.[29]

One could therefore have expected that courts and tribunals played a major role in delimiting the maritime areas of the Baltic Sea, especially when taking into consideration the presence of many islands in the area, usually rendering the achievement of an equitable solution quite elusive.

The next part will nevertheless demonstrate that despite the absence of any concrete guidance with respect to the rules of delimitation concerning the continental shelf and the exclusive economic zone under the UNCLOS, not a single segment of maritime delimitation has so far been arrived at by means of third party settlement in the Baltic Sea. Instead, states have always succeeded in finding a solution through the conclusion of bi- and trilateral agreements up to the present.

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[25] The term "in theory" is used, because there are in reality but a few countries bound by the 1958 Convention on the Continental Shelf today, that are not at the same time also a party to the UNCLOS. It concerns the following five countries: Cambodia, Colombia, Israel, United States and Venezuela. None of these states border the Baltic Sea.

[26] Germany. This country needed to ratify the UNCLOS before its entry into force if it wanted the seat of the International Tribunal for the Law of the Sea to be located in Hamburg.

[27] Estonia was the last Baltic Sea coastal state to ratify the UNCLOS on 16 August 2005.

[28] J.I. Charney "Progress in International Maritime Boundary Delimitation Law" (1994) 88 *American Journal of International Law* 227, 228.

[29] It concerns Denmark and Russia, who both did so at the time of ratification. Information available at <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%20ratification>.

2.3 Existing Maritime Delimitation Agreements in the Baltic Sea[30]

All maritime boundaries in the Baltic Sea have so far been established by means of agreements directly arrived at between the coastal states in the area. When viewed as a whole,[31] four distinct periods can be distinguished in this respect.

Period 1: 1945–1972

This first period covers the heyday of the Cold War in Europe. This left a clear imprint on the nature of the bilateral delimitation agreements concluded during this period, as the majority of them were concluded between Eastern Bloc countries. The first, concluded in 1958, related to the delimitation of the territorial sea between Poland and the former Soviet Union.[32] The last, concluded between the same two parties in 1969, added a continental shelf segment to this boundary.[33] The political advantage of the conclusion of these agreements was partly the early acceptance in a treaty of "territorial waters" of 12 nautical miles, as claimed by the former Soviet Union at that time.[34] Also the treaty concluded between the former German Democratic Republic and Poland on the delimitation of the continental shelf in 1968[35] is noteworthy here because it implied that the former German Democratic

[30] This part is based on E. Franckx "Maritime Delimitation in the Baltic Sea: What Has Already Been Accomplished?" (2012) 6 (issue 3) *TransNav (International Journal on Marine Navigation and Safety of Sea Transportation)* 437–442 available at <http://www.transnav.eu/Article_Maritime_Delimitation_in_Franckx,23,382.html> and the more than 30 further references to be found in that article relating to maritime delimitation in the Baltic Sea written by the present author (ibid., 441–442).

[31] The present author has served as a regional expert for the Baltic Sea within the framework of a project set up by the American Society of International Law during the late 1980s, sponsored by the Ford and Mellon Foundations, which intended to provide an in-depth examination of the state practice arising from more than 100 existing ocean boundary delimitations. Two meetings, gathering all participants, were organized in order to outline and subsequently discuss the results of the project. A first one was held at Washington, D.C., 13–14 December 1988. The second one took place at Airlie, Virginia, 13–16 December 1989. Once the book, entitled International Maritime Boundaries, was published in 1993 (Volumes I and II), it was decided to prepare supplements at regular intervals. Volume III appeared in 1998, Volume IV in 2002, Volume V in 2005, Volume VI in 2011, and Volume VII in 2016. This part of the project is still running at present. In 1997, moreover, a CD-ROM version of this book was released. On 7 April 1994 the Certificate of Merit in the category of "high technical craftsmanship and high utility to practising lawyers and scholars" was attributed by the Executive Council of the American Society of International Law to this book.

[32] Protocol Concerning the Delimitation of Polish and Soviet Territorial Waters in the Gulf of Gdansk of the Baltic Sea of 18 March 1958 (1959) 340 UNTS 89, 94–96.

[33] Treaty on the Continental Shelf in the Gulf of Gdansk and the Southeastern Part of the Baltic Sea of 28 August 1969 (1971) 769 UNTS 75, 82–86.

[34] Indeed, the above-mentioned 1958 Protocol (note 32) was special in that it provided different terminal points for Poland, located three nautical miles seaward from the terminal point of the Polish-Soviet land boundary, and the former Soviet Union, located 12 nautical miles from that same starting point.

[35] Treaty Concerning the Delimitation of the Continental Shelf in the Baltic Sea of 29 October 1968 (1971) 768 UNTS 253, 260–264.