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COMMODIFYING THE OCEANS

The *North Sea Continental Shelf Cases* Revisited

Henry Jones

Introduction

In 1969 the International Court of Justice (ICJ), the World Court at The Hague, established under the Charter of the United Nations, issued its judgment in the dispute between the Netherlands and Denmark, on the one hand, and the Federal Republic of Germany on the other.[1] The dispute was over how to draw the boundaries allocating rights over the shallow portion of seabed off the coast of these states, under the North Sea, known as the continental shelf. This case happened during a period where the law of the continental shelf was still being made and argued over. The Court faced a novel challenge of law, geography, and technology. In this chapter, I return to those judgments to find how the law turns the oceans into discrete, exploitable objects, how it separates and fixes this fluid space, and how the materiality of the seas nevertheless always pushes back against this process.

The standard teleology of doctrinal legal history explains legal change by reference to social change and portrays law as a rational, functional response to the problem of organizing society.[2] However, when we look at the history of the law of the sea, we often see the law leading the way. Whether it is Grotius declaring a free sea to justify Dutch privateering, or the United Nations Convention

FIGURE 2.1 The North Sea with Marsden Rock in the foreground, as viewed from Marsden Bay, South Tyneside, UK. On this crumbling limestone coast, the distinction between land and sea is particularly unstable. It is also here where an 18th-century coal miner, known as Jack the Blaster, moved into a cave, to live "free from impost." Here Thomas Spence found him, and wrote in chalk on the wall "Ye landlords vile, whose man's peace mar, Come levy rents here if you can; Your stewards and lawyers I defy, And live with all the RIGHTS OF MAN." As recounted in Alastair Bonnett, "The Other Rights of Man: The Revolutionary Plan of Thomas Spence," *History Today* 57(9) (2007).

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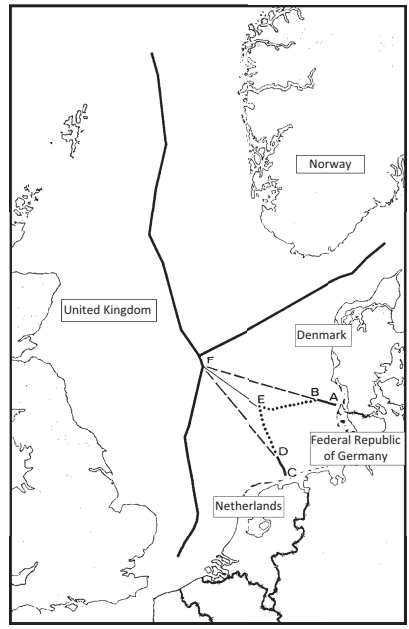

FIGURE 2.2 Produced by the International Court of Justice, this map illustrates the positions of each side. The lines drawn represent the various claims made. Public domain.

on the Law of the Sea (UNCLOS) regulating the then non-existent industry of deep seabed mining, the law is a productive force in the world. Productive in the sense that it is connected to the dominant mode of production, Henri Lefebvre's production of space as a social form. Lefebvre distinguishes social space from abstract, mental space and from given, natural physical space.[3] Legal geographers have further highlighted that this process is co-constitutive, that as law produces space so too does the materiality of the world feedback into the law.[4] These social phenomena inform the way we think about law, and how it is possible to think about law. To contribute to understanding the ways the law shapes the world and vice versa is the purpose of this chapter.

James Crawford and Thomas Viles attempted something similar in an essay entitled "International Law on a Given Day," in 1994, presumably prompted by the pending UNCLOS Implementation Agreement.[5] In this essay they ask what international law was on September 29, 1945, the day after the Truman Proclamations on the continental shelf and coastal fisheries.[6] This essay looks at the development of the law of the continental shelf before and after the Proclamations, and the effect of the proclamations themselves, as a case study of customary law formation, custom being a key source of international law. While some reference is made to material changes and the use of the oceans, such as the benefit to American oil companies of clarity over the continental shelf regime, the focus is almost exclusively on ideas. While they find the answer to their question to be indeterminate, "a question that cannot be answered, of

conduct that was neither lawful nor unlawful (or perhaps contingently both)," they locate this indeterminacy in legal thought, not in material social relations.[7] Their answer to this indeterminacy is that custom "is an *ex post facto* construct … international law has to be brewed." International law on a given day is indeterminate, but they give no answer to what Susan Marks calls the false contingency question, that is why given indeterminacy, how are arguments nonetheless resolved?[8]

It is surely much more useful to start from the other end, the material, and ask how it came to be. Therefore, in seeking to answer again what was international law on a given day, and looking instead at how the judges of the ICJ did it in *North Sea Continental Shelf*, my starting point is what were the material conditions, who was exploiting the continental shelf, how and why? What was at stake for the parties to the case, and what were the implications which the Court was, or should have been, aware of?[9]

I accept Crawford and Viles's argument that the continental shelf is a legal product, but this is how the indeterminacy question should be asked, with a focus on material relations not ideas. How was the continental shelf produced, and what did its legal character confer upon it? Ultimately, I suggest that this is a pure example of commodification, and the law as key to producing an abstract and universal commodity from the physical continental shelf. It is then the work of a critical oceans account of the law to undo this abstraction, to allow for the material to push back. My aim is to simultaneously explain the origin of the continental shelf regime in historical materialist terms, and to rid the concept of this abstraction. Further, by bringing in the historical and colonial context of the decision, the temporality as well the materiality of the law is highlighted.

To do this, I will first explain the historical materialist approach to the study of international law, then think about what the ocean is, drawing on scholarship from across the humanities and social sciences, that can be loosely called "critical ocean studies."[10] Taken together these methodologies allow for a re-understanding of international law and space and create an opportunity to see and make use of the spatial feeding back into the legal. After this theoretical section attention will turn to reading *North Sea Continental Shelf*, before, in the final part, a study of the history and material conditions around the case.

Law and the Production of Commodities

Humanity burns about 40 gigatons of fossil carbon a year. It has been calculated that we can burn about 500 more gigatons before the average global temperature rises over two degrees. There remains at least 3,000 gigatons of fossil carbon in the ground.[11] Finding and extracting these resources requires a large investment before it is profitable. A clear and certain system of ownership has been developed. If we are to prevent the burning of fossil fuels, essential for the survival of life on this planet, then one small part of this will be to change how we value and control these resources and spaces, how they are constructed and produced.

What does it mean to say the ocean is legally produced? It means to connect legal innovation to the dominant mode of production, which is capitalism.[12] The understanding of the sea and seabed change due to a change in the imperatives of economic exploitation. These spaces are remade, as commodities, through law. What is a commodity? That is the question with which Marx began *Capital*. "A commodity is, first of all, an external object, a thing which through its qualities satisfies human needs."[13] Through an analysis of use value and exchange value, Marx quickly comes to a different answer: "analysis brings out that it is a very strange thing, abounding in metaphysical subtleties and theological niceties."[14] It is exchange value which provides these effects, the abstraction away from the thing itself to an exchangeable commodity.

The role of law then becomes to guarantee these commodities. In order for commodities to be exchanged, their owners must "recognize each other as owners of private property."[15] According to the commodity form theory of law, as developed by Bolshevik legal theorist Evgeny Pashukanis, it is law which allows for this recognition. Law "is that which regulates disputes between formally equal, abstract individuals," over equal and abstract things.[16] This theory holds that law only becomes a universal system under capitalism. It is capitalism which turns specific goods into generalizable commodities, with an abstract value. Everything has a value and everything can be exchanged. Law both creates and secures this abstract value.

International law in this understanding is structurally connected to imperialism, first because the international legal form is bound up with the spread of international capitalism, and second because only imperial violence can enforce international law. As Robert Knox explains, there is a structural connection between international law and imperialism. The violence of imperialism is the enforcement mechanism of international law. As capitalism spread internationally and became global, so too did international law, to the point where international law, constituted by imperialism and violence, comes to structure the world.[17]

If all international law is tied up with imperialism, how does this play out in a dispute apparently limited to northern Europe? Prior to the case, the Netherlands and Denmark are concerned for their colonial territories' potential continental shelves. The preference for negotiation and equity hands over the enforcement to the formally equal states. But states are only formally equal, as China Miéville explains in his reading of Pashukanis,[18] and so the force behind the states is the actual enforcement. It will be seen that this judgment reiterates a fundamental feature of international law—strong states win over weak states, imperialism is baked in, even in something as strict and worked out as the continental shelf would seem to be after its codification in the UNCLOS.[19]

The Marxist understanding of international law illuminates what is happening in the development of the continental shelf regime. In terms of changing it, that is tactical engagement with the international legal system, a focus on oceans offers solutions. One of the contributions of a legal focus on ocean geography is that it demands a systematic legal geographic engagement with international

law, something which to date has been piecemeal. What is needed is an emphasis on the materiality of the seas, a reconnection of these disconnected zones and ideas, a refusal of environmental protection as a discrete legal project but instead as the basis of all action, this will get us closer to understanding the relationship between law and social change, "*the* question of Marxist legal theory."[20]

When we relate this back to the ocean, the process is actually more visible than more routine commodities, or even land, because the thing itself, whether the continental shelf, the deep seabed, or exclusive economic zones, is already abstract. It is on this basis that I argue that the continental shelf and the deep seabed are legally produced. As geographical facts they do not exist in anything like the form they are regulated. The continental shelf would not exist without the law. And this is where it is essential to bring in more direct attention to the oceans.

Critical Ocean Studies

In critical ocean studies, the work of Kimberley Peters and Phil Steinberg and that of Elizabeth DeLoughrey get us started on how to think with and about the ocean. Steinberg and Peters have developed the concept of wet ontologies to capture the potential for thinking with and about the seas.[21] What they mean by wet ontology is to understand the ocean in all its complexity, "as forces, as vectors, as assemblages of molecules and meanings, as spaces of periodicity, randomness, instability and transformation, and as volumes (depths) and areas (surfaces)," gives rise to an oceanic politics and an understanding of space as unstable, transforming, voluminous.[22] This approach puts emphasis on the materiality of the oceans, and tries to move beyond accounts of the ocean which treat it as flat or inert, as a stage for human history, but rather as a space with its own history. It draws attention to the fabrication and instability of line drawing as a governance technique in general, by first understanding it as completely unsuitable to ocean geographies, before then questioning the practice in general. In Marxist terms, we see here very clearly a clash between the classes of governance and the governed, and how open to struggle and contestation lines, space, and therefore law really are.

DeLoughrey has developed complementary thinking from a literary discipline: "unlike terrestrial space—where one might memorialize a space into place—the perpetual circulation of ocean currents means that the sea dissolves phenomenological experience and diffracts the accumulation of narrative."[23] Where Steinberg and Peters seek the more-than-wet, to use the sea to think geopolitically in general, DeLoughrey uses the absence of the human at sea to access thinking about the nonhuman, and to de-center the human from cultural and political thought. Of course, the specific human usually centered is the Western, masculine, capitalist subject, and DeLoughrey highlights other perspectives, experiences, and ontologies of the ocean. For example, using Indigenous Pacific poetry to undo the US military spatial construction of the ocean,[24] or using Caribbean art to emphasize the depths and currents that create ocean space, in a form of thinking DeLoughrey and Flores call "Tidalectics."[25]

The *North Sea Continental Shelf* Cases

In the North Sea, gas was found from 1964, and oil was discovered in December 1969.[26] During this period, Denmark, the Netherlands, and Germany tried and failed to negotiate their overlapping claims before referring their dispute to the ICJ in February 1967.[27] Alex Oude Elferink provides a masterful and exhaustive historical account of the cases.[28] Before the cases were referred to the ICJ he reveals the different interests and anxieties of the parties. Interestingly, all parties had an eye on claims to resources beyond the North Sea, meaning that some of the claims were not connected to the specifics of the North Sea. Denmark had concerns over its colonies of Greenland and the Faroe Islands; the Dutch had interests in resources connected to their territories of Suriname, the Antillies, and New Guinea in particular; Germany had resisted the continental shelf regime in general, fearful that it would miss out, and also had concerns of the claims to be made for the German Democratic Republic.[29] Then again, some concerns were directly related to the geographical context, such as the choice to ignore the Norwegian Trough as it was in nobody's interest to drag Norway into the dispute.[30] Denmark had given its first concession to prospect for hydrocarbons in its territorial sea in 1962, including an option to extend the search if Danish sovereignty was extended.[31] In the Netherlands, gas had been discovered in Gröningen in 1959.[32] Interestingly, given that the case is famous for setting out the rule that such disputes should be negotiated equitably, when negotiations began between the states both the Netherlands and Denmark were caught by surprise when Germany suggested splitting the area equally.[33]

Also of interest is the position of other North Sea states not party to the dispute. The UK North Sea Continental Shelf Act of 1964 stated in its introduction that it was to give effect to the Geneva Convention of 1958, while never offering its own definition or limit on the continental shelf, nor making any claims.[34] All three parties to the case also made efforts to keep the United Kingdom out of the dispute, having accepted equidistance agreements there which suited the Netherlands and Denmark.[35] In the submissions from all parties to the ICJ the North Sea is described as all being at a depth of less than 200 meters, with the exception of the Norwegian Trough running along the Norwegian coast, which is much deeper. This was a considered choice, but it remains striking that this geographical fact could so easily be ignored without even explaining why it does not have legal effect. While it may make sense not to give legal effect to it in this specific situation, by ignoring it the Court instantly detached the legal geography from the physical geography.

The case remains interesting as an example of how to wrangle with international law sources, not as a source of law on the continental shelf. On that front it was overtaken by UNCLOS. However, it is incredibly instructive as an example of how international law deals with a new geographic space, a new resource. As Judge Tanaka saw it in his dissent:

> An originally geological and geographical concept … by reason of its intrinsic economic interests which have become susceptible of exploration and exploitation as the result of recent technological development, has been vested with legal interest and presents itself as a subject matter of rights and duties subject to the rule of law and constituting an institution belonging to international law.[36]

Interesting features from the main judgment include that the majority limit themselves to delimitation, not apportionment, explained as:

> Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.[37]

The significance of this is that the territorial claims here are not new, the Court is not granting territory, it sees itself as only clarifying the means by which to agree the boundaries. The Court here is insisting on a lack of novelty in what it is doing, it is simply clarifying the rules for allocating the continental shelf, not making new ones. The Court may think that is what it is doing, but in the very next paragraph it says:

> rights of the coastal state in respect of the area of continental shelf that constitutes a *natural prolongation of its land territory* … exist *ipso facto* and *ab initio*, by virtue of its *sovereignty* over the land … an *inherent right* … Its existence can be *declared* but does not need to be *constituted* … [T]he right does not depend on its being exercised.[38]

Suddenly this still very new concept is natural, inherent, and automatic; something which can be, but does not need to be, declared, and does not need to be constituted. The continental shelf by 1969 just *is*. This is an extreme statement of how sovereignty over territory works, and I struggle to find any comparable example before this. Settler colonialism still needed something like discovery, occupation, or use. The early development of the continental shelf regime was clearly weighed down by issues around extension of territory and questions of discovery, of symbolic vs. actual occupation, of *terra nullius* and more.[39] The ICJ breaks free of all of this, saying that a state has a continental shelf simply by having a coastline. The law is producing territory out of nothing and producing and guaranteeing property in the seabed. Even if the state doesn't know it, hasn't explored or made any attempt to claim it. That states have this huge extent of underwater territory, and always have, is quite a thing for the ICJ to discover in 1969.

This reasoning continues, where the continental shelf is described as "*actually part of the territory* over which the coastal State *already has dominion*" and "a prolongation of continuation of the territory." The Court follows the parties in just ignoring the geographic fact of a massive trench far deeper than 200 meters just off Norway. Prolongation obviously makes no sense if the trench was taken into account. The curvature of the coastline of Germany is described as "an incidental special feature from which an unjustifiable difference of treatment could result."[40] No explanation of what makes this special is given, and as noted by Elferink this was a surprise to both Denmark and the Netherlands when Germany first raised it. The judges close by calling the continental shelf "submerged land,"[41] finally betraying the understanding that has informed their entire judgment. Only by seeing the continental shelf as land can such strange things be said seriously at the start of the judgment. If the shelf is land, then it doesn't matter about depth or shape. Discovery and occupation are not needed because this land was always there. By understanding the seabed as land then the problem just becomes a question of clarifying the borders. In my view this is more than just a convenient legal fiction, it is an ontological choice that the lawyers and judges in the case understand the sea as if it were land. Either way, the outcome is to transform the near coastal seas into commodities, abstract, certain and fungible, ready for exploitation.

What becomes clear re-reading the judgment is that for the most part the Court is satisfied to abstract entirely from material reality. Whether it is ignoring a deep trench, finding something special about a concave coastline, or saying that the continental shelf existed before it was ever explored or named, there is denial of the material. This process commodifies the seas, fixes them with lines and definitions that bear little relation to geography. The seabed can then more easily be packaged up to be exploited and exchanged. In the next section I tell a materialist history of the North Sea, to try and bring some of the flow and churn back to the case, and to unsettle international law's commodifying effect.

A Materialist History of the North Sea

In this section I trace the history of the North Sea, with a focus on the materiality of this ocean space, how it had been constructed and understood, and how this further enhances our understanding of the ICJ case. The case took place as the North Sea was first being explored for oil, and the decision constructs the seabed in a way which is optimal for this type of exploitation. Interestingly, while lawyers argued about distance from shore, in the history of offshore oil it is depth which is the key consideration. This makes intuitive sense, as the challenges of drilling increase in line with depth, ever increasing pressure, turbulence, stresses on materials, et cetera. The difficulties of being far from shore are not much more if it is 100 nautical miles or 200 nautical miles, simply the complexity of supply and transport. The distance from shore is more prominent for non-industry perspectives. Close to shore operations pose a greater environmental

threat to the coastline, and have a bigger effect on the local economy, such as the influence of North Sea oil on the development of the city of Aberdeen.[42] The law's preference for understanding this regime in terms of distance from shore betrays a terracentric ontology, while oil platform builders and operators have a more fluid ontology.[43] As the use and understanding of the geographical area has changed, so too has the way it is regulated.

Archaeologists have suggested that the North Sea was a large prehistoric plains area until the end of the last ice age, and Stone Age artifacts have been found.[44] In ancient history, Pliny called it the Northern Ocean,[45] the Celts knew it as *Morinaru*, the Dead Sea, and Germanic peoples as *Morimarusa*.[46] This naming convention, which lasted into the Middle Ages, referred to still water patches on the sea, a name based on the materiality of the sea itself rather than its relationship with land. The North Sea was also known this way in Dutch—*lebermer* or *libersee*.[47] By the late Middle Ages, its name as the German Ocean was common in English.[48]

The North Sea was central to the late Viking Empire, and was primarily important as a means of transport.[49] With the Norman conquest of England, the North Sea lost its prominence as a travel route, with attention shifting to the Baltic Sea, dominated by the Hanseatic League.[50] Bruges's deep port made it the center of trade between the Hanseatic League and London and therefore the rest of southern Europe.[51] The Danish Sand Toll, first recorded in 1461, was a tax specifically on use of the beach, or more generally on launching and landing boats and fishing equipment.[52] Denmark dominated herring fishing in the North and Baltic seas in the high Middle Ages, but by the late Middle Ages this position was already dwindling, with Dutch ascendancy.[53] The Hanseatic deal had prohibited Dutch herring fishing in the 14th century, but this restriction had led to Dutch fishermen developing other herring fisheries in the 15th century. As the Hanseatic League broke down in the early 15th century, the Netherlands became the center of the North Sea economy.[54]

As European exploration and colonialism spread out into America and the East Indies, the North Sea remained important for connecting Dutch spices and Spanish silver. It also became a key economic area for fishing and whaling. Norway, Denmark, and Scotland all made claims to territory in North Sea herring fisheries. Grotius's argument in *De Jure Praedae* is more generally associated with the East Indies, and this was of course a top priority, but the North Sea was also a major concern. Alison Rieser argues persuasively that the Battle of the Books, and Grotius's debates with Welwood in particular, was primarily about herring fishing.[55]

Potentially the first legal construction of the North Sea came with the English Navigation Acts of 1651 and 1660. The 1651 Act required all trade between England and its colonies to be carried out on English vessels and tried to impose a 30-mile exclusive fishing zone.[56] This led to the first Anglo-Dutch war. These Acts created tensions between England and the Netherlands both in the North Sea, and in North America where trade between English and Dutch colonies

was prohibited. Anglo-Dutch wars were fought at least partly over herring fishing and shipping in the North Sea in 1652–1654, 1665–1667, and 1672–1674, each time resulting in Dutch victory.[57] This understanding of the North Sea as important for transit, trade, and fishing remains well into the 19th century, when we start to see a change in the understanding of the sea due to a change in the relationship of production.

The mercantilism of the early modern period required the ever-greater exploitation of fisheries for trade, and Dutch dominance of herring fisheries was the key reason for its growth and dominance as the trade hub for Baltic grain and timber with French and Iberian salt, oil, and wine. Spanish and Portuguese gold and spices changed this dynamic again, and the involvement of the Dutch in imperialism in the east demanded a new assertion of the freedom of both fisheries and seas.[58] As we see the emergence of capitalism, the law becomes more generalized as a tool of social organization. Freedom is not enough, and property must be secured. On land this is the key innovation of English imperialism. However, this change comes more slowly to the seas. The commodification of the seas really arises in the 20th century, and the possibility of the exploitation of the resources of the continental shelf. It is at this point that the North Sea stops being understood and constructed in its specificity, as a place for transit and fishing, and becomes abstracted into a space for exploitation of commodities. As such, the focus of the history changes to the continental shelf.

A Materialist History of the Continental Shelf

The growth of oil and gas as an alternative to coal changed both the labor market around fossil fuels and the geography of energy production. Commercially viable oil wells had been drilled in the United States since the middle of the 19th century. Offshore drilling began in 1896, on a Santa Barbara beach in California. Connected to the land by a 300 foot wooden pier, Henry L Williams was the first person to drill for oil under the sea.[59] At that time nobody argued that the United States did not have sovereignty over the land below the water. In 1911, Shell built a well on Caddo Lake, Louisiana, ending the reliance on piers for drilling under water. The year 1938 saw the successful establishment of the first oil rig in the Gulf of Mexico, about a mile from the shore. By 1947, there was a well 10 miles out. Today, the world's most isolated oil platform is Shell's *Perdido*, in the Gulf of Mexico, nearly 200 nautical miles from land, 8,000 feet deep.[60]

The term continental shelf itself slowly emerges over the first half of the 20th century, and its usage tracks the legal history, peaking with the negotiation of UNCLOS.[61] The earliest use of the term I have so far found is from 1888, in a paper on fish habitats published in the *Scottish Geographical Magazine*.[62] This paper defines the term as meaning "applied to the shallow portion of the continental slope, lying within the 100-fathom line, which is usually terminated seawards by a very abrupt descent to abysmal soundings."[63] The paper cites as authority one from the previous year, on soundings required to lay underwater cables, but in

that paper the feature is at all times referred to as the continental slope, without differentiating different parts. The term appears sporadically in other geographical meetings in the 1890s and begins to appear more widely in scientific literature in the early 20th century, in a variety of places but mostly in geological surveys, particularly in the United States, the Arctic, and the Antarctic. At this time, it certainly hasn't established a specific technical meaning, still being interchangeable with continental slope.

The initial interest in the continental shelf is related to fishing and to the laying of submarine cables. But the use of the continental shelf for energy also has a history going back to a similar point. The legal history of the continental shelf starts with the Cornwall Submarine Mines Act of 1858, declaring that ownership of minerals and workings from mines below the low tide mark adjacent to the coast of Cornwall belonged to the Crown.[64] The deeper Cornish mines went out under the sea. This drove various technological developments such as the Cornish steam engine to pump water out efficiently, and developments in law as the Duchy of Cornwall and the Crown clashed over ownership of the land beyond low tide. This Act was a result of this clash, as described in the judgment of Lord Coleridge in *R. v. Keyn*.[65]

The Duchy of Cornwall, the estate belonging to the Prince of Wales, owned and operated mines which extended out underground beyond the low-water mark. It was found by the arbitrator in that case, Sir John Patteson, that the Crown owned the land beyond the low-water mark. The Duchy argued first that the seabed which adjoined the county of Cornwall was passed to the Duchy under the original grant, and second and in the alternative that the seabed was unowned, and thus belonged to the Prince of Wales as first occupier. At this time the argument that the seabed was *res nullius* was not successful, and the decision of the arbitrator is reflected in the language of the Act. Section 2 declared and enacted that:

> All mines and minerals lying below low-water mark under the open sea adjacent to but not being part of the County of Cornwall are, as between the Queen's Majesty, in the right of her Crown, on the one hand, and His Royal Highness Albert Edward Prince of Wales and Duke of Cornwall, in right of his Duchy on Cornwall, on the other hand, vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown.

This was raised and discussed in *R. v. Keyn* as the dispute was an appeal against a criminal conviction of the captain of a German ship which had collided with a British vessel within three nautical miles of the coast. In the case we see English High Court judges grappling with all manner of authority on international law. Lord Coleridge concludes based on this exercise of sovereignty over mines which extend below the low tide mark that "the realm does not end with [the] low-water mark, but that the open sea and the bed of it are part of the realm and territory of the sovereign."[66]

However, Coleridge was in the minority. In his majority judgment Lord Chief Justice Cockburn proceeds along a very different line of reasoning. He traces the development of the jurisdiction of the Admiralty, and case law where jurisdiction was claimed at sea since Edward I. The judges who find jurisdiction rely on the opinions of international legal scholars, while the majority who do not find jurisdiction rely on domestic case law. Cockburn dismisses Selden and Hale's extensive claims, alongside others, as "vain and extravagant pretensions." Where he relies on jurists, he traces a more modest line from Grotius of qualified jurisdiction at sea.[67]

Crucially, while writers on international law gradually accepted a three-mile territorial sea, English lawyers were ignorant of this. Cockburn finds no reference in English legal history to claims of territory over the sea. Enough inconsistency is shown in the international legal authorities as to doubt the obviousness of criminal jurisdiction extending out to sea. Furthermore, claims that the bed of the sea is the territory of the state are all found to start from claims of ownership over all the seas. If that claim falls away as outdated, then so does the accompanying claim of ownership of the seabed.

In relation to the Cornish mines, he finds the territory where the mine starts belongs to the Crown, and that presumably the seabed is capable of being appropriated by first occupier: "I should not have thought that the carrying one or two mines into the bed of the sea beyond low water mark could have any real bearing on a question of international law."[68] The Act itself only conveys rights "in right of her Crown," not because of any ownership of the soil. That a carefully limited piece of legislation, in response to one very specific dispute, should be the basis of "a parliamentary recognition of the universal right of the Crown to the ownership of the bed of the sea below low water mark" is, as Cockburn says, surprising.[69] In short, the majority is not convinced that international law can convey rights to a state without that state actively claiming them, it doesn't find anything like a claim to criminal jurisdiction up to three miles in the legislation over mines, and as such finds that the German ship captain was not subject to English law.

This case is best remembered as being about the rule of law,[70] but it also illustrates the relationship between domestic and international law at this time in fascinating ways. To just focus on the legal doctrine is to miss the way the sea is being constructed and commodified through law, and the way the materiality of the ocean is driving the development of the law. A few Cornish mines might not have represented a claim to ownership of the seabed at the time, but as ownership of the seabed became a more pressing matter, this history was reinterpreted.

In 1923 Cecil Hurst claimed in the *British Yearbook of International Law* that this English mining legislation from 1858 was the starting point for the authority for a state to claim ownership of the seabed.[71] He was not convinced by Cockburn, finding that the only basis for this legislation could be a belief that the Crown had territorial rights over the bed of the sea. His reading of the common law authority separates the question of territorial waters from the question of ownership

of the bed of the sea. Where Cockburn had found no necessary connection between property in a couple of mines and the extension of criminal jurisdiction, Hurst reads it the other way around: "the property in the bed of the sea and not merely sovereignty and jurisdiction over it was vested in the Crown."[72] Property in the bed of the sea has existed since people claimed exclusive fisheries beyond the low-water mark, and as such "the rights of the Crown in the bed of the sea must have been fixed at least as early as the thirteenth century."[73] That is quite a change in interpretation of the same piece of legislation.

In the interim between *R. v. Keyn* and Hurst's article, there had been several decisions which accepted property in the seabed, mostly Privy Council decisions concerned with British colonies. He also extends the claim of property beyond three miles where the concern is sedentary fisheries. The right to these fisheries is a property right, and the ownership of the benefit is "based on their being a produce of the soil."[74] So having dismissed *res nullius* arguments for the seabed beyond the low-water mark, it comes back in here in the language of settlor colonialism, with title in property being derived from occupation, usage, and enjoyment of the benefits. The areas in question are also largely off the coast of colonies. Furthermore, this is a distinctly terracentric understanding of the bed of the sea.[75]

The 1930 Hague Codification Conference reached no outcome on the continental shelf, although preparatory materials noted that there was unanimity about territory over at least three miles. The Truman Proclamations in 1945 gave new impetus. The most relevant and best-known Proclamation over the continental shelf has several interesting features. First, it situates the declaration in the context of the need to secure and exploit petroleum resources.[76] By the middle of the 20th century oil had decisively overtaken coal as the most important hydrocarbon in the global economy. Second, it uses the term continental shelf, with no limits. The origin of title here is the seabed being contiguous. The Proclamation also claimed "jurisdiction and control," but only over the resources of the seabed and subsoil. The second Proclamation, on fisheries, is notable for the assertion of the power to regulate fishing activities on the high seas, whittling down the freedom of the seas to navigation alone.

Reaction to the Proclamations is interesting. Commentators were skeptical, but states were either silent or followed the US practice.[77] Panama made a declaration in 1946, as did Argentina, which went a big step further in claiming sovereignty over the continental shelf. Also in 1946, the United Kingdom negotiated with Venezuela to divide the seabed between Trinidad and Venezuela, again basing the title on occupation and exploitation. However as quickly as 1951 the International Law Commission found that "the seabed and subsoil were subject to the exercise, by the littoral states, of control and jurisdiction for the purposes of exploration and exploitation. The exercise of such control and jurisdiction was independent of the concept of occupation."[78] The Geneva Convention in 1958 defines the continental shelf based on adjacency, confers sovereignty over resources, with the only limit being 200 meters depth, or up to the depth that "admits of the exploitation of the

natural resources."[79] Whether there is significance in the difference between near synonyms contiguity and adjacency is hard to say. Depth as a limit, much as it was for the oil industry, is more interesting, again part of a long line of extractivism driving the framing of the law in this area.[80]

That brings us back to the cases, and again the question of what the law is, but now this is not a metaphysical question but a materialist one. In 1967, Maltese Ambassador Arvid Pardo gave a famous speech at the United Nations to argue for the deep seabed and its resources to be protected as the common heritage of mankind.[81] As made clear by R. P. Anand in his account of these years, the ICJ is responding to these developments, albeit indirectly, in its assertions of sovereignty for these European states. This other major tension, between First and Third World, would go on to be central to the UNCLOS negotiations. How the law would continue to be derived from and shaped by the materiality of the seabed, the demands of the dominant mode of production, and the ideological effect of the law, is beyond the scope of this chapter. The judgment of the Court is not consciously commodifying the seabed and producing something abstract and fungible, it is responding to the demands of the material conditions. The final abstractness of the continental shelf is achieved as it is disassociated from the water, conceptualized as land which does not need occupying, and after UNCLOS is disconnected from any material definition when it is granted to every coastal state up to 200 nautical miles.

Conclusion: Freeing the Sea

> For the chains of the sea
> Will have busted in the night
> And will be buried at the bottom of the ocean.
>
> —Bob Dylan, "When the Ship Comes In"[82]

The history I tell here has revealed that as the use of the North Sea changed, so too did the way it was conceptualized. This happened incredibly quickly, with the reorganization of the North Sea based on the seabed rather than surface and water column activities preceding the first commercial exploitation of the seabed resources. As demonstrated here, in different times the sea was understood differently. In the pre-modern, it was primarily a way of travelling. In the early modern, a fishing resource, and then very quickly in late modernity, the seabed became all important. The hydrocarbons contained under the continental shelf became the resource which dominated the understanding of the sea.

What should be clear from this chapter is that thinking about law with the sea makes international law central to legal geography. Legal geography's central contribution has been to demonstrate that law and space are co-constitutive, and that legal justice and spatial justice rely on each other. On land, this can often mean a focus on property law and local legal constructions, but to understand the legal constitution of the oceans is to understand the legal co-constitution of the world.

North Sea Continental Shelf is particularly suitable for this sort of analysis, treating the ocean as flat, empty, and easily divided into different, separate, zones. It doesn't take much ontological questioning to see that to separate the seabed from the water above it, to prioritize its connection to the land beside it, is a peculiar way to understand the sea. But putting this in the context of critical oceans thinking, we can see this as using law to respond to a specific oceanic anxiety, the very fluidity, the smooth and de-territorializing effect of the ocean. Law's very abstractness and abstracting force makes it the perfect, necessary tool for rendering the oceans comprehensible for exploitation, not just as flat surface for movement, but also the seabed for mining, life forms for biotech research, et cetera.

North Sea oil and gas reserves went on to be exploited over the next five decades, peaking around 1999. North Sea oil is now nearing depletion. The oil infrastructure is being decommissioned. Some argue for decommissioned oil rigs to be left in place, as nature reserves,[83] sea-steading bases,[84] or diving hotels.[85] The Oslo-Paris Commission has instead demanded that all non-natural infrastructure should be removed.[86] The North Sea today faces being re-constructed a commodified anew, as the commercial viability of oil and gas under the sea falls, and the promise of sea wind power rises. The innovation of the North Sea Windpower Grid, for example, would see a whole new understanding of the sea and energy which connects seabed anchoring and cables with the air currents above.[87]

New uses of space, as demonstrated here, demand new legal constructions. The law is central to how the space is constituted, and by understanding how a space has been made we can try to understand how it can be remade. The oceans are a generative space for law as commodity producer and commodity guarantor. The ocean as commodity and the law as commodifier are co-constitutive, and as I have sought to demonstrate elsewhere, original and generative.[88] Thus, the challenge of Peters and Steinberg, to do *more* than just take account of the oceans' fluidity, depth, volume, et cetera, but to understand the more-than-wet, the ice, the mist, the winds, currents, atmosphere, dissolving, and precipitation, will be key in re-imagining not just the continental shelf, not just ocean space in general, but the international legal constitution of the world as a whole.

Notes

1 *North Sea Continental Shelf* Judgment, *International Court of Justice Reports* (1969), 3.
2 The critical legal historian Robert Gordon called this "evolutionary functionalism" in Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.
3 Henri Lefebvre, *The Production of Space*, trans. Donal Nicholson-Smith (Oxford: Blackwell, 1992), 27.
4 Andreas Philippopoulos-Mihalopoulos, "And for Law: Why Space Cannot Be Understood Without Law," *Law, Culture and the Humanities* 17, no. 3 (2018): 620–639.

5 James Crawford and Thomas Viles, "International Law on a Given Day," in *International Law as an Open System: Selected Essays*, ed. James Crawford (London: Cameron May, 2002), 69–94.
6 For the text of the Truman Proclamations see *American Journal of International Law* 40, supp. 45 & 46 (1946).
7 This is China Miéville's critique of Martti Koskenniemi's indeterminacy thesis in China Miéville, *Between Equal Rights* (Leiden: Brill, 2005), 54.
8 Susan Marks, "False Contingency," *Current Legal Problems* 62, no. 1 (2009): 1–21.
9 I have attempted something similar, in collaboration with others, with the *SS Lotus* case, C Chinkin et al., "Bozkurt Case, aka the Lotus Case (France v Turkey): Ships That Go Bump in the Night," in *Feminist Judgments in International Law*, eds. Loveday Hodson and Troy Lavers (Oxford: Hart Publishing, 2019).
10 The term "critical ocean studies" is most associated with the work of Elizabeth DeLoughrey, see Elizabeth DeLoughrey, "Submarine Futures of the Anthropocene," *Comparative Literature* 69, no. 1 (2017): 33 and Elizabeth DeLoughrey, "Toward a Critical Ocean Studies for the Anthropocene," *English Language Notes* 57, no. 1 (2019): 21–36.
11 All statistics taken from "Energy and Carbon Tracker 2020," International Environment Agency, accessed January 9, 2021, https://www.iea.org/data-and-statistics/data-product/iea-energy-and-carbon-tracker-2020.
12 On the question of modes of production and production of space more generally, see Henri Lefebvre, *The Production of Space*, trans. Donald Nicholson-Smith (Oxford: Blackwell, 1991).
13 Karl Marx, *Capital Volume 1*, trans. B. Fowkes (Middlesex: Penguin Books, 1990), 125.
14 Ibid., 163.
15 Ibid., 178.
16 Robert Knox, "Marxist Approaches to International Law," in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffman (Oxford: Oxford University Press, 2016), 316.
17 Ibid., 319.
18 Miéville, *Between Equal Rights*.
19 United Nations Convention on the Law of the Sea, December 10, 1982, Montenegro Bay Jamaica, UN Treaty Series 31363.
20 Knox, "Marxist Approaches," 326.
21 The concept is developed through a trilogy of important articles: Philip Steinberg and Kimberley Peters, "Volume and Vision: Toward a Wet Ontology," *Harvard Design Magazine* 39 (2014): 124; Philip Steinberg and Kimberley Peters, "Wet Ontologies, Fluid Spaces: Giving Depth to Volume Through Oceanic Thinking," *Environment and Planning D: Society and Space* 33, no. 2 (2015): 247–264; Philip Steinberg and Kimberley Peters, "The Ocean in Excess: Towards a More-Than-Wet Ontology," *Dialogues in Human Geography* 9, no. 3 (2019): 293–307.
22 Steinberg and Peters, "Wet Ontologies," 261.
23 Elizabeth DeLoughrey, "Submarine Futures of the Anthropocene," *Comparative Literature* 69, no. 1 (2017): 33.
24 Elizabeth DeLoughrey, "Toward a Critical Ocean Studies for the Anthropocene," *English Language Notes* 57, no. 1 (2019): 21–36.
25 Elizabeth DeLoughrey and Tatiana Flores, "Submerged Bodies: The Tidalectics of Representability and the Sea in Caribbean Art," *Environmental Humanities* 12, no. 1 (2020): 132–166.
26 James Bamberg, *British Petroleum and Global Oil, 1950–1975* (Cambridge: Cambridge University Press, 2000), 201–203.
27 Alex G. Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands* (Cambridge: Cambridge University Press, 2013), 95.
28 Ibid.

29 Ibid., 20-31.
30 Ibid., 18.
31 Ibid., 70.
32 Ibid., 99.
33 Ibid., 104–107.
34 Ibid., 36.
35 Ibid., 153–155.
36 *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (February 20, 1969) (Tanaka, J., dissenting).
37 Ibid., 18.
38 Ibid., 19 (emphasis added).
39 Reading articles in leading international law journals from the time before the case demonstrates just how debated the concept was. See, for example, Shigeru Oda, "A Reconsideration of the Continental Shelf Doctrine," *Tulane Law Review* 32 (1957): 21–36; J.A.C. Gutteridge, "The 1958 Geneva Convention on the Continental Shelf," *British Yearbook of International Law* 35 (1959): 102–123.
40 *North Sea Continental Shelf* at [91].
41 Ibid. [96]
42 Colin Jones & Duncan Maclennan, "The impact of North Sea oil development on the Aberdeen housing market", *Land Development Studies* 3, no. 2 (1986): 113–126.
43 However, it should be noted that it was a concerted effort from Third World states acting collectively which ultimately secured distance as the criteria. They saw this as giving them equal standing regardless of geographic specifics. See R.P. Anand, *Origin and Development of the Law of the Sea* (Hingham: Nartinus Nijhoff, 1982).
44 Simon Fitch et al., "The Archeaology of the North Sea Palaeolandscapes," in *Mapping Doggerland: The Mesolithic Landscapes of the Southern North Sea*, eds. Simon Finch et al. (Oxford: Archeopress, 2007): 105–118.
45 Pliny the Elder, *Natural History book 2* (Cambridge MA: Loeb Classical Library, 1938) 303.
46 Oskar Bandle et al., *The Nordic Languages: An International Handbook of the History of the Northern Germanic Languages* (Leiden: Walter de Gruyter, 2002), 596.
47 Ibid.
48 This naming continued in to the 19th century, for example in the 6th edition of the *Encyclopedia Brittanica* (Edinburgh: Archibald Constable, 1823).
49 James Graham-Campbell, *The Viking World* (London: F Lincoln, 2001), 10.
50 Arthur Boyd Hibbert, "Hanseatic League" in *Encyclopedia Britannica*, 21 Oct. 2019, https://www.britannica.com/topic/Hanseatic-League. Accessed 5 April 2022.
51 Ibid.
52 P. Holm, "South Scandinavian Fisheries in the Sixteenth Century" in Juliette Roding et al., *The North Sea and Culture (1550–1800)* (Leiden: Uitgeverij Verloren, 1996), 110 – 2.
53 Ibid.
54 Alison Rieser, "*Clupea Liberum*: Hugo Grotius, Free Seas, and the Political Biology of Herring," in *Blue Legalities*, eds. Irus Braverman and Elizabeth R. Johnson (Durham: Duke University Press, 2020), 206–207.
55 Ibid.
56 "October 1651: An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation", in *Acts and Ordinances of the Interregnum, 1642–1660*, ed. C.H. Firth and R.S. Rait (London, 1911), 559–562.
57 James R. Jones, *The Anglo-Dutch Wars of the Seventeenth Century* (London: Longman, 1996).
58 Rieser, "*Clupea Liberum*".
59 "History of Offshore Oil and Gas in the United States," National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, https://www.iadc

.org/archived-2014-osc-report/history/history-of-offshore-oil.html. Accessed 12 August 2021.

60 Ibid.

61 Google Books n-gram search for "continental shelf", available at https://books.google.com/ngrams/graph?content=continental+shelf&year_start=1800&year_end=2019&corpus=26&smoothing=0. Accessed 1 September 2021.

62 H.R. Mill, "Sea-Temperatures on the Continental Shelf," *Scottish Geographical Magazine* 4 (1888): 544–549. Mill cites a paper from the previous year in support of his definition, but this paper, on laying submarine cables, does not use the term continental shelf.

63 Ibid., 544.

64 Cornwall Submarine Mines Act 1858 c.109.

65 *R. v. Keyn* (1876) *UK Law Reports Exchequer Division*, 2, at 155–157.

66 Ibid., 158.

67 Ibid., 176.

68 Ibid., 199.

69 Ibid., 201.

70 A.W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1996), Chapter 9, 227–258.

71 Cecil J.B. Hurst, "Whose Is the Bed of the Sea?" *British Yearbook of International Law* 4 (1924): 34–43.

72 Ibid., 36.

73 Ibid., 37.

74 Ibid., 40.

75 For more on territory and terrain in the seas, see Phil Steinberg et al. in this volume.

76 For how this need leads US maritime policy see DeLoughrey, "Critical Ocean Studies."

77 Cecil J.B. Hurst, "The Continental Shelf," *Transactions of the Grotius Society* 34 (1948): 153–169; C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf," *Transactions of the Grotius Society* 36 (1950): 115; Sir Hersch Lauterpacht, "Sovereignty over Submarine Areas," *British Yearbook of International Law* 27 (1950): 376; J.L. Kunz, "Continental Shelf and International Law: Confusion and Abuse," *American Journal of International Law* 50 (1956): 828; Oda, "Reconsideration of the Continental Shelf Doctrine."

78 International Law Commission Yearbook, Volume II (1951), 384–385.

79 United Nations Convention on the Continental Shelf, Geneva, 29 April 1958, *United Nations Treaty Series*, vol. 499, p. 311.

80 On the extractivism of UNCLOS in general, and the deep seabed regime in particular, see Surabhi Ranganathan, "Ocean Floor Grab: International Law and the Making of an Extractive Imaginary," *European Journal of International Law* 30, no. 2 (2019): 573–600.

81 For more on Pardo's speech see Ranganathan, "Ocean Floor Grab."

82 Bob Dylan, "When the Ship Comes In," in *The Lyrics* (London: Simon & Schuster, 2012).

83 Known generally as rigs-to-reefs programs, see, for example, "Rigs to Reef Programs Create Valuable Fish Habitat," American Petroleum Institute, 2021, https://www.api.org/oil-and-natural-gas/environment/environmental-performance/environmental-stewardship/rigs-to-reef-programs.

84 "Reimagining Civilization with Floating Cities," Seasteading Institute, 2021, www.seasteading.org. On seasteading more generally, see Surabhi Ranganathan, "Seasteads, Landgrabs, and International Law," *Leiden Journal of International Law* 32, no. 2 (2019): 205–214.

85 See the Seaventures Dive Rig Hotel, off Borneo, Malaysia (https://seaventuresdive.com/).

86 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, Ministerial Meeting of the OSPAR Commission, July 22–23, 1998 Decision 98/3.
87 "Political Declaration on Energy Cooperation Between North Sea Countries," European Commission, 2016, https://ec.europa.eu/energy/sites/default/files/documents/Political%20Declaration%20on%20Energy%20Cooperation%20between%20the%20North%20Seas%20Countries%20FINAL.pdf.
88 Henry Jones, "Lines in the Ocean: Thinking with the Sea About Territory and International Law," *London Review of International Law* 4, no. 2 (2016): 307–343.