Árni Olafsson[1]

The Continental Shelf Boundary[2]

One of the preconditions for the 1st Faroese Licensing Round in the shape and scope recommended by the petroleum authorities and presented to Parliament, the Løgting, in the autumn of 1999, was the agreement with the United Kingdom on the continental shelf boundary between the Faroe Islands and Britain inside of 200 nautical miles, signed in May 1999.

Already the report of the Faroese Government Hydrocarbon Planning Commission in June 1993 advised that among the conditions for launching a licensing round was a clarification of the Faroe-U.K. continental shelf boundary issue. Such clarification could - in the best case - be a boundary agreement, or - if that proved impossible - an arrangement regarding activities in disputed areas, or - in the worst case - a court case in which the claims of the parties were revealed, so it would be generally known which

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The views expressed in this essay are the author's own, and should not been seen as expressions of opinions of Faroese or Danish authorities.

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areas were subject to overlapping claims. In the 1993 Report the boundary issue was described (pp. 51 - 55).

The negotiations between Denmark/Faroes on the one hand, and the United Kingdom on the other hand on the delimitation of the continental shelf between the Faroe Islands and Britain lasted for more than 20 years. The first meeting was in 1978. Other meetings were held in 1984/85, and in 1990/91 the negotiations took off which led to the 1999 agreement on the maritime delimitation between the parties inside of 200 nautical miles.

The main subject of the talks was the continental shelf boundary. However, when 200 nautical miles fisheries limits were being set around the Faroes and Britain, respectively, in 1977, it appeared that even if the parties were in agreement that the fisheries boundary should follow the median line principle, they disagreed on the exact positioning of the median line. The British calculated the median line from their most distant islets and rocks, but not from the straight baselines around the Faroes. Denmark in respect of the Faroe Islands calculated the median line from the straight baselines, but not from islets and rocks far from the British coast. Apart from the solitary rock of Rockall which is almost 200 nautical miles from inhabited islands, the features in question were the two islets Sule Skerry and Sula Sgeir, and the small island of North Rona, which lie more than 30 nautical miles off the coast, and the islet archipelago Flannan Isles, which is situated 18 nautical miles from the coast. This disagreement on how to calculate the median line produced three areas with overlapping claims to fisheries jurisdiction: East of Faroe less than 200 km^2 , south of Faroe approx. 8,000 km^2 and south-west of Faroe approx. 5,000 km^2 . In order to avoid escalating the dispute into a conflict both sides exercised their fisheries jurisdiction in these 'Grey Areas' with moderation, so by and large fishermen from the other party were left alone. Therefore the disagreement on the fisheries boundary did not cause great difficulties for the parties.

Maritime limits of 200 nautical miles became international state practice in the middle of the 1970s, after the UN had initiated its 3rd Law of the Sea Conference. (The first two were held in 1958 and 1960, respectively). In the 3rd conference the concept of a 200 nautical miles 'Exclusive Economic Zone (EEZ)' emanated. In this zone coastal states should have exclusive rights to explore and exploit the natural resources, in the sea as well as on and under the seabed, and also have the control over and the responsibility for the marine environment. Initially, however, many countries, among them the United Kingdom and Denmark, the Faroes included, opted to

expand only their fisheries jurisdiction from the then usual 12 nautical miles, without asserting other EEZ-rights. This meant that the Faroese 200 mile limit was solely a fisheries limit. The same was the case with the U.K.

The rules on how far a country could extend its continental shelf jurisdiction were laid down in the Continental Shelf Convention of 1958, which allowed states to claim continental shelf down to the 200 metre isobath, or as deep as exploitation of the natural resources of the seabed was possible. In the 3rd Law of the Sea Conference new rules were formulated on this subject. According to the new rules which were laid down in Article 76 of the Law of the Sea Convention from 1982, states may claim continental shelf rights up to 200 nautical miles from their baselines. However, if they can substantiate that the natural prolongation of their landmass extends to more than 200 nautical miles, they can, with certain limitations, claim continental shelf jurisdiction either out to 350 nautical miles or down to the 2,500 metre isobath. The 'Deep Ocean Floor' outside of the national continental shelves shall be managed as the 'Heritage of Mankind' by a UN agency. Questions on how far a state may claim continental shelf in excess of 200 nautical miles shall be put before a special commission appointed by the UN ('Commission on the Limits of the Continental Shelf').

Already in the early 1970s, when petroleum exploration and exploitation was well under way on the British Shelf, the United Kingdom began to claim continental shelf rights farther and farther to the north and west of Shetland, the Orkneys and the Western Isles, towards an imagined median line towards the Faroes. In a westerly direction from the Hebrides the claims exceeded 200 nautical miles. Also Ireland declared continental shelf claims far beyond 200 nautical miles on the Faroe-Rockall-Hatton Plateau. In accordance with its own conception of how the rules laid down in the Law of the Sea Convention should be applied, Denmark decided in 1985 to make a public announcement of an area, both within and outside of 200 nautical miles, designated until further notice to be under Danish sovereignty and thereby subject to Faroese legislation. Shortly afterwards, Iceland made a similar declaration. The designated continental shelf area around the Faroe Islands overlapped in the southwest the claims made by Britain, Ireland and Iceland. Inside 200 nautical miles both the United Kingdom and Denmark delimited the designated area by straight lines in the shape of a 'ladder'. Between the designated areas where Denmark and the United Kingdom, respectively, claimed continental shelf rights, a 'no man's land', the so-called 'White Zone' emerged, over which neither party

exercised shelf jurisdiction. The 'White Zone' measured approx. 42,000 km^2 and also covered the eastern and the southern 'Grey Zone' of overlapping fisheries jurisdiction.

In 1979 an agreement was concluded between Norway and Denmark on the maritime delimitation between the Faroe Islands and Norway inside of 200 nautical miles. The boundary is a median line. The boundary line begins in the so-called 'tripoint', which is equidistant from Norway, Shetland and the Faroes, and which is the meeting point between the median lines Norway-U.K., Faroe-Norway, and U.K.-Faroe, and the boundary extends from there to a point 200 nautical miles from both Faroe and Norway. Neither party has so far claimed shelf outside of 200 nautical miles north of the Faroe Islands.

In the sea inside 200 nautical miles between the Faroes and Iceland, Denmark/Faroe and Iceland, respectively, have declared a median line boundary. However, the two sides have not reached agreement as to whether the uninhabitable solitary rock, Hvalsbakur, about 20 nautical miles from the Icelandic coast, shall serve as a basepoint when calculating the median line. This disagreement has produced an area, approx. 3,600 km^2 wide, where the fisheries jurisdictions of the two parties overlap.

From what has been explained above regarding the fisheries and shelf jurisdiction claims announced by Denmark/Faroes and the United Kingdom, respectively, it might be imagined that it would not be without difficulties to reach agreement on a continental shelf boundary between the Faroe Islands and Britain.

The parties agreed on guidelines for the talks where one of the stipulations was that the negotiations be kept confidential. Hence, it is not possible to explain the process nor disclose the propositions that were tabled and the reasoning behind them, nor the discussions to which they gave rise.

Delimitation between states is typically handled by foreign ministries. When the talks started they were held between delegations headed by the Danish and the British foreign ministries, but in both delegations were representatives of other interested authorities, which in the Danish case meant both Danish and Faroese authorities, notably petroleum authorities, but also geological and hydrographic expertise. Following the assumption by Faroese authorities in December 1992 of the legislative and administrative competence in matters pertaining to the resources in the

subsoil, the Danish Foreign Ministry suggested that the Faroese authorities assume leadership of the negotiations. This was decided in March 1993. As before, the negotiating mandates were laid down in agreement between Faroese and Danish authorities, and Danish authorities were represented in the delegation.

One characteristic distinguishing delimitation talks from most other international negotiations is the tradition of submitting such differences to a third party for solution in accordance with international law, if the parties fail to reach an agreement. The third party could be the International Court of Justice in the Hague (ICJ) or it could be an arbitration tribunal appointed by the parties. Thus neither party is inclined to accept a compromise solution, which is perceived as less favourable than the outcome of a potential court case. If the parties have similar perceptions of international law on the issue under discussion it may contribute to reducing the controversy to matters of detail. The opposite is the case, if they hold very different legal views.

In the Convention on the Continental Shelf from 1958, which both Denmark (Faroes included) and the United Kingdom are parties to, Article 6 states that shelf boundaries shall be determined by agreement. In the absence of agreement, the boundary shall be the median line, unless another boundary line is justified by special circumstances. Thus the 1958 Convention gives a preference to equidistance. The party which wants to deviate from equidistance must substantiate this claim by pointing to 'special circumstances'.

In the 'North Sea Judgment' from 1969 the ICJ decided in a continental shelf delimitation dispute between on the one hand Denmark and the Netherlands, both parties to the 1958 Convention and adhering to the median line, and on the other hand the German Federal Republic, not a party to the Convention and claiming another delimitation method. The Court stated that the delimitation rules of the 1958 Convention were limited to parties to that convention, and hence should not be regarded as rules of universal application, and were therefore not relevant in that particular case. The boundary between these countries should be determined in an equitable manner. However, the Court went out of its way to state that between opposite coasts, there was a presumption that the median line would lead to an equitable result, notably if calculated by ignoring features such as islets, rocks and minor coastal projections, capable of producing disproportionally distorting effects in favour of one party. This was the first judgment to

mention that the length of the coast abutting upon the area of delimitation was a factor which could influence the course of the boundary.

In later judgments, where the applicable law was not Article 6 of the 1958 Convention, but international customary law, the ICJ took the relative length of the coasts into account, also in cases with opposite coasts, like the 1985 jugdment in the continental shelf case between Malta and Libya, (where the coastal length ratio was calculated as 8:1). In 1977 an arbitration tribunal decided in a case between the United Kingdom and France on the continental shelf delimitation in the Channel. Notwithstanding the agreement that Article 6 of the 1958 Convention - with some reservations - was applicable law between the parties, and the coasts were opposite, the tribunal in the westernmost part of the area transposed the median line towards Britain with the reasoning that a true median line would not render an equitable result, as the Scilly Isles were seen as protruding from Cornwall like a promontory which was held to distort the median line in favour of the U.K. The isles were only accorded half weight when the boundary line was constructed.

Between lawyers the notion spread that the equidistance rule in Article 6 should not be interpreted too literally, but should be understood in the light of jurisprudence emanating from court decisions, which stressed the need for solutions to be equitable. When the 3rd Law of the Sea Conference should formulate delimitation rules it was not possible to obtain consensus on a formula which mentioned equidistance. Instead it was agreed that maritime boundaries (i.e. both continental shelf and EEZ boundaries) 'should be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.' This was not a very clear rule. But it could be read to mean that states which already were bound by the rules of the 1958 Convention continued to be so.

When considering state practice, a great deal of the delimitation agreements made between states adhere to the equidistance principle, notably in case of opposite coasts, however often with deviations where motivated by the shape of the coasts.

The doubts and differing opinions prevalent among international lawyers would not have contributed to finding common ground as to the applicable law in a rather complicated geographic situation like between the Faroes and Britain. As mentioned above regarding the fisheries boundary, there

was an evident disagreement between the two sides about the baselines from which to calculate the median line. As to coastal lengths it may be added that even if it is not easy to decide exactly which coasts on the Faroese and on the British sides, are relevant in the context of comparison, it may be assumed that the British coasts facing the Faroes are longer than the Faroese coasts facing Britain. The coasts are not lying strictly vis à vis each other. The Faroese archipelago forms a triangle with its sharpest corner pointing south towards the north coast of Scotland in front of which most of the small offlying Scottish islets are located.

In June 1993 the International Court of Justice decided in a court case which might be viewed as relevant for the negotiations with the U. K., not least as one of the litigants was Denmark. The dispute was between Denmark and Norway about the maritime boundaries between Greenland and Jan Mayen, a relatively small, solitary island without a civil population or any domestically based economy. Norway claimed a median line, while Denmark claimed an unabridged 200 mile zone towards Jan Mayen, pointing to Norway's acceptance of such a solution regarding the boundary between Jan Mayen and Iceland, and to the considerable difference in coastal lengths (a ratio of 9:1). The Court dealt with the shelf and the fisheries boundaries separately, but heeded the wish of the parties that the two boundaries should coincide. The Court stated that concerning the shelf boundary, the parties were bound by the 1958 Convention, which as mentioned before gives preference to equidistance; concerning the fisheries boundary international customary law also indicated a median line as a point of departure in a case like this of opposite coasts. The ICJ ignored what Norway had agreed with Iceland. Neither did it agree with the contention that the division of the seabed should reflect the coastal length ratio. On the other side it found that with such a significant coastal length ratio (9:1) the median line would not divide the seabed between the parties in an equitable manner. When determining the boundary line, the Court divided the contested area in three parts. In the northernmost third, it divided the area of overlapping claims with 2/3 to Jan Mayen and 1/3 to Greenland. In the southernmost third, where the capelin swim, Greenland got half, with a reference to the need for Greenland to fish its part of the capelin stock in own waters. The partition of the middle third follows from the other two, so all in all Greenland got approx. 5/12 and Jan Mayen 7/12 of the disputed area.

As mentioned earlier, the negotiations were conducted in confidence. But the talks dragged on, and - notably in the Faroes - there was considerable

curiosity as to how the islands were faring in a matter of such importance for the whole community. Many guesses were made, and by and by people would get a notion of the main contours of the positions of the parties. It was not difficult to figure out that inside of 200 nautical miles the Faroese would stick to the median line, preferably in the version apparent in the Faroese fisheries boundary line. It was understood, that the United Kingdom laid claim to a continental shelf boundary lying closer to the Faroes than even the publicised British version of the fisheries median line. Probably it was not difficult to figure out that such British claims, at least in part, would be based upon an alleged difference in coastal lengths.

Outside of 200 nautical miles it had been obvious since the Danish designation in 1985 that the positions of the two parties were completely incongruous. The Danish claims on behalf of the Faroe Islands were based on the geological understanding that Britain (as well as Ireland and Iceland) was physically separated from the Rockall-Hatton Plateau to such an extent that only the Faroes were able to fulfil the criterion of natural prolongation throughout the 200 mile zone and beyond the 200 mile limit. Another aspect is, that even if the United Kingdom and Faroes/Denmark should reach an agreement on the Plateau, the Icelandic claim would remain. The U.K. and Ireland had in 1988 reached an agreement on how to split their claims on the Plateau. Such a solution did neither bind Denmark nor Iceland, who both lodged protests. A bilateral agreement between two contestants did not suffice to make the area undisputed. Such considerations could motivate the parties to restrain themselves to the area inside of 200 nautical miles, where oil company interest was most pronounced.
When the United Kingdom in 1997 acceded to the Law of the Sea Convention of 1982, the British Government declared that it withdrew its claim of a 200 mile fisheries limit around Rockall as this would be incompatible with the Convention, which in Art. 121 paragraph 3 stipulates that rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf. This move reduced the south-western area of overlapping fisheries jurisdiction from 5,000 km^2 to less than 100 km^2.
Probably the idea of submitting the issue to the International Court of Justice would have occurred to the parties from time to time. However, in a joint statement from a meeting in Copenhagen in February 1995 between the Faroese Head of Government and the British Secretary of State for Foreign Affairs, they expressed their joint resolve to avoid litigation. Such court cases are expensive, they are time consuming, often lasting 5 years or

longer, and - inherently - neither party can be certain of getting its way. Often the decisions of the ICJ resemble negotiated compromise solutions.

The talks made little headway and in 1997 they seemed to have come to a halt. During the
ONS (Offshore Northern Seas) exhibition in Stavanger in august 1998 the new Faroese Minister of Petroleum met his British counterpart. The boundary negotiations were not their portfolio, but nevertheless they took the opportunity to discuss matters of mutual interest which were slowed down by the stalemate in the boundary issue. In the autumn of 1998 new contacts were made between the parties, however without much publicity. And in May 1999, an agreed text was lying on the table, ready for signature.

The agreement, which was signed by the Faroese Prime Minister together with the Danish Minister of Foreign Affairs on the one hand, and the British Minister of State at the British Foreign and Commonwealth Office on the other hand, deals with the maritime delimitation in the waters between the Faroe Islands and Britain within 200 nautical miles. Where there was agreement on the course of the 1977 median line, the boundary shall follow that line. The eastern area of overlapping fisheries jurisdiction falls entirely to the Faroe Islands, both for fisheries and continental shelf purposes. In the southwest, the agreed fisheries and continental shelf boundary splits the area of overlapping fisheries claims (less than 100 square kilometres) equally between the parties. In the 8,000 km^2 area of overlapping fisheries jurisdiction to the south of the Faroes, the continental shelf boundary runs mostly somewhat south of the British version of the fisheries boundary. But, the parties agreed that in this sector both the Faroese and the British fisheries boundary remain in place. Thus both parties uphold their fisheries legislation in the area between the two original median lines and refrain from exercising jurisdiction over vessels with a fishing licence solely from the other party. This means that in this 'Special Area', which is intersected by the continental shelf boundary, both parties have fisheries jurisdiction in the water column on both sides of the shelf boundary, including the water column above the other party's shelf. Special provisions oblige the parties to ensure that their petroleum activities infringe as little as possible upon the conduct of the fisheries.

As explained above, neither the Faroe Islands nor the U.K. have an EEZ. Where the parties have agreed that the continental shelf boundary and the fisheries boundary shall coincide, the Agreement stipulates that a future

EEZ boundary shall follow the other two. In the 'Special Area' neither party shall declare an EEZ or an 'Environment Zone' without the consent of the other party. At this early stage (spring 2000) no attempt has been made to make any arrangement in this respect. For the Kingdom of Denmark an EEZ legislation was introduced in 1996, but it was not promulgated in the Faroe Islands in order not to add difficulties to the negotiations with the United Kingdom on the shelf boundary. It will not be promulgated in the Faroe Islands until requested by the Faroese authorities. And in that case a particular reservation has to be made for the 'Special Area'.

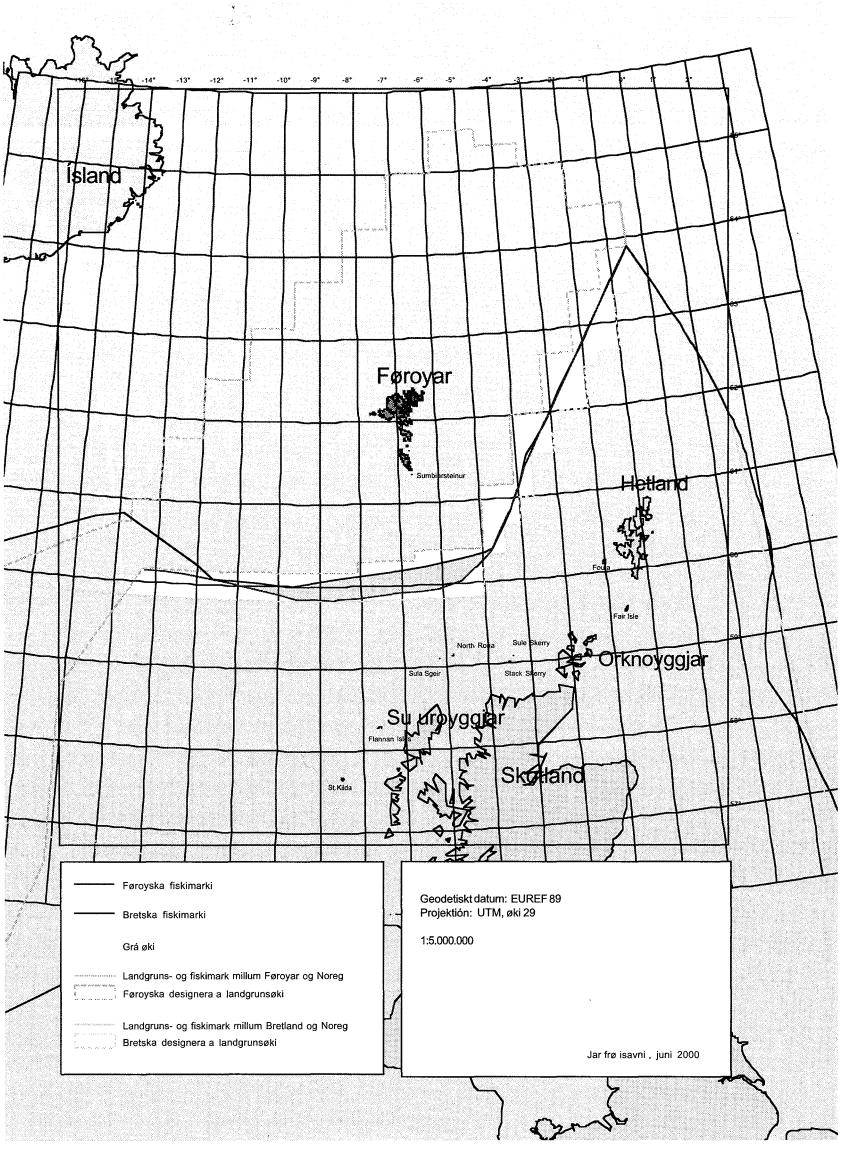
It was mentioned above, that the United Kingdom, which was not a signatory to the Law of the Sea Convention of 1982, acceded to this convention in 1997. Denmark, which was one of the signatories, has not yet ratified it, among other things to avoid complicating the shelf boundary negotiations with Britain.

As already stated, the Boundary Agreement is confined to the area inside of 200 nautical miles. The Agreement stipulates that it shall be without prejudice to any claim of either party outside the area. This wording refers to the disagreement over the seabed in the Rockall-Hatton area outside of 200 nautical miles. Coastal states that lay claims to seabed beyond 200 miles shall notify the UN thereof with thorough arguments to be assessed by the UN Commission on the Limits of the Continental Shelf. If several states lay claim upon the same area of seabed it will be difficult for the Commission to assess the individual claims, and it is not unlikely that the Commission will call upon the states to find an agreement.

In the international oil industry there was evidently a widespread interest in opening up, not only the designated Faroese shelf area, but also the 'White Zone' for real petroleum exploration. As long as no boundary was in place in the zone, there was no basis for other activities than seismic acquisition and the like. That also the authorities on both sides were eager to open the 'White Zone' for exploration can be inferred by the speed of the ratification process, a procedure which often takes years. Already the day prior to the signing on 18 May 1999, the Faroese Parliament, the Løgting, had approved the Agreement. The Danish parliament, the Folketing, completed its procedure before its summer recess in early June. In Britain the agreement was sent to Parliament, and if no comments were made within a specified deadline, it was considered approved. Already on 21 July 1999 the parties could make an exchange of notes informing each other that their respective ratification procedures had been completed, so the Faroese Prime

Minister could tell the Faroese people in his address to the Løgting on the national day, 29 July, that the Agreement had entered into force.

The uncertainty about the boundary made it difficult for the Faroese authorities to decide about launching a licensing round. As soon as the boundary agreement had been signed, and it had become clear, which seabed areas were at their disposal, the Faroese petroleum authorities started to prepare the first licensing round.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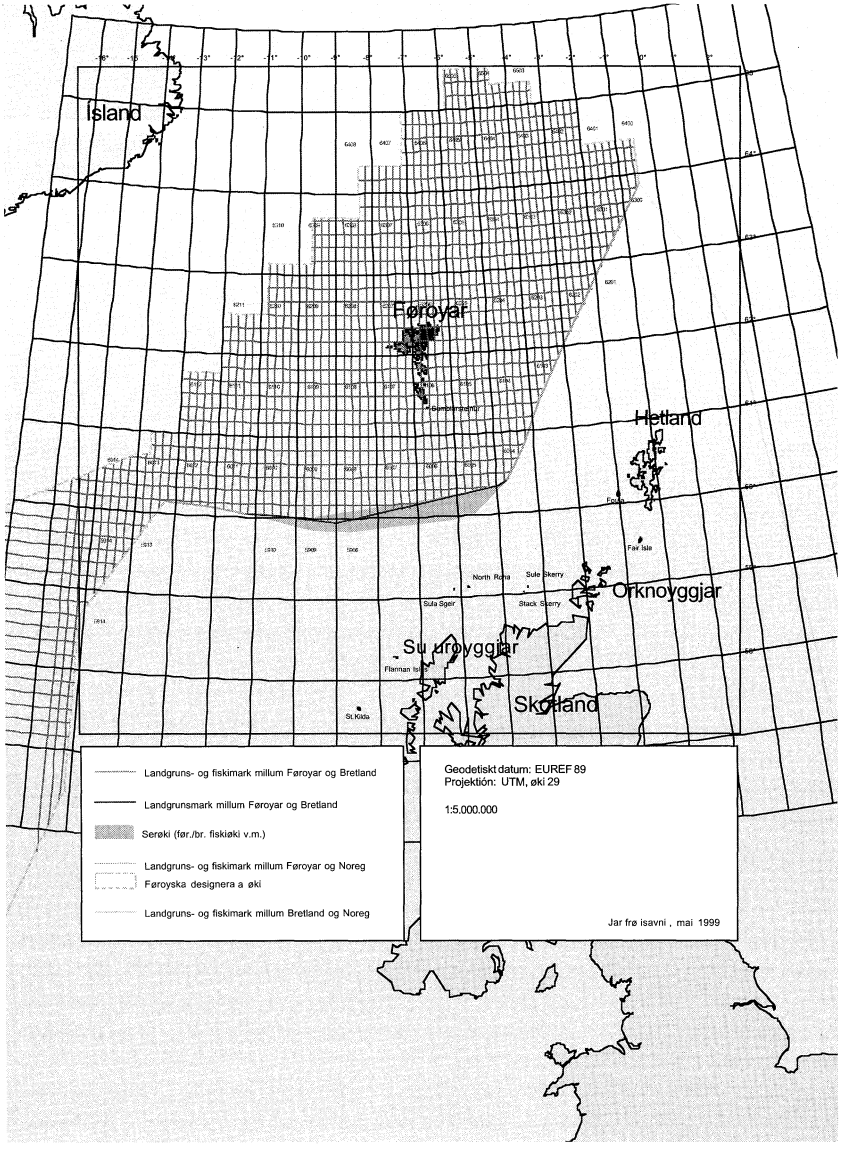
Kort 1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Kort 2