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UNDELIMITED MARITIME AREAS: OBLIGATIONS OF STATES UNDER ARTICLE 74(3) AND 83(3) OF UNCLOS

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Abstract

The delimitation of maritime areas between neighbors is of vital importance as it provides stable and long-lasting relations. Maritime boundary delimitation has been enriching the international law with a new chapter that has developed steadily in proportion with the related challenges and expectations. However, many maritime boundaries in the world are not delimited. This implies that disputes relating to maritime delimitation have many issues in future. In this case, State shall have to negotiate among them or to use dispute resolution mechanism. Under Article 74 and Article 83 of the United Nations Convention on the Law of the Sea (UNCLOS) provides for the delimitation of the territorial sea, the continental shelf and the economic exclusive zone. However, maritime delimitation disputes reveal that these provisions hardly occupy the central place they are expected to. This paper examines the issue of undelimited maritime areas where involved the Article 74(3) and Article 83(3) of UNCLOS and of vital importance in that it provides for stable and long-lasting relations among States.

Keywords : undelimited maritime, obligations, Article 74(3), Article 83 (3), UNCLOS

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I. INTRODUCTION

A coastal State has sovereign rights to explore and exploit the natural resources of the continental shelf appurtenant to its territory. In some situations, however, States have overlapping claims as to their continental shelves, which raises important issues as to how they must conduct themselves prior to resolution of their dispute. This is not an unusual circumstance. Indeed, it is estimated that more than half of the possible maritime boundaries between States have yet to be delimited, and that more than 2.7 million square kilometres of potential extended continental shelf areas are subject to these overlapping claims.¹

¹ Poll V. Robert and Schofield C, "A Seabed Scramble: A Global Overview of Extended Continental Shelf Submissions," in *Proceedings of the Advisory Board on the Law of the Sea (ABLOS) conference on Contentious Issues in UNCLOS – Surely Not?*, (Monaco: ABLOS, 2010), 3–4,

Various sources of international law provide guidance as to the rights and obligations of States prior to the resolution of their overlapping continental shelf claims. Treaty provisions, in particular Article 6 of the 1958 Convention on the Continental Shelf (CS Convention) and Article 83 of the U.N. Convention on the Law of the Sea (UNCLOS), are directly binding upon States Parties, at least in their relations with other States Parties. State practice in the application of those treaties is also pertinent. To the extent that States are not bound directly by treaty rules, customary international law becomes pertinent. As subsidiary sources, the views expressed by various international courts or tribunals, notably in the *Guyana v. Suriname* and *Ghana/Côte d'Ivoire* disputes, and by publicists, provide further guidance.² The tribunal in the *Guyana v Suriname* case has commented that the obligation “to make every effort ...not to jeopardise or hamper the reaching of final agreement” is:

An important aspect of the Law of the Sea Convention’s objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area.

II. PRINCIPLES OF DELIMITATION

The maritime delimitation shall rely on the determination of the relevant coasts and the relevant maritime zones of each States.

A. THE RELEVANT COASTS

Relevant coasts are crucial in the delimitation exercise. They are the basis of a State’s entitlement to the areas to be delimited. As indicated by the ICJ, the title of a State to the continental shelf and to the EEZ is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts.³ The land is the legal source of power which a State may exercise over territorial extensions to seaward.⁴ Moreover, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.⁵ It is therefore important to determine the relevant coasts of each party to the case, which confer legal entitlement of countries to the continental shelf and the EEZ, because the purpose of delimitation is to resolve the issue of overlapping claims by drawing a line of separation between the maritime areas concerned.

The role of relevant coasts can have two different closely related legal aspects in relation to the delimitation of the continental shelf and the EEZ. First, it is necessary to identify the relevant coasts in order to determine

what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line⁶

B. THE RELEVANT MARITIME ZONE

Seaward projections of relevant coasts of the coastal State and the encroachment effect of these projections on those at sea of the other coastal State determine maritime delimitation. This means therefore that the delimitation exercise only takes account coasts that generate overlapping titles. It is for this reason that the utility of the notion of relevant maritime zone is often challenged. The ICJ in the case of *Romania v Ukraine*, sought to justify the use of this notion. It observed that the legal concept of the “relevant area” has to be taken into account as part of the methodology of maritime delimitation.

In the first place, depending on the configuration of the relevant coasts in the general geographical context and the method for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand. Secondly, the relevant area is pertinent to checking disproportionality. The purpose of delimitation is not to apportion equal shares of the area or indeed proportional shares. The test of disproportionality is not in itself of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one part or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.⁷

In the case of *Romania v Ukraine*, the Court further observes that for the purposes of this final exercise in the delimitation process the calculation of the relevant area does not purport to be precise and is approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas as according to the case of the *North Sea Continental Shelf*. The relevant maritime zone covers the entire area of coastal extensions of litigating States. These projections may overlap those of third-party States.⁸

⁶ Judgment on North Sea Continental Shelf Case (Federal Republic of Germany v. Netherlands) ICJ Reports 51 (1969) at 96.

⁷ Tafsir Malick Ndiaye, “The Judge, Maritime Delimitation and the Grey Areas,” *Indian Journal of International Law* 55, (2015): 497.

⁸ In the case of *Romania v Ukraine*, the Court notes that the delimitation will occur within the

III. MARITIME BOUNDARY DELIMITATION

Boundary delimitation between opposite and/or adjacent States would assist cooperation to achieve law and order at sea. Regional States should move expeditiously to resolve existing boundary disputes to ensure that jurisdiction might properly be exercised in applicable zones. If boundaries cannot be resolved, economies should be prepared to enter into some form of provisional arrangements for the maintenance of law and order in the disputed area without prejudice to their positions in the boundary negotiations.⁹

A. THE METHOD OF DELIMITATION

In the *Case Concerning the Continental Shelf (Libya/Malta)*, in which it states: ‘In applying the equitable principles thus elicited, within the limits defined above, and in the light of the relevant circumstances, the Court intends to proceed by stages; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result.’

The provisional delimitation line is determined, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case.¹⁰ So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms “median line” and “equidistance line” since the method of

enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It will stay north of any area where third-party interests could become involved.

⁹ Clive Schofield, “Cooperative Mechanism and Maritime Security in Areas of Overlapping Claims to Maritime Jurisdiction,” in *Capacity Building For Maritime Security Cooperation in The Asia-Pacific: A Selection Of Papers Presented at The CSCAP Study Group Meeting On Maritime Security Cooperation*, December 2004 edited by P. Cozens & J. Mossop (New Zealand: Centre for Strategic Studies, 2005), 99-115.

¹⁰ *Case Concerning the Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v Honduras)*, [2007] ICJ Rep 745 [281], it is stated: ‘... , the Court finds itself within the exception provided for in Article 15 of UNCLOS, namely facing circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.’

delimitation is the same for both.¹¹

Based on the coastal configuration of litigating States, the provisional line may vary; an equidistance line between adjacent coasts and a median line between opposite coasts, for example. Given that the course of the final line should result in an equitable solution,¹² the Court will at the second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.¹³

B. THE PROVISIONAL EQUIDISTANCE LINE

The provisional equidistance line includes two key stages; selection of base points and consequently the construction of the line itself. The geography of the area to be delimited plays an important role in the selection of base points. In the case of the Black Sea delimitation, the Court had to indicate the conclusions drawn from the fact that the dispute related to both adjacent and opposite coasts. The Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines.

From the case of *Romania v Ukraine*, the points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography. According to this case, the geography shows that the capacity of the coasts to generate overlapping titles indicates the existence of two areas: in one case, the coasts are adjacent; in the other, they are opposite. In practice, the first conclusion which the Court draws from this is that, on the Romanian coast, the significant base points from which the equidistance line

¹¹ This is stated by the ICJ in the aforementioned *Black Sea Case*.

¹² In compliance with the first paragraphs of Articles 74 and 83 of the UNCLOS.

¹³ Case Concerning the Land and Maritime Boundary (Cameroon and Nigeria, Equatorial Guinea intervening) [2002] ICJ Rep 60. On 29 March 1994, the Government of Cameroon filed an application in the Registry of the ICJ in which it observed that 'delimitation [of the maritime boundary between the two States] has remained a partial one and, despite many attempts to complete it, the two parties have been unable to do so.' It consequently requested the court, 'In order to avoid further incidents between the two countries, [...] to determine the course of the maritime boundary between the two States beyond the line fixed in 1975.' In the Case between *Cameroon and Nigeria*, the ICJ states in [288]: 'The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result."'

and the median line must be established are the same, since this coast is both adjacent and opposite to the Ukrainian coast. The second conclusion is that, as the Ukrainian coast consists of two portions—one adjacent to the Romanian coast, the other opposite to it—the base points to take into account must be defined separately, according to whether the adjacent or opposite portion is concerned. The third conclusion is the identification of a turning-point on the equidistance line where the effects of adjacency give way to those of the coasts on the opposite side, resulting in a change in the direction of the line.¹⁴

After describing the views of Parties on base points to be taken into consideration in order to draw the provisional equidistance line between adjacent coasts of the two parties, the Court examined the question of whether the base points to be used could be the same as those selected by each State to determine the outer limit of its territorial sea. In this respect, the Court observed that the geometrical nature of the first stage of the delimitation exercise leads it to use as base points those which the geography of the coast identifies as a physical reality at the time of the delimitation. The Court upholds the dual principle of baselines and base point. It appears that the base points and baselines for the purpose of delimitation are independent of those that serve to measure the breadth of the territorial sea and other maritime jurisdictions. After identifying the base points on the coastline of the two parties, the Court will trace the provisional equidistance line based points on those points, which will be identical to the provisional median line.

C. THE RELEVANT CIRCUMSTANCES

When the provisional equidistance line is drawn, the Court considers whether any factors calling for an adjustment or displacement of this line to achieve an equitable result.¹⁵ These equidistance line that has been drawn based on the geometrical method from base points identified on the Parties' coastlines is not, in the light of the special circumstances, perceived as inequitable. If such was the case, the judge would adjust the line in order to reach an equitable solution.¹⁶

The Court acknowledged that 'a substantial difference in the lengths of the

¹⁴ Ndiaye, "The Judge, Maritime Delimitation and the Grey Areas," 497.

¹⁵ This principle was constructed over a long period from 1969 Case Concerning the North Sea Continental Shelf, Tunisia v Libya (1982), Case Concerning the Gulf of Maine (1984) and Libya v Malta (1985) with the famous statement of principle of the Court: 'but in any event the baselines as determined by coastal States are not per se identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islet, rocks and minor coastal projections."'

¹⁶ ICJ, North Sea Continental Shelf.

parties' respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line.' The Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland constituted a "special circumstances" requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone.¹⁷ In the Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine area (*Canada v United States of America*), the Court examining 'the equitable criteria that may be taken into consideration for an international maritime delimitation stated:

*"[T]he fact that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for delimitation, or a method that can be used to implement such delimitation. The Chamber recognizes that this concept is put forward mainly as a means of checking whether a provisional delimitation established initially on the basis of other criteria, and by the use of a method which has nothing to do with that concept, can or cannot be considered satisfactory in relation to certain geographical features of the specific case, and whether it is reasonable or otherwise to correct it accordingly. The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction."*¹⁸

The judge will only focus on the circumstance relating to the legal title of the State on disputed maritime areas and which will allow him to draw a delimitation line that that is acceptable and equitable for parties. After taking into consideration, or not. One or more relevant circumstances likely to result in the adjustment or shifting of the provisional delimitation line, the judge will determine and draw what will become the final delimitation line.

¹⁷ ICJ, Cameroon v Nigeria Case.

¹⁸ Maritime Delimitation (Greenland and Jan Mayen), the Court observed that 'it should however be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen.

D. VERIFICATION OF THE ABSENCE OF DISPROPORTIONALITY

So far as the envisaged delimitation line is concerned, should not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. The ICJ in the case of *Libya v Malta*, recommends the attitude to be adopted. Views contained in the judgment in the case concerning the delimitation of continental shelf between the United Kingdom and the French Republic are decisive.¹⁹

In examining the concepts of “proportionality” and “reasonable evaluation of natural features,” the Tribunal stated:

“[P]articular configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of “proportionality” merely express the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned...It is disproportion rather than any general principle of proportionality which is the relevant criterion or factor...there can never be a question of completely refashioning nature...it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations of features...”

Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf...proportionality is not in itself of a source of title [...], but is rather a criterion for evaluating the equities of certain geographical situations...The element of proportionality..., its role being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity.²⁰

Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as

¹⁹ North Sea Continent Shelf: ‘...to be taken account of [...]the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.’

²⁰ Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, XVIII RIAA 189 and FF., [100, 101, 246, 250]; see also *Guinea v Guinea-Bissau*, XIX RIAA 183-184 [94-94].

to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal water should be excluded, each maritime delimitation case is *unicum* ²¹

IV. JURISPRIDENCE IN THE DELIMITATION

Delimitation is determined by agreement or by adjudication by a court or tribunal. The outer limits of the continental shelf are established by the coastal State on the basis of recommendations by the Commission and are final and binding. The recommendations of the Commission are submitted in writing to the coastal State which made the submission and to the Secretary General of the United Nations.²² For this reason, Article 7 of Annex II provides: “Coastal States shall established the outer limits of the continental shelf inconformity with the provisions of Article 76, paragraph 8, and in accordance with the appropriate national procedures.” The thrust of these rules is to establish by implication that any delimitation of the continental shelf, or any delineation of its outer limits beyond 200 nautical miles, effected unilaterally by one State regardless of the views of the other State or States concerned, or establish otherwise than under Article 76, paragraph 8, is in international law not opposable to those States.²³

*“The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”*²⁴

A. TREATY OBLIGATION

Paragraph 1 of Article 76 of UNCLOS defines the continental shelf and establishes two criteria. The first is the distance criterion for those States whose continental margin does not extend more than 200 nautical miles from the baselines. In this case, the outer limit of the juridical continental shelf merges with the outer limit of the Exclusive Economic Zone. The second criterion is geomorphological one for those States whose continental margin

²¹ ICJ, Black Sea Delimitation.

²² Annex II, Article 6, UNCLOS.

²³ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America) (1984), ICJ Reports 1984, 74 at 246.

²⁴ Fisheries Case (UK v. Norway) (1951), ICJ Reports, 116, at 132.

extends more than 200 miles from the baseline. In this case, the coastal States must show the Commission on the Limit of the Continental Shelf (CLCS) that the natural prolongation of its land mass extends more than 200 nautical miles. For purposes of this determination, there apply (i) two formulae determining the outer edge of the continental margin and (ii) constraints limiting the expansion of States. The outer limit of the juridical continental shelf can be established by the combined application, in accordance with precise rules, of the lines resulting from the formulae and constraints. Scientific data must be gathered at sea to produce the information needed to apply the formulae. The coastal State establishes the outer limits of the continental shelf on the basis of the recommendations made by CLCS.²⁵

The Secretary-General of the United Nations gives due publicity to these limits. Article 3, paragraph 1, of Annex II to the Convention describes the Commission's functions as follows:

"1. The functions of the Commission shall be:

(a) to consider the data and other material submitted by coastal States concerning the outer limit of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of Sea;

(b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

This means that the authority to examine lies with Commission if the information furnished to its proves that the conditions laid down in Article 76 for purposes of establishing the outer limits of the continental shelf are satisfied by the coastal State. Under the terms of Convention, the power to assess the scientific and technical data submitted by the coastal State is vested exclusively in the Commission.

The Tribunal complicated its task by delimiting the continental shelf beyond 200 nautical miles even though the Commission has not pronounced upon the outer limits of each Party's continental shelf.

2. Suspension of a submission by the Commission on the Limit of the Continental Shelf.

In case where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned

²⁵ Article 76, para 8 of the Convention and Annex II of the Convention.

in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute."²⁶

B. ALTERNATIVES TO DELIMITATION

Although maritime boundaries are the dominant means of governing and defining national claims to maritime jurisdiction and are clearly the type of management regime favored by coastal states, it is clear that many overlapping claims to maritime jurisdiction, especially those involving sovereignty disputes over island of which there are numerous examples in the Asia-Pacific region, are likely to be extremely hard to resolve in the foreseeable future. Disputed maritime areas can create different levels of conflicts between coastal States having overlapping claims, ranging from no problems arising between them to disputes being frequent. Two ways can be identified as to how claimant States can respond to unilateral conduct; protesting and taking physical action.²⁷ Yet there are fundamental differences between these types of responses: protesting through diplomatic channels is a lower intensity response than formulating a physical reaction such as through sending navy vessels to the area concerned in an attempt to put a halt to unilateral conduct.²⁸ Giving a reaction to a unilateral act may be called for in certain circumstances and might prevent a State from being confronted with the argument that by staying silent it has acquiesced in the lawfulness of that conduct; or, alternatively, in the claim of the other state over the area.²⁹ In this context, it is therefore worth considering alternatives to the delimitation of international boundaries and the adoption of cooperative mechanisms providing for shared rather than unilateral management of maritime space. The principle form of cooperative mechanism to emerge in the maritime context in recent years is maritime development zones.

²⁶ Annex 1, para 5 (a), of the Rules of Procedure of the Commission.

²⁷ Youri van Logchem, "Exploration and Exploitation of Oil and Gas Resources in Maritime Areas of Overlap: the Falkland (Malvinas)," *Hague Yearly Book International Law* 28, (2015): 29.

²⁸ For example, after Guyana allowed an oil rig to be placed within a disputed maritime area, to commence with exploratory drilling, Suriname put a halt to this conduct by sending its naval vessels. The Tribunal concluded that Suriname breached Article 2(4) of the United Nations Charter and general international law. It was particularly held against Suriname, that it issued an ultimatum: the rig would need to "leave the area at once, or the consequences will be yours." *Guyana v Suriname*, Permanent Court Arbitration 2007, 30 RIAA, 1 445, 476.

²⁹ M. Shah Alam and A. Al Faruque, "The Problem of Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar: Prospect for a Solution," *International Journal of Marine & Coastal Law* 25, (2010): 405.

The legal rationale for joint development is provided by UNCLOS Article 74(3) and Article 83(3) dealing with the delimitation of the exclusive economic zone and continental shelf respectively. These articles state, in identical terms, that:

“Pending agreement as provided for in paragraph 1, the States concerned in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” (UNCLOS, 1982)

Joint development zones have attracted considerable enthusiasm from commentators as a means of overcoming seemingly intractable maritime boundary dispute. When the parties concerned appear to be deadlocked and there appears to be little prospect of agreement on a boundary line in the foreseeable future, it has been argued that joint development agreements seem to offer an ideal way forwards, placing the focus squarely on “a fair division of the resources at stake, rather than on the determination of an artificial line”.³⁰

C. OBLIGATIONS ARISES UNDER ARTICLE 74(3) AND ARTICLE 84(3)

Pending conclusion of an agreement with respect to overlapping claims in the exclusive economic zone or the obligation. UNCLOS Convention Article 83(3) also provides in part that: “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort . . . not to jeopardize or hamper the reaching of the final agreement.” This obligation might be characterized as a negative obligation; it requires States Parties to refrain from engaging in unilateral action that may aggravate a dispute. At the same time, it is also an obligation of conduct, not of result. States must exercise due diligence in this regard but may not ultimately succeed³¹.

Although this analysis breaks up into two “rules” the obligation to pursue practical arrangements and the obligation not to jeopardize the reaching of a final agreement, it should be noted that the *Ghana/Côte d’Ivoire* special chamber found that these are “two interlinked obligations for the States concerned” and “that the two obligations are connected.” Further, the special

³⁰ Miyoshi, Masahiro and Clive H. Schofield, *The Joint Development of Offshore Oil and Gas In Relation to Maritime Boundary Delimitation* (Durham, United Kingdom: International Boundaries Research Unit, University of Durham, 1999), x.

³¹ Sean D. Murphy, “Obligations of States in Disputed Areas of the Continental Shelf,” 183.

chamber viewed this obligation “not to jeopardize or hamper” as operating during the period after the maritime delimitation dispute has been established, but before either a provisional arrangement has been reached or a final delimitation by agreement or adjudication has been achieved.³²

As to the drafting history of Articles 74(3) and 83(3) of UNCLOS, the initial stages of their negotiation was marked by disagreements between a group of States supporting the median line as a default rule for maritime delimitation, and another group of States equal in size supporting the view that delimitation could only be effected on the basis of equitable principles. In view of the impasse, the idea of moratoria on resource related activities, and interim arrangements began to gain traction. Common paragraph (3) of Articles 74 and 83 of UNCLOS is a synthesis of those views, albeit not a well drafted one³³.

The present study of State practice shows that Articles 74(3) and 83(3) have been applied expressly in certain instances and tacitly in others. Provisional arrangement of a practical nature have taken many forms, but, in their absence, restraint is not always exercised. Investors, and particularly oil companies, remain wary of disputed maritime areas. When activities (e.g drilling) have taken place in undelimited areas they may have resulted from a deliberate policy to try to create facts on the ground – this does happen. In many instances it seems to result from administrative shortcomings and failures of communication between domestic agencies. For example, an energy ministry may license areas or issue concessions without consulting the foreign ministry’s legal experts about the course, or the maximum extent, of the State’s maritime limits. Other problems arise because charts are sometimes old and unreliable, producing uncertainty as to where even a provisional equidistance line would run. Both limbs of Article 74(3) and 83(3) have been applied only by the *Guyana v Suriname* Arbitral Tribunal. The award found a violation of the provisions of both sides without awarding any compensation. Parties have not sought a ruling on the legality of conduct during negotiations under those provisions in more recent delimitation cases that are pending before international courts and tribunals.³⁴

In the *Guyana v. Suriname* Award, the tribunal focused largely on whether the parties’ unilateral actions would cause permanent physical change to

³² *Ibid.*

³³ British Institute of International and Comparative Law, *Obligations of States on Undelimited Maritime Areas*, 2016 <https://www.biiicl.org/projects/obligations-of-states-under-articles-743-and-833-of-unclos-in-respect-of-undelimited-maritime-areas>

³⁴ Anderson, D, Legal Issues Relating to Articles 74(3) And 83(3) of UNCLOS, *British Institute of International and Comparative Law* 2, no. 2 (2018)

the marine environment (“seismic exploration” versus “exploitation of oil and gas reserves”) an approach that was likely inspired by the International Court’s decision on provisional measures of protection in Aegean Sea Continental Shelf. With that standard, the *Guyana v Suriname* tribunal found that both Guyana and Suriname had violated their obligation under UNCLOS Convention Article 83(3). According to the tribunal, Guyana failed to exercise the necessary self-restraint by authorizing exploratory drilling by an oil rig in the contested waters, while Suriname had failed by sending a coast guard vessel to order the rig to leave the area, stating that if it did not do so, unspecified “consequences” would ensue.³⁵

D. MARITIME DELIMITATION COOPERATION BETWEEN STATES

Principle of cooperation formed the joint exploitation of the East Sea on the basis of mutual respect and equality in order to contribute to the environmental preservation of peace and stability. Historically, joint mining models have taken place in many different parts of the world, while the issue of sovereignty has not been resolved, hence the joint exploitation isn’t a new idea in resolving maritime disputes in the world.³⁶

In fact, shows the sea border between Vietnam and Malaysia exists an overlapping area on the continental shelf of the two countries are about 2.800 km. This area is located at the mouth of the Gulf of Thailand with little depth, averaging approximately 50 m, seabed topography’s relatively flat. Vietnam and Malaysia countries are members of the UNCLOS so that the common principles resolve delimitation of the continental shelf and exclusive economic zone is the principle of fairness has been recognized in Article 74 and Article 83 of the UNCLOS.³⁷ The actual requirements of the place are two sequential negotiations, narrowing disagreements, to find a fair solution that the two parties can accept. On the basis of the two countries are members of UNCLOS, so both Vietnam and Malaysia will accept the application of the principles of international law and the provisions of UNCLOS to resolve the maritime delimitation.

In early 1992, during the visit of Prime Minister of Vietnam Vo Van Kiet

³⁵ Sean D. Murphy, “Obligations of States in Disputed Areas of the Continental Shelf” in *New Knowledge And Changing Circumstances In The Law Of The Sea*, ed. Tomas Heider (Nether-

³⁶ H. Viet, “Which Solution to the South China Sea Dispute?” Available at http://www.tapchithoidai.org/ThoiDai19/201019_HoangViet.htm accessed on 29 May 2020.

³⁷ M. Nordquist and S. N. Nandan eds., *United Nations Convention on the Law of the Sea 1982, Volume VII: A Commentary* (Netherlands: Martinus Nijhoff Publishers, 2011).

to Kuala Lumpur, an agreement to negotiate continental shelf delimitation between the two countries was adopted. Subsequently, from 3 to 5 June 1992 at Kuala Lumpur, the first round of talks between the two countries Vietnam and Malaysia have taken place and a great success. On the basis of the content of the first round of negotiations, the two countries have stepped up their agreement to apply the provisional settlement principle laid down in Articles 74 and 83 of UNCLOS, that boundary's outlined and indicated on the charts with the appropriate ratio to determine its location, cases of drawing boundaries or roads outside this planning can be replaced by the lists of geographical coordinates of points³⁸.

On that basis, the two sides quickly come to an agreement apply general mining model for determining regions in a spirit of understanding and cooperation.³⁹ In that spirit, on 5 June 1992, the two countries officially signed the Memorandum. The contents of the Memorandum on this day, specified range defined area, and the two parties must nominate their representatives to conduct exploitation in the area identified. And that cooperation does not harm the outcome of the final sea delimitation plan between the two countries.

Through the signing of the Memorandum dated 5 June 1992, we can see that Vietnam is leading country in applying the provisions of Article 74 and Article 83 of UNCLOS, not only in maritime delimitation but also in the overlapping measures of marine resources in the sea⁴⁰. However, reality shows, Memorandum nor solved the problem of maritime delimitation between the two countries Vietnam and Malaysia. The fact that the two sides need to continue peace negotiations and based on the contents of the Memorandum of UNCLOS and to delimit the continental shelf and exclusive economic zone. To implement the content of the memorandum, Vietnam has sent Petro Vietnam, Malaysia Petronas appointed to jointly explore oil and gas in areas identified. On July 29, 1997, the first ton of oil was exploited at the Bunga Kekwa mine, which marked a great success for both sides in the management and exploitation of natural resources and contributed valuable experience to resolve other disputes. Due to the distance between the coast and the islands of the two sides is less than 400 nautical miles, is located on a continental shelf and more homogeneous sides claim based on the median line, i.e. based on the

³⁸ *Ibid.*

³⁹ "The Philippines and Indonesia Sign an Agreement on Delimitation of Exclusive Economic Zones," People's Army Newspaper, available at <http://www.qdnd.vn/thoi-su-quoc-te/su-kien/philippines-va-indonesia-ky-hiep-dinh-phan-dinh-phan-dinh-ranh-gioi-vung-dac-quyen-kinh-te-353651>, accessed on 1 June 2020.

⁴⁰ N. T. Minh, "Naval Modernization Policy of Some Southeast Asian countries in the Current Context," *Journal of Southeast Asian Studies* 1, (2017).

standard distance of two national seashore, so can use a single delimitation line as the boundary for the exclusive economic zone and continental shelf of the two countries.⁴¹

Joint development cooperation has been seen as an agreement between the countries concerned, in order to share resources in overlapping waters. The basis of these agreements is the provisions of international law, international maritime law, especially the provisions of UNCLOS. In terms of the international maritime law, UNCLOS requires that the countries concerned take direct steps to negotiate to arrange temporary, pending negotiations to sign the final agreement on demarcation of the sea. Interim arrangements may include joint fishing or jointly agreed to exploit marine resources such as oil and gas. On the other hand, the agreement on joint exploitations considered as a temporary solution to reduce the risk of conflict between the parties to the dispute and is intended only to exploit marine resources and measures also not affect the sovereignty, sovereign rights and national jurisdiction in the sea. As such, joint development cooperation between ASEAN countries implemented regularly and effectively will contribute to reducing the risk of destabilizing ensures a peaceful environment and freedom of navigation in the East Sea. At the international conference about the East Sea has many plans suggested applying joint development cooperation on overlapping areas, but in fact, the implementation of this model has less.

Marine delimitation is an important part of the maritime policy of coastal states, island nations, regions and the world. Marine demarcation between the adjacent waters is to create a clear sea border, contributing to maintaining a peaceful and stable environment for the development of marine economic sectors. In fact, in the East Sea area, many sea delineation agreements have been concluded in the spirit of peace, stability and joint development. Vietnam has carried out sea demarcation with most of its neighbours sharing the sea border.⁴²

However, the problem of delimitation of the sea not in any region can be easily carried out. The most difficult issues are the resolution of sovereignty disputes, sovereignty and jurisdiction over the islands because of their far-sighted sovereignty. On 15 December 2016, the Indonesian Parliament⁴³ - DPR has ratified agreements on the sea between Indonesia and Singapore⁴⁴,

⁴¹ N.T. Minh, "Cooperative Forms of ASEAN Countries Effectively in the East Sea in Reality and Prospect," *The Journal of Middle East and North Africa Sciences* 4, (2018): 4.

⁴² *Ibid.*

⁴³ Minh, N , "Build Trust Contribute to Reducing Tensions in the East Sea", *Journal of Coast Guard*, No. 4, 2017.

⁴⁴ Son, H. (2017, January 24). Indonesia promotes an agreement to delimit the maritime border,

accordingly, the maritime boundary between the two countries is defined in the East of Singapore Strait. This Agreement determines the borderline stretching 9.45 km between Singapore and Bintan Island Indonesia. This approval comes after 27 months since the signing of the maritime boundary agreement between the two countries in September 2014.

Notably, during a one-month session of parliament, DPR approved only two bills, including an agreement with Singapore, while delaying another 40 bills. The reason for DPR's approval of this agreement: As the largest country in Southeast Asia, Indonesia considers the ratification of the Agreement to be of great importance because it makes the demarcation at sea aimed at protecting sovereignty and preserving its territorial integrity. Indonesia has now settled all bilateral maritime borders with Singapore, beyond the boundary between Indonesia's Bintan Island and Singapore's Pedra Branca. Pedra Branca requires Singapore to negotiate the first boundary with Malaysia after the island was claimed by the International Court of Justice⁴⁵ belonged to Singapore in May 2008. The agreement has been ratified on the 3rd sea issue between Singapore and Indonesia. In May 5 1973, under the government of President Suharto and Prime Minister Lee Kuan Yew, two countries signed an agreement on the delimitation of the sea border along the central part of the Singapore Strait. This Agreement was ratified in December 1973 Indonesia, Singapore ratified in August 1974.

Then in March 2009, boundary delimitation agreements start in the west of the Straits of Singapore, it covers the sea stretching between Singapore's Sultan Beach and Indonesia's Pulau Nipah. This second agreement was approved by both sides in August 2010. The personal relationship between Prime Minister Lee Hsien Loong and President Susilo Bambang Yudhoyono and then President Jokowi Widodo helped the two countries quickly ratify the Agreement on the delimitation of the third. The agreement was ratified only a month after the leaders met in November 2016. The ease and speed of Indonesian ratification may also be due to political support in the country. An ethnic outburst in Indonesian society requires the government to ensure that Indonesia has a clear boundary to protect the sovereignty and territorial integrity. With this agreement, Indonesia can have better conditions to protect natural resources and avoid falling into a situation losing territory.⁴⁶

available at <http://nghiencuubiendong.vn/tin-ncbd/6319- indonesia-thus-day-hiep-dinh-phan-dinh-ranh-gioi- bien> accessed on 31 May 2020.

⁴⁵ D.K Chatterjee, D. K., International Court of Justice (ICJ). In Encyclopedia of Global Justice, Springer, Dordrecht. 2011.

⁴⁶ N.T Minh, "Cooperative Forms of ASEAN Countries Effectively in the East Sea in Reality and Prospect", *The Journal of Middle East and North Africa Sciences*, 2018.

Maritime delimitation between Indonesia and the Philippines: May 23-5, 2014 in Malacanang - President of the Philippines, Foreign Minister of the host country Albert del Rosario and his Indonesian counterpart Marty Natalegawa signed the Agreement on the demarcation of exclusive economic zone⁴⁷ between the Republic of the Philippines and the Republic of Indonesia on Mindanao and Celebes Sea in the presence of President of the two countries. The signing ceremony took place during a state visit to the Philippines, also, attend the East Asia Summit and the World Economic Forum⁴⁸ of Indonesian President Susilo Bambang Yudhoyono.

Maritime delimitation between Malaysia and Indonesia: agreed to accelerate the demarcation of the maritime boundary between the two countries. This is one of the key points of the agreement between Indonesia and Malaysia in bilateral meetings between the two countries' leaders in Putra Jaya, Malaysia on 6 February 2015. The maritime border technical negotiations between Indonesia and Malaysia were held from February 24 to 26, 2015⁴⁹.

V. CONCLUSION

The general duty under customary international law not to extend or aggravate a dispute applies to sovereignty and jurisdictional disputes. A sovereignty dispute is not directly subject to Article 74 and Article 83 but it may be an element in a boundary dispute. Sovereignty should be determined first, then the boundary.

⁴⁷ People's Army Newspaper, available at <http://www.qdnd.vn/thoi-su-quoc-te/su-kien/philippines-va-indonesia-ky-hiep-dinh-phan-dinh-phan-dinh-ranh-gioi-vung-dac-quyen-kinh-te-353651>, accessed on 11 October 2020.

⁴⁸ K. Schwab, "World Economic Forum. The global competitiveness report", 2016.

⁴⁹ T.T. Duan Indonesia-Malaysia accelerates the completion of delimitation. Available at <https://www.vietnamplus.vn/indonesiamalaysia-day-nhanh-viec-hoan-thanh-phan-dinh-bien-gioi/306656.vnp> accessed on 12 October 2020.

BIBLIOGRAPHY

Journals and periodicals

- Minh, N. T. (2017a), Naval modernization policy of some Southeast Asian countries in the current context, *Journal of Southeast Asian Studies*, Issue 1
- Minh, N. T. (2017b), Build trust to reduce tensions in the East Sea, *Journal of Coast Guard*, No. 4.
- M. Shah Alam & A. Al Faruque, *The Problem of Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar: Prospect for a Solution*. 25 *International Journal of Marine & Coastal Law*, 405, 2010, p 408-409.
- David Anderson (2016), Legal Issues Relating To Articles 74(3) And 83(3) Of UNCLOS, *British Institute of International and Comparative Law*.
- Minh, N. T. (2018) Cooperative Forms of ASEAN Countries Effectively in the East Sea in Reality and Prospect, *The Journal of Middle East and North Africa Sciences*.
- Ndiaye, T. M, *The Judge, Maritime Delimitation and the Grey Areas*, *Indian Journal of International Law*, Vol 55, 497.

Book and book chapters

- Logchem, v. Y, *Exploration and Exploitation of Oil and Gas Resources in Maritime Areas of Overlap: the Falkland (Malvinas)*, 28 *Hague Yearly Book International Law*, 2017.
- M. Miyoshi, (1999) *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, *Maritime Briefing*, International Boundaries Research Unit, Durham.
- British Institute of International and Comparative Law*, (2016), *Obligations of States on Undelimited Maritime Areas*.

Web sources

- Duan, T. T. (2015, February 07). Indonesia-Malaysia accelerates the completion of delimitation. Retrieved August 10, 2018, from <https://www.vietnamplus.vn/indonesiamalaysia-day-nhanh-viec-hoan-thanh-phan-dinh-bien-gioi/306656.vnp>
- Son, H. (2017, January 24). Indonesia promotes an agreement to delimit the maritime border. Retrieved from <http://nghiencuubiendong.vn/tin-ncbd/6319-indonesia-thuc-day-hiep-dinh-phan-dinh-ranh-gioi-bien>
- People's Army Newspaper. (2017, October 17). Philippines and Indonesia sign the EEZ delimitation agreement. Retrieved August 10, 2018, from <http://www.qdnd.vn/thoi-su-quoc-te/su-kien/philippines-va-indonesia-ky-hiep-dinh-phan-dinh-ranh-gioi-vung-dac-quyen-kinh-te-353651>
- Viet, H. (2010, July 19). Which solution to the South China Sea dispute? Retrieved August 10, 2018, from http://www.tapchithoidai.org/ThoiDai19/201019_Ho-anh-Viet.htm.

Legal documents

- Black Sea Delimitation, (Romania v Ukraine) [2009] ICJ Rep 69, 129 [212].
- Continental Shelf Case (Tunisia/ Libya) [1982] ICJ Rep 18.
- Delimitation of the Continental Shelf between the United Kingdom of Great Britain

and Northern Ireland, and the French Republic, XVIII RIAA 189.
Continental Shelf Case (Tunisia/ Libya) [1982] ICJ Rep 18.
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) [1984] ICJ Rep 74 [246].
Fisheries Case (UK v Norway) [1951] ICJ Rep 116.
Grisbadarna Case (Norway v Sweden) [1909] 11RAA 147.
Guinea v Guinea-Bissau, XIX RIAA 183-184 [94-94].
Guyana v Suriname, Permanent Court Arbitration 2007, 30 RIAA, 1 445, 476.
Maritime delimitation in the Black Sea (Romania v Ukraine) Judgement 2009] ICJ Rep 69.
North Sea Continental Shelf Case [1969] ICJ Rep 51 [96].
United Nations Convention for the Law of the Sea (UNCLOS), 1982

Other sources

C.Schofield, (2005) Cooperative Mechanism and Maritime Security in Areas of Overlapping Claims to Maritime Jurisdiction.
Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, XVIII RIAA 189.
Murphy, Sean D.,(2018) Obligations of States in Disputed Areas of the Continental Shelf, in *New Knowledge And Changing Circumstances In The Law Of The Sea* (Brill, Tomas Heider, ed., forthcoming 2019).
Nordquist, M., & Nandan, S. N. (Eds.). (2011). *United Nations Convention on the law of the sea 1982, Volume VII: a commentary (Vol. 7)*. Martinus Nijhoff Publishers.
Robert Van de Poll and Clive Schofield, *A Seabed Scramble: A Global Overview of Extended Continental Shelf Submissions*, (2010) Advisory Board On The Law Of The Sea Proc. Conference On Contentious Issues In UNCLOS: Surely Not? 3–4 .
Chatterjee, D. K. (2011). International Court of Justice (ICJ). In *Encyclopedia of Global Justice* (pp. 540 - 544). Springer, Dordrecht.
Schwab, K. (2015). World Economic Forum. The global competitiveness report, 2016, 2015-2016.