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New Sea Boundaries in a Swedish Perspective

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NEW SEA BOUNDARIES IN A SWEDISH PERSPECTIVE

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Sweden's experiences in applying the principles of the new international law of sea boundaries have more than local interest. Zonebound on all sides and thus never able to determine unilaterally the limits of her newly declared zones, the country has been forced to maneuver in a tight geographical and political situation against smaller brothers on three sides and a dominant eastern neighbor. It has been a tricky game in the borderland between legal principles and pragmatism, where trump cards have been islands of "sufficient" size, and where points have been scored through moderation rather than by overstraining the rules of the game. The rules themselves have shown themselves ambiguous and contentious, but the parties have preferred a non-binding discussion of their contents to the hazard of restoring to a referee.

The game has had to be played with much give and take, but in retrospect it may perhaps be said that Sweden has come out on a par, or even slightly ahead.

THE ZONES

The momentous changes that have occurred in the international law of sea boundaries need not be documented in a volume dedicated to the memory of Professor William W. Bishop. Readers in the area in which he achieved eminence may be assumed to be aware of the traditional Grotius-inspired principle of the freedom of the high seas beyond narrow territorial waters, and of the late infringement of this freedom through various extensions of the coastal jurisdiction. They will know of straight baselines drawn across open water on the strength of a famous fishing case through which real adjacency to land ceased to be a workable test. They will be familiar with the 1959 Continental Shelf convention and will remember how it was extended by the ever growing appetite of many coastal states for bigger morsels of the surrounding seas — a development first denounced by major powers as exorbitant but gradually accepted by consensus in the course of

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a series of conferences leading to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").[1]

But if the general development of the law of the sea may be taken for granted in this paper, the special application of the rules by Sweden is not generally known and necessitates a presentation.[2] Moreover, the acceptance on all sides concerned of a convention not yet in force[3] is worthy of attention. Throughout, claims and negotiations have been based on UNCLOS as expressing the present state of international law of sea boundaries, in preference, indeed, to the formally applicable 1958 Shelf Convention.[4] Although Sweden had not fully exploited the possibilities of the new convention, and though in at least one respect she has resorted to the old convention to expound the meaning of the new one, she, too, has fully accepted the UNCLOS framework for the negotiations.

Around most of her coasts, Sweden is surrounded by an archipelago of quite a considerable extension. The land surface in these parts is mostly granite, with islands gradually dwindling into small rocks jutting out of the water and shoals which are from time to time submerged. There is no appreciable tide, and water level changes due to winds and currents will not normally exceed a metre.

According to the principle of the *Anglo-Norwegian Fisheries Case*,[5] Sweden has drawn baselines for its boundaries along the outermost islands and rocks not always submerged by water. Inside these baselines are the internal waters, which are subject in principle to complete Swedish sovereignty; outside lies the territorial sea, still Swedish territory though by international law open to innocent passage by ships of all nations. In her internal waters, Sweden has availed herself of her sovereign rights to declare large parts of her archipelagos to be military restriction areas[6] in which passage of foreigners and foreign ships

1. United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* United Nations Convention on the Law of the Sea 1982 B28 (K. Simmonds, ed. 1983).

2. An informative discussion of the occurrences is found in B. JOHNSON-TEUTENBERG, FOLKRÄTT OCH SÄKERHETSPOLITIK (Stockholm 1986), a series of lectures and presentations, partly in English. The author was the Swedish foreign office's expert at the time discussed in this paper.

3. UNCLOS requires sixty ratifications and will come into force twelve months after the last of these. To date (March 1989) only 38 ratifications have been handed in, though more than 150 countries have signed the treaty.

4. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

5. 1951 I.C.J. 132.

6. Presently Ordinance 1976:935 on Restricted and Semi-restricted Areas, to be replaced by a new Law on Military Restriction Areas. SWEDEN'S OFFICIAL INVESTIGATIONS 1986:7 [hereinafter SOU].

is prohibited, but the recognition of innocent passage is demonstrated by the fact that these areas are never allowed to extend into the territorial sea.

Traditionally Sweden, in common with her neighbors Norway and Finland, has claimed a four mile breadth[7] of her territorial sea off the baselines, though the claim could not always be upheld during the two world wars, when a practical limit of three miles was maintained. In 1979, the breadth was extended to twelve miles, equal to the maximum already agreed by the UNCLOS delegates and adopted by an increasing number of states, among them the Soviet Union, who has an ancient history of expansive coastal water policy.[8] Norway and Finland retain their traditional four mile limits, while Denmark has three miles.

Outside her territorial waters, Sweden does not maintain a contiguous zone for customs, immigration, and sanitary purposes, as allowed by UNCLOS Article 33. Nor does she claim an Exclusive Economic Zone ("EEZ") for all purposes, being content with a fishing zone and her part of the continental shelf; with insignificant exceptions the two are identical in extent and are so treated in negotiations with the neighbors.[9] The zones, as I have indicated, are on all sides cut off by the waters and zones of neighboring countries and do not anywhere even approach the full extent allowed by the respective conventions.

The exact drawing of the respective boundaries is rather complicated and depends to a large extent on what agreements Sweden has been able to reach with her neighbors.

BASELINES

The principles for drawing baselines are generally the same in UNCLOS as in the 1958 Convention on the Territorial Sea,[10] although with the wide territorial limits under the newer convention the recognition of salient base points have much more important consequences.

Straight baselines may not be drawn to outlying islands quite separate from the coast or coastal archipelago, or out of the general direc-

7. Nautical miles, equal to 1852 meters or approximately 1.2 statute miles, herein referred to as miles.

8. *See generally* W. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS (1967). It appears that twelve mile fishing zones were claimed already in imperial Russia before the revolution and met with much resistance from the other powers.

9. *Cf. infra* text accompanying note 50, on the few discrepancies between the zone and the Swedish shelf are, and on the bearing of this issue upon the coming final deliberations about the Swedish-Finnish zones.

10. Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 512 U.N.T.S. 205, Art. 4.

tion of the coast.[11] Such islands or groups of islands form their own baselines and have their own territorial waters. Thus, the island of Gotland off the Swedish coast has its own territorial water, and the Gotska Sandön and Karlsö islands, which are solitary in the sea or outside the general run of the Gotland coast, have their own baselines with resulting bulges on the territorial boundary.

"Rocks which cannot sustain human habitation or an economic life of their own" are not regarded under UNCLOS for the purposes of establishing economic zones or founding claims to the continental shelf.[12] Accordingly, Sweden disregards baselines drawn to such points for the purpose of delimiting zones and shelves.[13] While for the territorial sea there have been no reported discussions about such baselines, there have been lengthy disputes with neighboring countries as to how the baselines should affect the continental shelf and fishing zone. I shall return to these problems in my account of the delimitation of these areas.[14]

TERRITORIAL SEA

With the old four mile limit there were few areas in which Sweden could not unilaterally determine her territorial waters without need to discuss the matter with her neighbors. There was indeed a dispute with Norway on the boundary around some fishing skerries on the West Coast, resolved through arbitration in 1909,[15] and there have been discussions with Denmark concerning the demarcation line through the Sound,[16] and with Finland about the Sea of Åland[17] and the common coastline off the northern tip of the Gulf of Bothnia,[18] but these were not of much consequence and concerned small areas. Otherwise the boundary was drawn parallel to the baselines and four miles outside these.

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11. UNCLOS, *supra* note 1, art. 7(3).

12. *Id.* art. 121 (3).

13. Thus, Sweden emphatically protested against the Danish baseline to Hesselö, *cf. infra* text accompanying notes 37-47, though in the end Denmark was allowed limited credit for this line. The larger Gotska Sandön north of Gotland has been allowed her own shelf and fishing zone on a par with Gotland.

14. *See infra* notes 25-29 and accompanying text.

15. The "pig shoals" (Grisbädar) conflict. *See* Sihl, in 1930:6 SOU 269-70, *supra* note 6.

16. Agreement of January 30, 1932, SWEDEN'S AGREEMENTS WITH FOREIGN POWERS 1932:1 [hereinafter SÖ].

17. Swedish-Finnish treaty of September 29, 1972, 1973:1 SÖ, *supra* note 16, on the basis of the Swedish-Russian peace treaty of Fredrikshamn, 1809, and on the Convention 1921 on the non-militarisation of the Åland islands. *See also* B. JOHNSON-TEUTENBERG, *supra* note 2, at 193-206 and accompanying notes.

18. Swedish-Finnish treaty of September 29, 1972, *supra* note 17, reserving certain agreements in the peace treaty of Fredrikshamn 1811.

After extending her territorial sea to twelve miles, Sweden has longer borders shared with neighbors and has in some cases had to compromise in order to accommodate a mutual interest.

In general, the UNCLOS principle of delimiting opposite or adjacent coasts is along the median line, irrespective of the breadth of territorial waters claimed by the two countries concerned. Thus, the fact that Denmark maintains only a three mile territorial sea gives no claim to Sweden, with twelve miles' extension, to any waters beyond the median line.

However, in the approaches to the Danish Sound and in the straits of Bornholm in the Baltic and those of Anholt and Laesö in the Kattegatt (see Figure 1), a maximum claim to the median line could have unfavorable consequences. Under UNCLOS, international straits consisting wholly of territorial waters[19] are governed by the new regime of transit passage, which involves more extensive shipping rights than the innocent passage otherwise allowed through a coast state's territorial waters, and which, among other things, would not allow Sweden to require diplomatic prenotification of warships passing into such territorial waters.[20] This new regime does not apply to the Sound, where passage is governed by a separate earlier agreement,[21] but it would apply to its approaches and the other passages mentioned, unless there were an "international" route through these not touching the territorial sea of either state.[22] As long as Denmark maintains a three-mile limit and the Swedish claim stops at midwater, such a free passage may be said to exist on the Danish side; but it would be improper and unwise to rely on the continuance of this unilateral restraint. It has therefore been made clear to Denmark that in these areas neither country will claim sovereignty to the median line, but that there will be left a corridor of non-territorial water for international shipping.[23] A corresponding arrangement has not been considered necessary in the straits of Åland and the Gulf of Bothnia (Norra Kvarken), where prenotification is required of all foreign warships.[24]

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19. *See* the exception in UNCLOS, *supra* note 1, at art. 36.

20. On transit passage, compare UNCLOS, *id.*, arts. 37-44 with arts. 17-32 on innocent passage through the territorial sea. Prenotification from warships is not mentioned there and is somewhat contentions, but it is required by Sweden for passage through territorial waters except in the sound. *See* B. JOHNSON-TEUTENBERG, *supra* note 2, at 121-23.

21. The so-called abolition agreement of 1857, through which Denmark agreed with Sweden and a number of other States to abolish tolls and allow free passage through the Danish straits. *See* B. JOHNSON-TEUTENBERG, *supra* note 2, at 174-77, 230-31.

22. UNCLOS, *supra* note 1, at art. 36.

23. The agreement takes the form of a Swedish declaration of June 25, 1978, 1979:43 SÖ, *supra* note 17.

24. According to B. JOHNSON-TEUTENBERG, *supra* note 2, this has not raised any protests

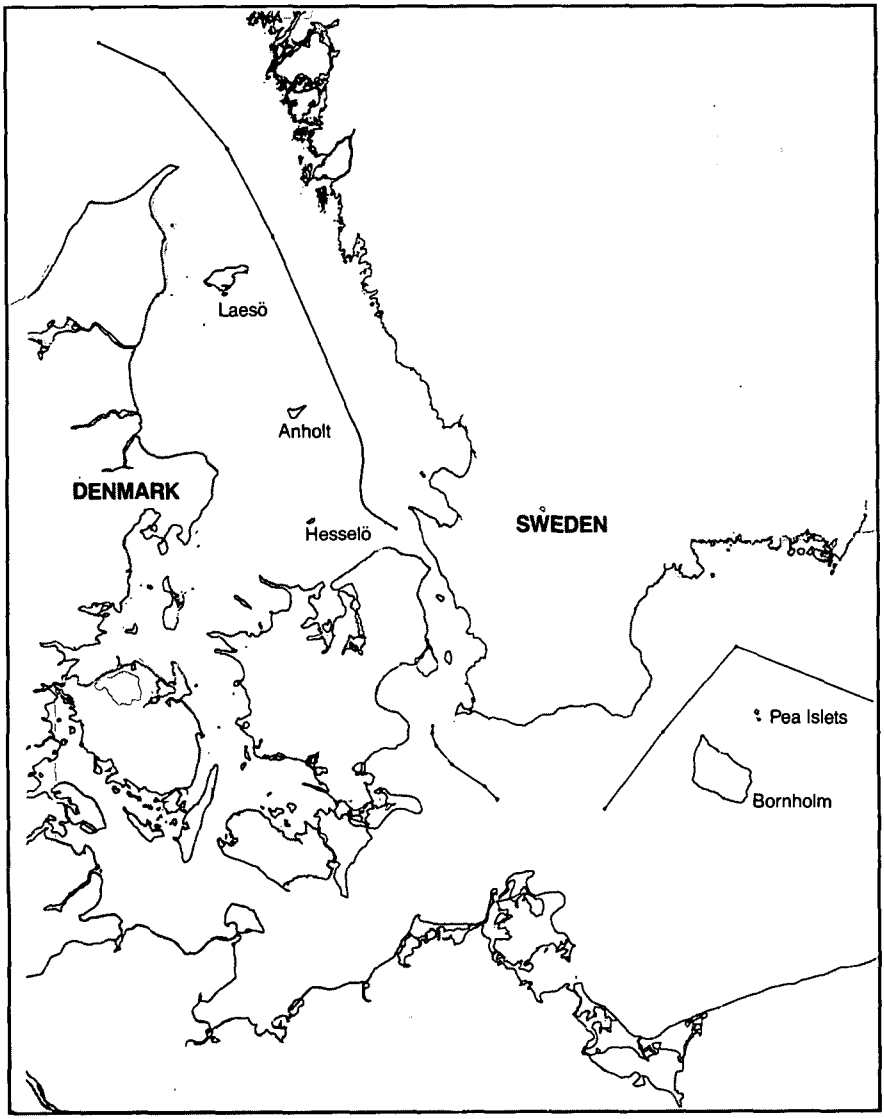

Figure 1
Fishing and Shelf Limits Against Denmark

FISHING ZONE AND CONTINENTAL SHELF

Apart from a minor deviation in the Åland sea,[25] the fishing zone and the Swedish continental shelf are identical in extent, and are so treated in the discussions with other countries. The demarcation lines in all places are shared with Sweden's neighbors and are therefore everywhere the result of discussions with them.[26] A final settlement of these lines in relation to Finland and Poland has long been deferred pending discussions with the Soviet Union on the boundary east of Gotland between the Swedish shelf and fishing zone and the Soviet economic zone; yet after the recent agreement on this latter boundary, the road now seems open to a final settlement of the other disputes.

Briefly, the situation with regard to Gotland was the following. Gotland is an island of 3,140 square kilometers and a length including the island of Fårö in the north, of about 125 kilometers (see Figure 2). With a population of some 56,000, it is a separate county of Sweden. In discussions with the Soviet Union — which, like Sweden, has signed but not ratified the UNCLOS — Sweden has consistently maintained that Gotland should be regarded as an integral part of Sweden, since under UNCLOS article 121 it cannot be disregarded for zone or shelf purposes as a "rock which cannot sustain human habitation or economic life of its own." Sweden has therefore argued that the demarcation line should be the median between the Gotland and Soviet baseline[27] in accordance with both the 1958 Continental Shelf Convention[28] and the settled practice of nations. The Soviets, on the other hand, would disregard Gotland for zone purposes, and advocated that the disputed area be treated by both sides as a "white zone" in which ships from all nations would be allowed to fish.[29] Speculations that there might be oil in the area[30] heightened interest in the discussions, but both sides have refrained from drilling.[31] Sweden wanted to bring

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by foreign powers. That article in the book was originally written in 1973, however, and it would seem that the straits should now be subject to the regime of transit passage. It is notable that there have been many indications of unnotified foreign submarine activity in the Gulf of Bothnia.

25. *See infra* text accompanying note 50.

26. Agreements have been concluded with Norway, with Finland (with an exception for the Bogskär area), 1973:1 SÖ, *supra* note 16, with East Germany, 1978:2 *id.*, and with Denmark, 1985:54 *id.*

27. *See* the State practice cited by B. JOHNSON-TEUTENBERG, *supra* note 2, at 269-70.

28. *See* Convention on the Continental Shelf, *supra* note 4, at article 6(1) for opposite states, and at article 6(2) for adjacent states.

29. Roth, *Den nya havsrätten*, 1984:2 UD INFORMERAR 1, 20, 24.

30. This has been claimed by the oil prospecting company Petroscan since 1983. *Ny Teknik*, TEKNISK TIDSKRIFT, 1988:31, at 14-15.

31. In accordance with a Soviet-Sweden Protocol of December 22, 1977 (annexed to the Fishing Agreement).

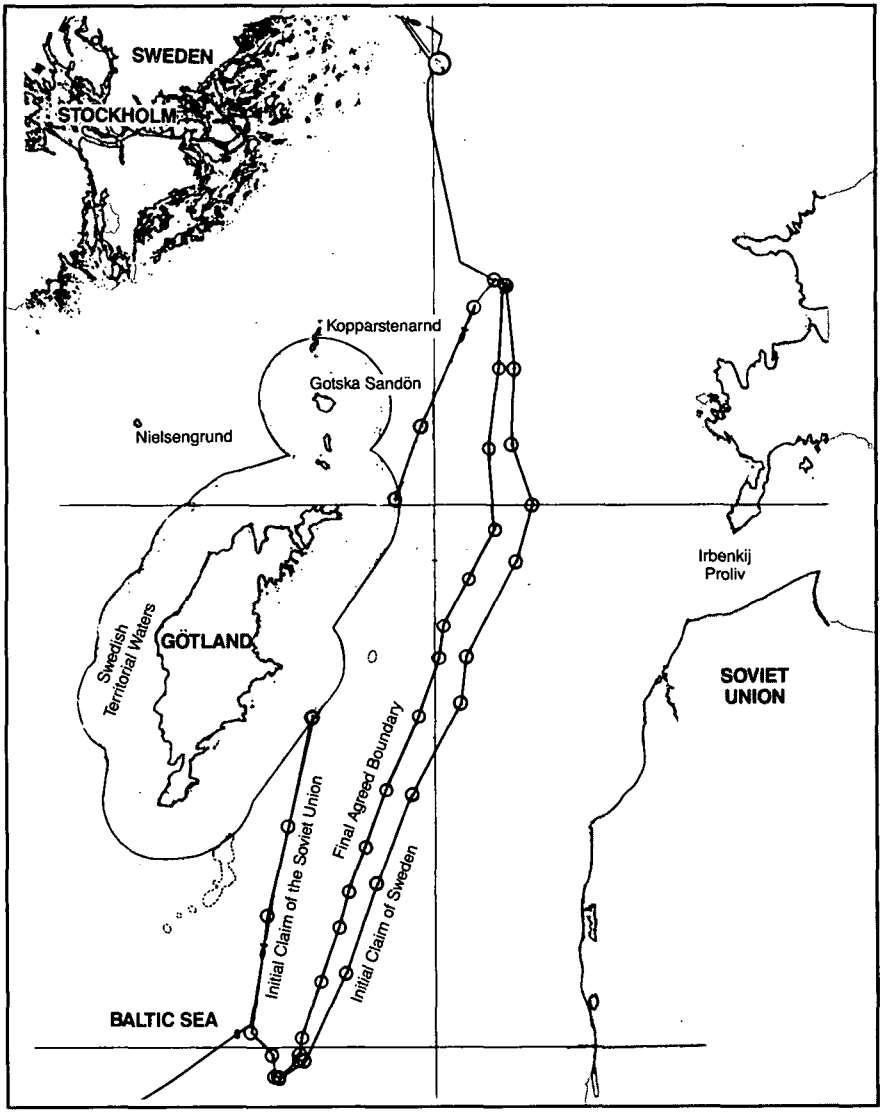

Figure 2
Disputed Area and Final Fishing and Shelf Demarcation Against the Soviet Union

the dispute before the International Court of Justice, but the Soviet Union refused.[32]

The trouble with the Swedish standpoint was that, although UNCLOS specifies the median line for delimiting the territorial sea,[33] it has no corresponding provision about fishing or economic zones; furthermore, regarding the continental shelf, it states only that the delimitation should be effected by agreement on the basis of international law.[34] A provision in the 1958 Convention prescribing the median line in the absence of other agreement[35] has not been reiterated in UNCLOS. On the other hand, the Soviet position had no support either in reason or in the old or new conventions, and it was directly contrary to that maintained by the Soviet Union in other areas.[36]

The Swedish position was, however, also complicated by a simultaneous dispute with Denmark. When, in 1977, the Swedish *Riksdag* decided to extend its maritime zones in accordance with the new consensus reached in the current UNCLOS negotiations, the implementation of the new fishing zone met with resistance from Denmark. The disagreement concerned both the drawing of certain baselines and the weight attributed to the separate Danish islands Anholt, Laesö and Hesselö in Kattegatt, and Bornholm and Christiansö with the "Pea Islets" in the Baltic. Pending discussions, fishing rights remained what they had been under various fishing agreements.

Denmark had also drawn a baseline to Hesselö, against which Sweden protested. Hesselö is an islet or gravel elevation of O,7 square kilometers in the Kattegatt (see Figure 1) with only two human inhabitants who might possibly spend the year there. Was this a "rock which cannot sustain human habitation or an economic life of its own" in the UNCLOS sense? The discussions had stalemated when in 1983 the Danish foreign office gave the A.P Möller Co. a concession to drill for oil inside the white zone.[37] In spite of an immediate Swedish demand for a postponement, drillings began in August, and were followed three days later by an official Swedish protest.[38]

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32. B. JOHNSON-TEUTENBERG, *supra* note 2, at 261-62.

33. UNCLOS, *supra* note 1, at art. 15.

34. *Id.* at art. 83.

35. *See* the 1958 Continental Shelf Convention, *supra* note 4, at arts. 6(1) and 6(2).

36. As examples, B. JOHNSON-TEUTENBERG, *supra* note 2, at 271, mentions the delimitations between the Soviet Union and Finland as agreed on May 5, 1967, and also that between Soviet and Rumania over the island of Ostrov Zmeinya. The Soviet position in the Baltic is also said to have been inconsistent with that taken by the Soviet Union in the Bering Sea.

37. *Svensk-dansk gränstvist efter oljefynd*, Svenska Dagbladet, July 20, 1983; and the synposis in *Tyst i nära fem år*, Dagens Nyheter, Aug. 19, 1983. The drilling platform was in position on August 1, 1983.

38. Official protest, August 4, 1983.

At this time, the affair was widely publicized, and both the Danish and Swedish press had sensed a discrepancy in the Swedish position *vis-a-vis* Denmark in the Kattegatt compared to that taken against Soviet in the Baltic.[39] The distinction between a large island with a considerable population and an isolated gravel reef with no permanent dwellings, though stressed officially,[40] was not always perceived by the press.[41] A high hand against Denmark could create a very unwelcome precedent for the simultaneous negotiations with the Soviet Union, and it was important for the Swedish negotiators to find a quick and tidy solution.

Within a few days, the Swedish and Danish prime ministers had agreed to initiate discussions, and towards the end of the month a Danish delegation was in Stockholm for negotiations.[42] The final proposal was made two months later,[43] and the formal agreement was signed in the autumn of 1984[44] and ratified a few months thereafter.[45] It gave Denmark full credit for the islands concerned in the much-publicized affair of the Kattegatt,[46] but gave Sweden some compensation in the Baltic, the demarcation line there being drawn quite close to the Pea Islets. Thus the Swedish negotiation position could be upheld against the Soviet Union, without the handicap of a widely publicized big brother attitude against Denmark.[47]

On January 13, 1988, the Soviet negotiations were finally brought to an end by a compromise which can probably be described as moderately successful for Sweden.[48] Sweden received 75% of the disputed area and the Soviet Union the remaining 25%,[49] and the parties mutu-

39. Melander, *Inget brott mot folkrätten*, Dagens Nyheter, Aug. 12, 1983. Melander advocated the application of the 1958 convention, but was contradicted by Danelius on the following day, Dagens Nyheter, Aug. 13, 1983.

40. Interview with Bo Johnson-Teutenberg, as expert of the foreign office, in *Folkrättsliga principer avgör*, Svenska Dagbladet, August 6, 1983; and Theutenberg, *Vi har viktiga principer att försvara*, Svenska Dagbladet, August 19, 1983; *reprinted in* B. JOHNSON-TEUTENBERG, *supra* note 2, at 244.

41. *Danmark har rätt*, Dagens Nyheter, July 23, 1983; *but see Svensk-dansk gränstvist efter oljefund*, Svenska Dagbladet, July 20, 1983.

42. *Uppgörelse närmar sig*, Svenska Dagbladet, Aug. 24, 1983; *Tvisten mot en lösning*, Svenska Dagbladet, Sept. 1, 1983.

43. *Slutbud om gränsen mot Danmark*, Svenska Dagbladet, October 23, 1983.

44. *Avtalet klart om fiskezon*, Svenska Dagbladet, Nov. 10, 1984.

45. 1985:54 SÖ, *supra* note 16; and Prop. 1984/85:131.

46. Only half credit was given for the baselines to Hesselö, however.

47. *Cf. Nu löper svenskerna helt amok*, Dagens Nyheter, Aug. 21 1986, reflecting a Danish attitude.

48. *See* Prop 1987/88:175, in particular the satisfaction expressed on page 7.

49. The technical division was elaborated in a separate agreement of January 18, printed in Prop. 1987/88:175, annex 2.

ally granted one another certain fishing rights in the relinquished areas.

This solution can be expected to set the pattern for the future negotiations with Poland about the much smaller adjoining area south of Gotland which has been in dispute between the countries. There will remain negotiations with Finland concerning the weight to be attributed to the small Bogskär rocks. They sport a lighthouse but are very insignificant in size[50] and completely unfit for human habitation. If Hesselö could be a precedent, it would be a very inconclusive one. However, in these negotiations it may be deemed suitable to clear out certain discrepancies between fishing zones and the shelf division, so that a streamlined boundary system can be found, and gives and takes may be possible in such negotiations.

CONCLUSIONS

The Swedish experience demonstrates the sensitive balance between legality and pragmatism in the important negotiations required for implementation of the new law of the sea. Some of Sweden's maneuvers against her equal or smaller brother countries have been made in seeming disregard of the legal possibilities, and were dictated by a desire to obtain a successful bargaining position against her bigger and less tractable neighbor Soviet Russia. It might have been possible to forbear that sacrifice — if sacrifice it was — by submitting the greater dispute to the International Court of Justice, but this road was closed by the Soviet attitude. Even so, it may well have been an advantage to both parties to have enjoyed the certainty of gradually reaching a conscious solution rather than submitting to the hazard of an unknown one.

As in most negotiations, the legal solution has still exerted a decisive influence, the negotiations and final outcome being in all cases within the bounds of what might possibly be the proper legal solution. Throughout the discussions, the background regulation was that of UNCLOS, although that convention had not been ratified by any of the actors. Whether this reverence for a formally non-binding convention is due to the parties being signatories is hard to say,[51] but it is noteworthy that in the end Sweden accepted a solution (departure

50. The aggregate surface is reported to be just over 4,000 square meters.

51. Under the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 (*entered into force* January 27, 1980), 1155 U.N.T.S. 331; *reprinted in* 8 I.L.M. 679 (1969), *and in* 63 AM. J. INT'L L. 875 (1969), art. 18(a), ratified by both Sweden and the Soviet Union, signatories to a convention are obliged to refrain from actions inconsistent with its fundamental principles.

from the midwater principle) which she had strenuously opposed during the pre-convention conferences.

The Swedish experience hardly enables us to say to what extent UNCLOS represents the general international law of today, applicable to signatories and non-signatories alike. But although the outcome itself hardly justifies any such conclusions, I can report a clear feeling among Swedish negotiators that as far as relevant, the rules of the convention were regarded by all hands as an expression of the world law of the sea, applicable by general consensus.[52]

52. This seems to be only one testimony among many others. For examples of other law of the sea rules being challenged, see the address by E.L. Miles of the Institute of Marine Studies, in COUNCIL ON OCEAN LAW 5 (1988).