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Disputes Emanating from the Infringement of Articles 74(3) and 83(3) and Optional Exception under Article 298(1)(a)(i) of the United Nations Convention on the Law of the Sea

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ABSTRACT

Maritime delimitation, which ensures the jurisdiction exertion and effective use of maritime spaces of coastal States, never involves minimal efforts. In the transitional period pending the final delimitation agreement of overlapping areas in the exclusive economic zone or continental shelf, the United Nations Convention on the Law of the Sea (UNCLOS) sets out obligations for State Parties to take provisional measures under Articles 74(3) and 83(3). The violation of these obligations may lead to disputes between States that will potentially be brought before the compulsory dispute settlement procedure under UNCLOS. Whether disputes arising from the violation of Articles 74(3) and 83(3) fall into the scope of application of optional exception under Article 298(1)(a)(i) remained debatable. Accordingly, this research paper is conducted to analyse the separation and independence between the interim regime and maritime delimitation to support the opinion that disputes emanating from the infringement of Articles 74(3) and 83(3) are not disputes ‘relating to sea boundary delimitation’ under Article 298(1)(a)(i). This paper uses the doctrinal approach on the provisions in international treaties or conventions, international customary law, and decisions and awards of international courts and tribunals.



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1. Introduction

The oceans have undeniably been considered to bring enormous benefits to coastal States. Promising economic development, dynamic maritime transportation lanes, fortified national security, useful marine scientific research, and more are the bright colours that paint the picture of the auspicious prosperity of a State. For this reason, the majority of the coastal States attempt to widen their maritime zones as much as permitted under the United Nations Convention on the Law of the Sea 1982 (UNCLOS). Therefore, in many cases between States with opposite and adjacent coasts, there exists an overlap in maritime claims.

Maritime boundary delimitation, in this sense, becomes the most popular option for the States concerned. However, enormous time and efforts have to be invested in the process of drawing a line in the overlapping area, in most scenarios. The States concerned will have to take into account many geographical and non-geographical factors. Therefore, the negotiations to delimit the overlapping areas can be prolonged and sometimes end up achieving no results. During the potentially lengthy process of establishing the line specifically in the exclusive economic zone (EEZ) or continental shelf, to make sure that the maritime spaces are effectively used, the UNCLOS sets out two distinct but interlaced obligations pending final delimitation agreement under Articles 74(3) and 83(3).

In case these obligations are breached, which further complicates the delimitation process, the States concerned may wish to file an application and submission to a dispute settlement procedure entailing binding decisions under the UNCLOS. Nevertheless, several States have, at the time of their signature, ratification or accession to the UNCLOS or any time thereafter, made a written declaration that they do not accept any one or more of the above-mentioned dispute settlement procedures concerning the disputes, *inter alia*, 'relating to sea boundary delimitations' as provided for in Article 298(1)(a)(i).

However, it is not impossible to argue that Articles 74(3) and 83(3) only deal with the obligations pending final delimitation agreement, thus cannot be considered as 'relating to sea boundary delimitations'. Given the ambiguity of this issue under international law, it is important to examine the possibility of initiating compulsory dispute settlement procedures to a dispute concerning the obligations under Articles 74(3) and 83(3) of the UNCLOS when one of the disputing parties made a declaration of optional exceptions by Article 298(1).

2. The Interim Regime under the Common Paragraph 3 of Articles 74 and 83

Under the UNCLOS, Articles 74 and 83 respectively provide rules concerning the delimitation of the EEZ and the continental shelf between States with opposite and adjacent

coasts, consisting of four essentially identical paragraphs. Besides providing a general rule for the delimitation of the exclusive economic zone and the continental shelf under paragraph 1,¹ Article 74 and 83 of the UNCLOS also promote interim regimes that could pave the way for the provisional use of the undelimited zones pending final delimitation agreements² under paragraph 3 as follows:

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 agreements shall be without prejudice to the final delimitation.

Under this provision, there are two distinct, yet intertwined, obligations imposed upon States concerned regarding the overlapping EEZ or continental shelf. In particular, State Parties to the UNCLOS are required to, before the conclusion of the final delimitation agreements, (1) 'make every effort to enter into provisional arrangements of a practical nature', and (2) 'make every effort ... not to jeopardize or hamper the reaching of final agreement'.³ These obligations will be comprehensively analysed in turn.

2.1 The Common Character of the Two Obligations – 'shall make every effort'

Under the umbrella of the term 'shall make every effort', the two interlinked obligations under common paragraph 3 of Article 74 and 83 are characterized as an obligation of conduct, not of result.⁴ The characteristics of such obligation are manifested as follows:

Firstly, regarding application *ratione temporis*, the obligations under Articles 74(3) and 83(3) arise as soon as the two States concerned have made it clear that there is an existence of the overlapping EEZ and continental shelf.⁵ Besides, the adherence of such obligations would also be triggered when sovereignty between two parties is determined and one of

¹ United Nations Convention on the Law of the Sea (10 December 1982) 1833 United Nations Treaty Series 397, arts 74(1) and 83(1): 'The delimitation of the [EEZ/continental shelf] between States with opposite or adjacent coasts shall be affected by agreement on the basis of international laws, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.' (hereinafter UNCLOS).

² Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *The American Journal of International Law* 345, 351 and 354; *Guyana v Suriname* (17 September 2007) Permanent Court of Arbitration, Award of the Arbitral Tribunal, 153 [460].

³ *Guyana v Suriname* (n 2) 152 [459]; Third UN Conference on the Law of the Sea, *Netherlands: draft article on delimitation between States with opposite and adjacent coasts* (1974) Document A/CONF.62/C.2/L.14. <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_3/a_conf62_c2_l14.pdf>.

⁴ Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire) [2017] *International Tribunal for the Law Of the Sea Reports*, 4 [624]; *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS In respect of Undelimited Maritime Areas* (30 June 2016) *British Institute of International and Comparative Law*, 13 [47] (hereinafter BIICL Report).

⁵ Lagoni (n 2) 358; Alexander Proelß, *The United Nations Convention on the Law of the Sea: A Commentary* (C.H.Beck/Hart/Nomos 2017) 578.

those parties refuses to enter into negotiation on the maritime delimitation of the overlapping area within the EEZ and continental shelf. Eventually, State obligations under Articles 74(3) and 83(3) only come to an end following the conclusion of the final delimitation agreement.⁶

Secondly, in terms of substantive requirements of the obligation to 'make every effort', States must, in the spirit of good faith, enter into 'meaningful' negotiations on provisional arrangements,⁷ or intensify effort to refrain from conducting any unilateral actions that escalate sea delimitation disputes between or among them.⁸ 'Meaningful' negotiation, as negatively defined by the ICJ in the *dictum* of the *North Sea Continental Shelf* cases, will not be achieved when either of the States concerned insists upon its position without contemplating any modification of it, even though it does not imply an obligation to reach an agreement.⁹ In other words, State shall have 'a conciliatory approach to negotiations'.¹⁰

Finally, the States in question could freely decide to go through a formal or informal process of negotiation¹¹ as long as it effectively enables them to conclude amicable provisional measures applied in the overlapping area between such States.

2.2 The Obligation to Make Every Effort to Enter Into Provisional Arrangements of a Practical Nature

The first obligation enshrined under Articles 74(3) and 83(3) requires States to 'make every effort to enter into provisional arrangements of a practical nature'.¹² This conventional obligation¹³ applies whenever a final agreement on the delimitation of the EEZ or continental shelf has not been reached between States with opposite or adjacent coasts. Provisional arrangements are only applied to those areas about which States concerned have opposing views.¹⁴ They implicitly recognize the importance of avoiding the suspension of economic development in a disputed maritime area¹⁵ and promote 'the equitable and efficient utilization of the resources of the seas and oceans'.¹⁶

⁶ *ibid.*

⁷ *North Sea Continental Shelf Cases* (Judgment) [1969] International Court of Justice Reports, 3 [85(a)] & [86]; *Guyana v Suriname* (n 2) 153 [461].

⁸ BIICL Report (n 4) 19 [66].

⁹ *North Sea Continental Shelf Cases* (n 7) [87]; *Lagoni* (n 2) 356.

¹⁰ *Guyana v Suriname* (n 2) 152 [459].

¹¹ *North Sea Continental Shelf Cases* (n 7) [85].

¹² *Lagoni* (n 2) 354.

¹³ Obligations regulated under arts 74(3) and 83(3) do not reflect customary international law and thus only have binding effect on Member States of the UNCLOS 1982. *See ibid.*

¹⁴ *ibid.*, 356.

¹⁵ *Guyana v Suriname* (n 2) 153 [460].

¹⁶ Thomas A Mensah, 'Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation', in Rainer Lagoni & Daniel Vignes, *Maritime Delimitation* (Publications on Ocean

The provisional arrangements adopted by State Parties in the meaning of Articles 74(3) and 83(3) shall be ‘of a practical nature’, which refers to ‘practical solutions to actual problems’ regarding the use of an area without interfering either the delimitation issue itself or the territorial questions underlying this issue.¹⁷ The practical character of the concerned arrangements needs to be addressed on a case-by-case basis.¹⁸ Importantly, such arrangements shall be ‘without prejudice to the final delimitation’,¹⁹ meaning that they do not lead to ‘the acquisition of rights to the undelimited waters and its resources’, or preventing States from taking opposing opinions to such arrangements.²⁰

As for the temporal scope of the application of provisional arrangements, unless the States concerned otherwise specify in their agreement, the arrangements will continue until a definitive maritime boundary is established between those States.²¹ However, the ‘provisional’ nature suggests that States concerned still have the right to denounce or withdraw from an arrangement, but they must propose and negotiate other feasible alternatives if a final delimitation agreement has yet to be concluded.²²

In practice, provisional arrangements take one of two main forms, namely a provisional boundary line and an area of joint management.²³ In the case of a provisional boundary, examples of this approach are the agreement between Algeria and Tunisia in 2002,²⁴ and the agreement between Ireland and the UK in 2001.²⁵ Both agreements, in their preambles, refer to Articles 74(3) and 83(3) as their legal basis. In the case of the joint management area, it is established based on agreements of States reflecting the cooperation between them about ‘exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in the area of overlapping claims’.²⁶ Particularly, it can take the form of, *inter alia*, joint scientific research and common fishing

Development Series 53, Nijhoff 2006) 143.

¹⁷ Lagoni (n 2) 358.

¹⁸ Proelß (n 5) 577.

¹⁹ UNCLOS, arts 74(3) and 83(3).

²⁰ Lagoni (n 2) 18 [63].

²¹ BIICL Report (n 4) 17 [60].

²² *ibid*, 18 [60].

²³ *ibid*, 14 [51]; Proelß (n 5) 577–578.

²⁴ Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People’s Democratic Republic of Algeria (11 February 2002) 2238 United Nations Treaty Series 197.

²⁵ Exchange of Notes dated 18 October 2001 and 31 October 2001 between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland constituting an agreement pursuant to Article 83 paragraph 3 of the United Nations Convention on the Law of the Sea 1982 on the provisional delimitation of an area of the continental shelf (2011) 2309 United Nations Treaty Series 21.

²⁶ *Guyana v Suriname* (n 2) 153–154 [462].

exploitation zone²⁷ or the establishment of joint bodies to manage the development, and environmental protection of the overlapping maritime area.²⁸

2.3 The Obligation of Mutual Self-Restraint

The obligation of self-restraint is the second obligation set out under Articles 74(3) and 83(3). This obligation connotes that States shall not conduct any unilateral activities in undelimited maritime areas that jeopardize or hamper the reaching of a final delimitation agreement. It is noteworthy that there is no hierarchical order between the obligation to negotiate provisional arrangements and the obligation to self-restraint.²⁹

As to the geographical scope of the obligation of self-restraint, it is plausible to interpret that there is no geographical limit to this obligation.³⁰ Rather, it is the propensity of the act jeopardizing or hampering the reaching of a final delimitation agreement that must be considered.³¹ Depending on particular contexts, when considering the obligation of self-restraint, the account has to be taken of the unilateral actions conducted both inside and outside the disputed maritime areas. For example, legislative or executive acts governing the overlapping zones would normally be concluded and enacted on the land territory.³² This approach accords more closely to the text of the UNCLOS and may help avoid some of the definitional problems inherent in seeking to define a geographical scope of application of the obligation.³³

Regarding the substantive scope of the obligation, there has yet to be clear guidance on the types of activities in breach of the obligation of self-restraint. This obligation does not exclude all kinds of activities in disputed maritime areas but obligates State Parties to refrain from the unilateral activities that could irreparably affect³⁴ the prospect of successful conclusion of a final delimitation agreement³⁵ Up to now, the *Guyana v Suriname Award* is the first and also one of the limited precedents providing relatively clear indications of

²⁷ Agreement on the Delimitation of the Marine and Submarine Areas and Maritime Cooperation between the Dominican Republic and the Republic of Colombia (signed 13 January 1978, entered into force 15 February 1979) 1275 United Nations Treaty Series 363.

²⁸ Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and Other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States (signed 21 February 2001; entered into force 16 January 2003) 50 Law of the Sea Bulletin 43.

²⁹ Yuri Van Logchem, 'Chapter 7: The scope for Unilateralism in Disputed maritime area', in Clive H Schofield, Seokwoo Lee and Moon-Sang Kwon, *The Limits of Maritime Jurisdiction* (Martinus Nijhoff Publishers 2014) 179.

³⁰ BIICL Report (n 4) 31 [106]–[107].

³¹ *ibid.*

³² *ibid.*, 25 [100].

³³ *ibid.*

³⁴ Lagoni (n 2) 366.

³⁵ *Guyana v Suriname* (n 2) 154 [465].

permissible and impermissible activities within the scope of Articles 74(3) and 83(3).³⁶ The Tribunal, in that case, made rulings on the claims of Suriname and Guyana regarding, *inter alia*, the violation of Article 83(3). In particular to the obligation of self-restraint, Suriname claimed that Guyana violated this obligation by authorizing exploratory drilling of a third-State company in the undelimited area, whereas Guyana contended that, *inter alia*, the forcible expulsion of a licensee's vessel from a disputed maritime of Suriname's navy was a breach of this obligation.³⁷ In its analysis, the Tribunal sets forth two broad categories of activities that cannot be unilaterally conducted by coastal States:

- (i) activities that cause (permanent) physical change or damage to, or have a (permanent) physical impact on, the marine environment; and
- (ii) activities that might affect the other party's rights permanently.³⁸

The relation between these two types of activities is that those activities affecting the marine environment also consequently 'affect the other party's rights'.³⁹ The interpretation of the Tribunal in the *Guyana v Suriname* case was later reaffirmed in the report of the British Institute of International and Comparative Law.⁴⁰ This report supports the Tribunal approach to categorizing the activities which can be considered in the context of Article 74(3) and 83(3). However, it did not wholly agree with the ruling of the Tribunal on specifying seismic exploration as activity jeopardizing or hampering the reaching of a final agreement.⁴¹ The rationale that underlines this opinion is that it is not plausible to conclude that 'seismic activity by its very definition is permissible in a disputed area'.⁴²

Furthermore, in determining criteria and threshold of an activity not leading to physical change or damage to the maritime environment, the Arbitral Tribunal reaffirmed the International Court of Justice's ruling in the *Aegean Sea* case⁴³ where three determinative factors are set out that the activity (i) does not cause physical damage to the seabed and subsoil; (ii) is of transitory character; and (iii) does not accompany with operations involving the actual appropriation or other use of the natural resources. The Tribunal, by taking into account the possibility of permanent physical change to the marine environment, concluded

³⁶ The breach of the interlinked obligations under Article 83(3) was also raised by Côte d'Ivoire in the *Delimitation of the Maritime Boundary in the Atlantic Ocean* (n 4). However, the Special Chamber in this case did not render any further substantive decisions on the second obligation of self-restraint as 'Ghana has undertaken hydrocarbon activities only in an area attributed to it.' See *Delimitation of the Maritime Boundary in the Atlantic Ocean* (n 4) 4 [633]–[634].

³⁷ *Guyana v Suriname* (n 2) 82 & 154, [274], [453]–[456].

³⁸ *ibid*, 155 [467] and [470].

³⁹ *Van Logchem* (n 29) 184.

⁴⁰ BIICL Report (n 4) 25 [88].

⁴¹ *ibid*.

⁴² *ibid*; *Van Logchem* (n 29) 185.

⁴³ *Aegean Sea Continental Shelf Cases (Greece v Turkey)* (Interim Protection Order) [1976] International Court of Justice Reports, 3 [30].

that exploitations of oil and gas reserves are impermissible activities, and seismic exploration is permissible activities.⁴⁴

2.4 The Implication of the Interim Regimes of the UNCLOS

As Articles 74(3) and 83(3) only come into consideration if sovereignty has already been settled between States concerned, a dispute emanating from these provisions by its nature is not a sovereignty dispute and does not involve any consideration on sovereignty-related matters. Secondly, as observed from the Tribunal in *Guyana v Suriname* case, when considering the violation of the obligation to ‘make every effort to enter into provisional arrangements of a practical nature’, adjudicating bodies have to take into account whether States concerned have put effort to negotiate on provisional arrangements applied in the overlapping maritime areas. Besides, with regard to the obligation of self-restraint, the determination of the (permanent) impact of a State’s unilateral actions on the maritime environment and other States rights shall be rendered by the Tribunal. Accordingly, account should be taken of the important implication that no binding judgment on sovereignty and the official delimitation of the overlapping area will be made in the decision on the violation of obligation enshrined under Articles 74(3) and 83(3).

3. Compulsory Dispute Settlement Procedures and Their Optional Exceptions under the UNCLOS

3.1. Compulsory Dispute Settlement Procedures under Article 287

According to Article 288, to trigger the jurisdiction of an adjudicating body referred to in Article 287, two criteria pertaining to subject-matter jurisdiction shall be cumulatively fulfilled, namely (i) there must be one or more actual disputes between the States Parties concerned; and (ii) such disputes must concern the interpretation and application of the Convention.

Firstly, regarding the identification of ‘actual disputes’, ‘a disagreement on a point of law or fact, a conflict of legal views or interests’ between States concerned shall be specified.⁴⁵ Notably, whether such a disagreement exists ‘is a matter for objective determination’.⁴⁶ It is adjudicating bodies’ duty to decide this issue by examining the position of both parties, which will be based not only on the ‘application and final submissions’, but also ‘on diplomatic exchanges, public Statements, and other pertinent

⁴⁴ *Guyana v Suriname* (n 2) 155 [467]–[469].

⁴⁵ *Mavrommatis Palestine Concessions, Jurisdiction* (Judgment of 30 August 1924) Permanent Court of International Justice Series A 6, 11.

⁴⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase Advisory Opinion) [1950] International Court of Justice Reports 65, 74.

evidence.⁴⁷ Besides, a mere assertion by one party that a dispute exists is ‘not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence.’⁴⁸ Similarly, demonstrating a mere conflict in the interests of the disputing parties to the case is also insufficient.⁴⁹ Rather, it must be shown that the claim of one party is ‘positively opposed by the other.’⁵⁰

Secondly, ‘interpretation’ is determining the meaning of a rule.⁵¹ In the case of a treaty, it is governed by Articles 31–33 of the Vienna Convention on the Law of Treaties which can also be reflected in customary international law.⁵² Meanwhile, ‘application’ pertains to the implementation of one or more provisions in the treaty, the concrete terms of which oblige a party to do or refrain from doing something in particular factual circumstances.⁵³ That is to say, a dispute concerning the interpretation or application of the UNCLOS is a dispute as to the meaning of the UNCLOS provisions or as to whether the consequences should follow a given fact. Indeed, to identify whether the existing dispute concerns the interpretation and application of the UNCLOS, the determination of an alleged violation of one party’s actions on obligations set out in the Convention, which urges the adjudicating bodies to scrutinize the interpretation and application of relevant provisions of the Convention, shall be rendered.⁵⁴

3.2 Limitations and Optional Exceptions to Compulsory Procedures

By the phrase ‘subject to section 3’, Article 286 also establishes a link to two categories of subject matters that may prevent the applicability of the compulsory systems of dispute settlement, which are (i) automatic limitations and (ii) optional exceptions.

3.2.1 Automatic Limitations

This first category is enshrined under Article 297 of the UNCLOS. Such limitations suggest that there are no compulsory procedures for EEZ disputes concerning the exercise of

⁴⁷ *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment [1998] International Court of Justice Reports 432, 448 [30]–[31].

⁴⁸ *Interpretation of Peace Treaties* (n 46) 74.

⁴⁹ *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment [1962] International Court of Justice Reports 319, 328.

⁵⁰ *ibid.*

⁵¹ *Case Concerning the Factory at Chorzow (Germany v Poland)*, Claim for Indemnity, Jurisdiction, Judgment (1927) Dissenting Opinion by M. Ehrlich, Permanent Court of International Justice Series A 9, 39.

⁵² *Territorial Dispute (Libyan Arab v Jamahiriya/Chad)*, Judgment [1994] International Court of Justice Reports 6 [41]; See also International Law Commission, Report of the International Law Commission on the work of the sixty-fifth session (2013), A/68/10, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/480/25/PDF/N1348025.pdf?OpenElement>>.

⁵³ Proelß (n 5) 1815.

⁵⁴ *South China Sea Arbitration (The Philippines v China)* (29 October 2015) Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, [168]–[178] [hereinafter *SCS Arbitration*].

discretionary powers by the coastal State overfishing and marine scientific research.⁵⁵ Article 297(2)(a) provides that the coastal State shall not be obliged to accept the submission to the settlement under section 2 of any dispute arising out of (i) the exercise by the coastal State of a right or discretion regarding marine scientific research by Article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research project by Article 253.

On top of that, Article 297(3)(a) allows the coastal State to not accept the submission to such settlement of 'any dispute relating to its sovereign rights with respect to the living resources in the EEZ or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.'

3.2.2 Optional Exceptions

The second category is set out in Article 298 of the UNCLOS which embodies a compromise between those States in favour of compulsory and binding dispute settlement procedures and other States seeking to exclude even non-binding dispute settlement procedures.⁵⁶ Its first paragraph offers a list of disputes that prevents the applicability of compulsory mechanisms under section 2 when a State Party makes a written declaration on signature or ratification of or accession to the UNCLOS or at any subsequent time. Such disputes include those concerning: (i) the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations, historical bays, or titles; (ii) military activities and law enforcement activities regarding the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297(2) or (3); and/or (iii) which the UN Security Council is exercising the functions assigned to it by the UN Charter unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the UNCLOS. A State which made a declaration under Article 298(1) may withdraw at any time⁵⁷ and is not allowed to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party unless that Party consents.⁵⁸

About disputes specifically relating to sea boundary delimitations and historical bays or titles under Article 298(1)(a)(i), although they can be exempted from the compulsory means entailing binding decisions, they are subject to the compulsory conciliation under Annex V to the UNCLOS, when such a dispute arises after the entry into force of the UNCLOS and where no agreement within a reasonable period is reached in negotiations between the

⁵⁵ Yoshifumi Tanaka, *The International Law of the Sea* (3rd ed., Cambridge University Press 2019) 506.

⁵⁶ *A Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Permanent Court of Arbitration, Decision on Australia's Objections to Competence, 19 September 2016, [66].

⁵⁷ UNCLOS, art 298(2).

⁵⁸ UNCLOS, art 298(3).

Parties.⁵⁹ However, if the negotiations of an agreement between the States concerned subsequent to and based on the conciliation commission's report lead nowhere, the parties shall, by mutual consent, submit the question to one of the compulsory procedures entailing binding decisions, unless the parties otherwise agree.⁶⁰

It is necessary to note that compulsory procedures in section 2 can still exercise jurisdiction over a dispute falling within the automatic limitations or optional exceptions as long as the disputing parties so agree.⁶¹ That is to say, the effect of Articles 297 and 298 is to prevent the unilateral submission of a dispute in an excluded category to the compulsory procedures.⁶² Whether a dispute falls within any categories of disputes exempted from the compulsory procedures under Article 298(1) will be decided by a competent forum.⁶³

4. The Inapplicability of Article 298(1)(A)(I) of the UNCLOS to the Disputes Concerning the Application and Interpretation of the Common Paragraph 3 Of Article 74 and 83

4.1. The Interpretation of Disputes 'Relating To' 'Sea Boundary Delimitation' Under Article 298(1)(a)(i)

Article 298 embodies a compromise on dispute settlement following extensive negotiations between those States which favoured compulsory and binding dispute settlement procedures and other States which sought to exclude even non-binding dispute settlement procedures. Article 298(1)(a)(i) excludes the jurisdiction of compulsory dispute settlement procedures over disputes concerning the interpretation or application of, *inter alia*, Articles 74 and 83 'relating to sea boundary delimitations'. To determine the scope of application of this exception, the analysis of (a) the notion of 'sea boundary delimitation' dispute and (b) the interpretation of the term 'relating to' will be scrutinized.

4.1.1 The Notion of 'Sea Boundary Delimitation' Disputes

Sea boundary delimitation, or maritime boundary delimitation, is 'the process of establishing lines separating the spatial ambit of coastal State jurisdiction over maritime space where the legal title overlaps with that of another State'.⁶⁴ That is to say, the purpose of maritime delimitation is to separate the waters wherever exists a conflict in the claims made by the coastal States as well as in the exercise of their jurisdiction.⁶⁵ Sea boundary delimitation is a question of the approaches employed by the coastal States to draw the line,

⁵⁹ UNCLOS, art 298(1)(a)(i).

⁶⁰ UNCLOS, art 298(1)(a)(ii).

⁶¹ UNCLOS, art 299.

⁶² Tanaka (n 55) 509.

⁶³ *ibid.*

⁶⁴ *ibid.*, 237.

⁶⁵ *ibid.*

taking into account relevant geographical factors (configuration of coasts,⁶⁶ proportionality,⁶⁷ baselines,⁶⁸ presence of islands,⁶⁹ other geographical and geomorphological factors) and non-geographical factors (economic factors,⁷⁰ historic titles and historic rights,⁷¹ security interests,⁷² environmental factors⁷³). Therefore, disputes concerning sea boundary delimitation only focus on dealing with the technical aspect of boundary delimitation which is enshrined under common paragraph 1 of Articles 74 and 83.

Indeed, relevant case law shows that 'sea boundary delimitation' disputes are only disputes concerning the technical delimitation of a final and official sea boundary, which may trigger the question of sovereignty. Only disputes as such can fall under the scope of application of Article 298(1)(a)(i).

Firstly, it is well-established in the *Bay of Bengal* case that entitlement and delimitation are 'distinct concepts'.⁷⁴ Although delimitation presupposes an area of overlapping entitlements,⁷⁵ the determination of such overlapping maritime area facilitates the International Tribunal for the Law of the Sea to avoid dealing with a hypothetical question

⁶⁶ See for examples *North Sea Continental Shelf Cases* (n 7) 3 [8]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, (Judgment 3 June 1985) 1985 International Court of Justice Reports, 13 [56]; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment [2012] International Tribunal for the Law of the Sea Reports, 4, [291]–[293]; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)* (7 July 2014) Permanent Court of Arbitration, Award, [407]–[408].

⁶⁷ See for examples *North Sea Continental Shelf Cases* (n 7) [91]; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, XVIII Reports of International Arbitral Award, [99]; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment [2012] International Court of Justice Reports, 624 [242]; *Bangladesh v India* (n 66) [492].

⁶⁸ See for examples, *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] International Court of Justice Reports, 13 [64]; *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)* (17 December 1999) Reports of International Arbitral Award, [133]–[146]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment [2001] International Court of Justice Reports, 40 [210]–[215]; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment [2009] International Court of Justice Reports, 61 [137].

⁶⁹ See for examples *Qatar v Bahrain* (n 68) [222]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment [2007] International Court of Justice Reports, 659 [304]–[305]; *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)* (17 December 1999) Reports of International Arbitral Award, [139].

⁷⁰ See for examples *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment [2002] ICJ Reports, 303 [304]; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Judgment [1993] International Court of Justice Reports, 38 [92].

⁷¹ See for examples, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment [1982] International Court of Justice Reports, 18 [100]–[102].

⁷² See for examples *Libyan Arab Jamahiriya/Malta* (n 68) [51]; *Denmark v Norway* (n 70) 38 [81].

⁷³ See for examples *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment [1984] International Court of Justice Reports, 246 [193].

⁷⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (n 66) 4 [398].

⁷⁵ *ibid.*

of maritime boundary delimitation.⁷⁶ In other words, the identification of an area of overlapping entitlements is independent of and does not render a definitive decision on the sea boundary delimitation.⁷⁷

Secondly, the remarkable ruling of the Tribunal in the *SCS case* provides that a dispute over an issue that may be considered in the course of maritime boundary delimitation does not automatically constitute a dispute over maritime boundary delimitation itself.⁷⁸ It recognized the existence of an entitlement dispute which is independent and separable from a maritime delimitation dispute,⁷⁹ and therefore, only the latter falls within the scope of the Article 298(1)(a)(i) exclusion.

Thirdly, in the most recent arbitration *Dispute Concerning Coastal State Rights in the Black Sea, the Sea of Azov, and Kerch Strait*, in deciding the question relating to the applicability of Article 298(1)(a)(i) raised by the Russian Federation, the Arbitral Tribunal ruled that it did not have jurisdiction to rule on claims of Ukraine by this Article to the extent that such claims would require the Tribunal to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.⁸⁰ This ruling indicates that the Tribunal was not prevented from deciding other matters not involving sovereignty issues⁸¹ in the sea boundary delimitation disputes.⁸²

4.1.2 The Interpretation of the Term ‘Relating To’

According to its dictionary meaning, the term ‘relating to’ is defined as to be connected with something.⁸³ However, such dictionary meaning does not provide a clear clarification of this term in the context of Article 298(1)(a)(i). Therefore, it is important to interpret the term ‘relating to’ in a restrictive manner by considering other relevant provisions of the

⁷⁶ *ibid*, [399].

⁷⁷ *ibid*.

⁷⁸ *SCS Arbitration* (n 54) [155].

⁷⁹ *ibid*, [156].

⁸⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (n 66) [381]. It is noteworthy that sovereignty and the question of whether Russia or Ukraine was the ‘coastal State’ was a prerequisite to its decision on a significant number of Ukraine’s claims in this case.

⁸¹ Nilüfer Oral, ‘*Ukraine v The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS*’ (2021) 97 *International Law Studies* 478, 495 <https://cil.nus.edu.sg/wp-content/uploads/2021/02/Ukraine-v.-The-Russian-Federation_-Navigating-Conflict-over-Sovereignty-under-UNCLOS.pdf>.

⁸² For example, in some cases, to settle the dispute relating to sea boundary delimitation, adjudicating bodies must first establish which islands come under sovereignty of a State concerned. This requirement is based on the principle of ‘the land dominates the sea’. See *Qatar v Bahrain* (n 68) [185].

⁸³ Oxford Learners Dictionary, <<https://www.oxfordlearnersdictionaries.com/definition/english/relate-to>>.

UNCLOS⁸⁴ and confirming such interpretation via the preparatory works of Article 298(1)(a)(i).⁸⁵

First, with regard to exclusionary clauses under the UNCLOS, Article 309 emphatically States that: ‘No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention’. This provision implies that every exception set out by the UNCLOS is specific, ‘expressly permitted’, and narrowly drawn.⁸⁶ It also applies to the exception of Article 298(1)(a)(i).⁸⁷

Second, this interpretation is in line with the perspectives of delegations on the exclusionary clause during the drafting process of the UNCLOS.⁸⁸ Although the object and purpose of Article 298(1) are to protect the sovereign will of States not to have certain sensitive matters subjected to dispute settlement procedures with binding effect,⁸⁹ the majority of delegations affirmed that every proposed exception should be formulated very clearly, and its scope and application should be interpreted restrictively.⁹⁰ The rationale underlining this view was unambiguously analysed in the 58th plenary meeting in the Fourth session of the Third UN Conference on the Law of the Sea as follows:

If exceptions were too numerous or too broadly defined, the value of the system would be reduced and the possibility of securing agreement on compromises subject to future interpretation would also be diminished.⁹¹

Notably, the drafting history of the UNCLOS also reveals that the exceptions to the compulsory jurisdiction were formulated to exclude, *inter alia*, maritime boundary disputes⁹² which are considered to be a sensitive problem in nature as they directly and significantly affect the sovereignty of coastal States.

⁸⁴ Vienna Convention on the Law of Treaties (23 May 1969) 1155 United Nations Treaty Series, art 31. [hereinafter VCLT].

⁸⁵ *ibid*, art 32.

⁸⁶ *South China Sea Arbitration* (30 March 2014) I The Philippines’ Memorial, [7.124].

⁸⁷ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation)*, Written observations and submissions of Ukraine on Jurisdiction (27 November 2018) [113]; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation)*, Rejoinder of Ukraine on Jurisdiction (28 March 2019) [109].

⁸⁸ VCLT (n 84) art 32.

⁸⁹ M Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (V Nijhoff 1989) 109–110 [298.2]; Proelß (n 5) 1921.

⁹⁰ Third UN Conference on the Law of the Sea, 58th Plenary meeting, Document A/CONF.62/SR.58, <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_5/a_conf62_sr58.pdf> [18]; M Nordquist (n 89) 92 [297.6], footnote 6.

⁹¹ *ibid*, [18].

⁹² Proelß (n 5) 1922.

Accordingly, the term ‘relating to’ used in the context of Article 298(1)(a)(i) is to limit the scope of application of this provision to only disputes over sea boundary delimitation as defined above.

4.2 The Distinction between Disputes Concerning the Alleged Violation of Obligations under 74(3) and 83(3) and Disputes Concerning Sea Boundary Delimitation

This part of the research paper will prove that a dispute concerning a State’s failure to carry out obligations under Articles 74(3) and 83(3) are not a sea boundary delimitation dispute and thus, are not excluded by a declaration under Article 298(1)(a)(i). Firstly, when settling disputes arising from the alleged violation of Articles 74(3) and 83(3), judicial organs only have to determine an overlapping maritime area and by no means delimit such area by imposing a permanent and official boundary line between disputing coastal States.

Secondly, the object and purpose of the interim regime under Articles 74(3) and 83(3), as provided in section 2.1 above, is independent of the final delimitation of the overlapping maritime area and is only to secure the economic interest of disputing coastal States during the delimitation process. Thence, potential claims in disputes concerning the violation of Article 74(3) and 83(3) are not directly related to the delimitation issue.

Thirdly, even if it is argued that Articles 74(3) and 83(3) are under the umbrella of the title ‘delimitation’ and contain the phrase ‘as provided for in paragraph 1’, these paragraphs are not inherently related to sea boundary delimitation. Indeed, applying the analogy of the Award in the *SCS case*, such title by no means automatically make the interim regimes, which is provisional in nature and does not impose any effect on the final delimitation agreement, become a critical part of the delimitation issue regulated in the paragraph 1 of such Articles. Moreover, the *travaux préparatoires* of these Articles confirm that the phrase ‘as provided for in paragraph 1’ does not make paragraph 3 (provisional measures) become an indispensable element of paragraph 1 (principles and methods of sea boundary delimitation). At the Third UN Conference on the Law of the Sea, provisional measures were first introduced in the Informal Single Negotiating Text (ISNT) of 1975: ‘Pending agreement, no State is entitled to extend its [EEZ continental shelf] beyond the median line or the equidistance line.’⁹³ However, due to the disagreement between the supporters of ‘equidistance’ and the supporters of ‘equitable principles’,⁹⁴ the text was simplified in the Revised Single Negotiating Text (RSNT) of 1976 that: ‘Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.’⁹⁵ Eventually, in 1980, the text, instead of directly referring to ‘the provisions of

⁹³ Third UN Conference on the Law of the Sea, *Informal Single Negotiating Text* (Part II) Document A/CONF.62/WP.8/Rev.1/PartII (1975) <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_4/a_conf62_wp8_part2.pdf>, arts 61(3) and 70(3).

⁹⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 71) Dissenting Opinion of Judge Oda 157 [131]–[145]; Alexander Proelß (n 5) 566, 654.

⁹⁵ Third UN Conference on the Law of the Sea (n 93) arts 62(3) and 71(3).

paragraph 1', was modified into 'pending agreement as provided for in paragraph 1'.⁹⁶ This modification suggests that the interim measures are carried out only when the States concerned cannot reach the agreement of delimitation, not based on paragraph 1. Accordingly, the State obligations as provided under Articles 74(3) and 83(3), in this sense, are independent of the notion of sea boundary delimitation.

In general, based on the interpretation of the phrase 'sea boundary delimitation' itself as well as observing relevant international jurisprudence, 'sea boundary delimitation' is restrictively interpreted to deal with the establishment of a line that confines the jurisdiction of the coastal States in the overlapping areas. That is to say, it implies an exclusion of the obligation to reach provisional arrangements of a practical nature and obligation to exercise self-restraint under Articles 74(3) and 83(3). For this reason, these above-mentioned obligations are not 'relating to sea boundary delimitations' as provided under Article 298(1) (a)(i), and therefore cannot fall within the category of optional exceptions that prevent judicial organs from exercising jurisdiction over certain disputes.

5. Conclusion

In conclusion, there is a possibility for a State to initiate compulsory dispute settlement procedures to a dispute concerning the obligations under Articles 74(3) and 83(3) of the UNCLOS when one of the disputing parties made a declaration of optional exceptions under Article 298(1). However, the classification of a dispute as such may vary in practice. In fact, several disputes between States involve the prior determination of territorial sovereignty, thus may render no jurisdiction for the compulsory dispute settlement body as concluded in. This point, therefore, needs to be further scrutinized on a case-by-case basis. Most importantly, as this research paper has highlighted, Articles 74(3) and 83(3) only oblige States concerned to carry out their obligations in the to-be-delimited maritime areas which are independent of 'sea boundary delimitations' as the establishment of a line in the overlapping EEZ or continental shelf. That is to say, even in a case where a disputing party made a declaration under Article 298(1), it does not constitute a bar to the jurisdiction of the competent dispute settlement procedures entailing binding decisions.

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⁹⁶ Third UN Conference on the Law of the Sea, *Informal Composite Negotiating Text* (Revision 2), UN Doc. A/CONF.62/WP.10/Rev.2/CORR.2 (1980) <https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_8/a_conf62_wp10_rev2_corr2.pdf> arts 74(3) and 83(3).

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