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The infringement of the obligations of self-restraint and cooperation under Articles 74(3) and 83(3), and possible strategies to bring disputes emanating from such infringement before relevant courts and tribunals

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Overview

- ▶ The obligations to exercise self-restraint and cooperate under UNCLOS
- ▶ Dispute resolution under UNCLOS
- ▶ Provisional measures under UNCLOS
- ▶ Practical strategies to bring disputes emanating from infringements of obligations to exercise self-restraint and cooperate before relevant courts and tribunals

Obligation to exercise self-restraint and cooperate – UNCLOS Articles 74(3) and 83(3)

- ▶ UNCLOS envisages that the delimitation of maritime boundaries will be the result of, first and foremost, agreement
- ▶ Before States have reached agreement on the delimitation of their EEZ and continental shelf, States are under an obligation to exercise self-restraint and to cooperate
- ▶ Self-restraint and cooperation are critical components of an inter-State normative framework for stability and security

“Pending agreement [...], 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.”

The compromise contained in Articles 74(3) and 83(3)

- ▶ Articles 74(3) and 83(3) represent a compromise between proposals during UNCLOS negotiations that represented:
 - ▶ a “prohibitive approach” (the median line should mark the outer limit of the maritime boundary in the absence of any boundary agreement)
 - ▶ an “incentive approach” (States should make provisional arrangements pending agreement or settlement of maritime boundary delimitation)
- ▶ No support for a complete moratorium on exploration or exploitation activities in areas claimed in good faith by another State
 - ▶ Proposals of prohibiting unilateral actions in disputed zones were softened by the addition that unilateral actions should be prohibited only if they aggravate the situation or jeopardise the interests of other States

Obligation to exercise self-restraint

- ▶ Refrain from acts that “jeopardise or hamper the reaching of the final agreement”
- ▶ An aspect of the principle of good faith (*see* Article 300 UNCLOS)
- ▶ A similar function to interim or provisional measures



Obligation to exercise self-restraint (cont'd)

- ▶ Temporal scope of application of the obligation to exercise self-restraint
 - ▶ From (arguably) when overlapping claims arise to when a final agreement is reached
- ▶ Substantive scope of obligation to exercise self-restraint
 - ▶ Not intended to preclude all activities in a disputed maritime area
 - ▶ Only acts that jeopardise or hamper the reaching of the final agreement
 - ▶ Activities undertaken pursuant to a provisional arrangement of a practical nature are permissible

Obligation to exercise self-restraint (cont'd)

- ▶ Assessment on a case-by-case basis
 - ▶ *Fisheries Jurisdiction*, Provisional Measures Order (1972), para. 21:
 - ▶ “irreparable prejudice”
 - ▶ *Aegean Sea Continental Shelf*, Interim Protection Order (1976), para. 30:
 - ▶ activities that cause “physical damage to the seabed or subsoil” (as opposed to exploratory activity such as seismic exploration)



Obligation to exercise self-restraint (cont'd)

- ▶ *Aegean Sea Continental Shelf*, Interim Protection Order (1976), para. 30:
 - ▶ establishment of installations (as opposed to activities of a “transitory character”)
 - ▶ actual appropriation or other use of natural resources



Obligation to exercise self-restraint (cont'd)

- ▶ Certain types of limited fishing activities would not be considered as jeopardising or hampering the final agreement (*Fisheries Jurisdiction*)
- ▶ Rights and freedoms with regard to, e.g., shipping remain intact
- ▶ However, military navigation directly related to the subject of the dispute would be likely to jeopardise or hamper the reaching of final agreement

Obligation to exercise self-restraint (cont'd)

- ▶ *Guyana/Suriname Arbitration*, Award (2007), para. 467:
 - ▶ Whether unilateral actions cause permanent physical change to the marine environment (“seismic exploration” vs. “exploitation of oil and gas reserves”)
 - ▶ Both States found to have violated the obligation to exercise self-restraint: by authorising exploratory drilling in disputed waters and by threatening the use of force in response to such actions, respectively
 - ▶ The Arbitral Tribunal ordered reparation in the form of satisfaction by a judicial declaration that there had been a violation of an obligation

Obligation to cooperate

- ▶ *Guyana/Suriname Arbitration* (2007), para. 460:
 - ▶ “designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation”
 - ▶ “acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area”
- ▶ Not merely a non-binding recommendation or encouragement, but a mandatory rule whose breach would represent a violation of international law

Obligation to cooperate (cont'd)

- ▶ Obligation to negotiate on provisional arrangements in good faith (*Guyana/Suriname Arbitration*, Award (2007), para. 461)
- ▶ A sincere attempt at agreement, but no obligation to come to agreement
- ▶ Obligation to negotiate in good faith (*North Sea Continental Shelf, Judgment* (1969), para. 85(a)):
 - ▶ “enter into negotiations with a view to arriving at an agreement and not merely go through a formal process of negotiation”
 - ▶ negotiations must be meaningful (not the case if either party “insists upon its own position without contemplating any modification of it” or engages in extreme claims)

Obligation to cooperate (cont'd)

- ▶ Provisional arrangements
 - ▶ can take many forms; not required to be a treaty
 - ▶ can be informal, i.e., not intended to be legally binding
- ▶ “Practical”: not touch upon the delimitation issue itself or underlying territorial issues
- ▶ “Provisional”: being “preliminary or even preparatory to the final agreed status of the area and the utilization of its resources” (Lagoni, 1984)
- ▶ Practical arrangements may include: provisional boundaries, joint development zones, joint fishing zones, moratoriums, agreements on allocation of criminal and civil jurisdiction

Practical strategies to bring disputes re self-restraint and cooperation to courts and tribunals

- ▶ Practical strategies under UNCLOS
- ▶ The tactics: relevant courts and tribunals
- ▶ Disputes emanating from infringements of obligations to exercise self-restraint and cooperate
- ▶ What are the general dispute resolution options available under UNCLOS
- ▶ First inquiry: are disputes emanating from infringements of obligations to exercise self-restraint and cooperate “exempt disputes” under UNCLOS?

Dispute resolution under UNCLOS

- ▶ Key provisions (Section 1, Part XV)
 - ▶ Article 279 – settlement of disputes by peaceful means
 - ▶ Article 280 – free choice of peaceful settlement means
 - ▶ Article 281 – the procedures in Part XV UNCLOS apply only where the parties have failed to settle the dispute through means of their own choice and where any such means chosen are not exclusive
 - ▶ Article 282 – other compulsory dispute settlement procedures entailing binding decision to which the parties have agreed to submit such a dispute prevail over UNCLOS (e.g., where the disputing States have each made a reciprocal declaration under Article 36(2) ICJ Statute)

Dispute resolution under UNCLOS (cont'd)

- ▶ Article 283 – obligation to proceed expeditiously to an exchange of views regarding the settlement of the dispute (failure to do so a common basis for challenging the jurisdiction of a court or tribunal seized with a request for provisional measures)
- ▶ Key provisions (Section 2, Part XV)
 - ▶ Article 286 – where no settlement has been reached by recourse to section 1 of Part XV of UNCLOS, submit dispute to a court or tribunal with jurisdiction
 - ▶ Article 287 – choice of venue for dispute resolution: ITLOS, ICJ, Annex II arbitral tribunal, Annex VIII special arbitral tribunal

Are disputes re obligations about self-restraint and cooperate “exempted disputes”?

- ▶ Section 3, Part XV of UNCLOS: exempted disputes
- ▶ May be submitted to compulsory procedures under UNCLOS only with the agreement of the disputing parties
- ▶ Can disputes emanating from infringements of obligations to exercise self-restraint and cooperate ever be “exempt disputes” under UNCLOS?
- ▶ Articles 297 and 298(1)

Article 297

- ▶ Article 297 – disputes relating to the exercise of sovereign rights or jurisdiction can be submitted under UNCLOS only where concerning
 - ▶ freedom of navigation
 - ▶ the right of overflight or laying of submarine cables and pipelines or uses under Article 58
 - ▶ inconsistency with marine environmental rules and standards



Article 298(1)

- ▶ Article 298(1)
 - ▶ (a) disputes concerning the interpretation or application of articles 15, 74 and 83 *relating to sea boundary delimitations, or those involving historic bays or titles*
 - ▶ (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial services, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3
 - ▶ (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations

Can disputes relating to the obligations to exercise self-restraint and cooperate be exempt?

- ▶ Do claims relating to Articles 74(3) and 83(3) fall within the scope of declarations under Article 298(1)(a)(i)?
 - ▶ One interpretation is that declarations under Article 298(1)(a)(i) only exclude (temporarily) from the compulsory dispute settlement provisions disputes arising under or concerning the application or interpretation of Articles 15, 74 and 83 that pertain to the sea boundary delimitation itself (or to historic bays or titles).
 - ▶ Under this interpretation, disputes arising out of an alleged breach of the obligations to cooperate and exercise-self restraint under Articles 74(3) and 83(3) are not excluded from the jurisdiction of the courts and tribunals under section 2 by virtue of a 298(1)(a)(i) declaration.
- ▶ This has not been tested by any court or tribunal.

Procedures for exempted disputes

- ▶ A State that has made a declaration under Article 298(1)(a) must accept submission of the matter to conciliation under Annex V, section 2 UNCLOS and engage in negotiations based on the reasoned conciliation report
 - ▶ Exception: any dispute “that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory”
- ▶ If no settlement through these means, the parties shall, by mutual consent, submit the question to one of the compulsory procedures provided for in section 2, unless the parties otherwise agree
- ▶ So what does this mean for disputes about self-restraint and cooperation?

Continuing and other obligations of peaceful settlement in relation to exempted disputes

- ▶ Declarations under Article 298 do not detract from States’ obligations under Articles 279-285 with regard to the peaceful settlement of disputes, e.g.:
 - ▶ Settlement of disputes using all the means provided for in Article 33(1) UN Charter (Article 279 UNCLOS)
 - ▶ Expeditious exchange of views regarding settlement (Article 283 UNCLOS)
 - ▶ Invitation to conciliation (Article 284 UNCLOS)
- ▶ Article 300, good faith and abuse of rights

Provisional measures under UNCLOS

- ▶ Existence of *prima facie* jurisdiction
- ▶ Urgency
- ▶ Risk of irreparable damage or prejudice to the parties’ rights
- ▶ Link between the right(s) forming the subject of the proceedings on the merits and the provisional measures being sought
- ▶ Article 290(1) UNCLOS
 - ▶ “the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to *preserve the respective rights of the parties* to the dispute or to *prevent serious harm to the marine environment*, pending the final decision”

Provisional measures under UNCLOS (cont’d)

- ▶ Provisional measures can only be prescribed at the request of a party
- ▶ Court or tribunal not bound by requested measures; can prescribe measures “which it considers appropriate under the circumstances” (Article 290(3))
- ▶ Compliance with provisional measures must be prompt (Article 290(6))
- ▶ What court or tribunal to use?

Provisional measures under UNCLOS (cont'd)

- ▶ ITLOS enjoys compulsory residual jurisdiction to prescribe provisional measures before an arbitral tribunal has been constituted (Article 290(5))
- ▶ Once constituted, the court or tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures (Article 290(5))
- ▶ Each court or tribunal seized of a provisional measures request will apply UNCLOS in conjunction with its own Rules in considering that request
- ▶ Arbitral tribunals are likely to be guided by the Rules of ITLOS and the ICJ Rules

Provisional measures under UNCLOS to prevent breaches of Articles 74(3) and 83(3)

- ▶ Threshold for establishing jurisdiction is lower than it is in contentious cases – “*prima facie*” jurisdiction
- ▶ Uncertainties regarding jurisdiction are normally decided in the applicant’s favour
- ▶ The applicant must only present an arguable case for the jurisdiction on the merits – i.e., show that there is “nothing which manifestly and in terms excludes” jurisdiction
- ▶ In a request for provisional measures, the uncertainty as to the effect of a declaration under Article 298(1)(a) on a dispute arising under Article 74(3) and 83(3) should be resolved in favour of the requesting party
 - ▶ However, such provisional measures can be revoked if a court or tribunal hearing the case on the merits finds that it lacks jurisdiction

Provisional measures to prevent breaches of Articles 74(3) and 83(3) (cont'd)

- ▶ Like the substantive obligations of Articles 74(3) and 84(3), provisional measures serve to restrain the parties from disrupting the situation or attempting to present the other party with a *fait accompli*
- ▶ The very fact that one State perseveres in undertaking activities in a contested maritime area may well cause increased antagonism between the relevant parties and potentially derail the legal proceedings

Provisional measures to prevent breaches of Articles 74(3) and 83(3) (cont'd)



- ▶ Provisional measures in relation to the obligation to cooperate may be of limited practical utility, in the absence of a threat of serious harm to the environment
- ▶ Since there is no obligation to come to a provisional arrangement, query if a court or tribunal could order such an arrangement as part of an award of provisional measures
- ▶ Provisional measures to cooperate have sometimes been formulated in exhortatory terms (“should” as opposed to “shall”)

Provisional measures to prevent breaches of Articles 74(3) and 83(3) (cont'd)

- ▶ More feasible to demonstrate threat to party's rights in requesting provisional measures relating to the obligation to exercise self-restraint
- ▶ May enable a court or tribunal to order a party to cease activities that may in the future be found to constitute a breach that party's obligations under Articles 74(3) and 83(3)
- ▶ May be significant for the underlying dispute



Tactical implementation

- ▶ Bringing a self-standing claim for the violation of Articles 74(3) and/or 83(3) along with a request for provisional measures to restrain the conduct of activities that violate Articles 74(3) and/or 83(3)
- ▶ Bringing a maritime boundary delimitation case and requesting provisional measures to restrain the conduct of activities that violate Article 74(3) and 83(3)
- ▶ Bringing proceedings under Part XV UNCLOS for breach of Article 300 (good faith and abuse of rights) in respect of Articles 74(3) and 83(3)
- ▶ Additional options through the UN, bilateral agreements and regional organisations/global bodies

Self-standing claim for violation of Articles 74(3)/83(3) and request for provisional measures

- ▶ Bring a self-standing claim for violation of Articles 74(3) and 83(3)
- ▶ Request for declaratory relief and compensation for any damage caused by violations of Articles 74(3) and 83(3)
- ▶ Advantages:
 - ▶ Speed
 - ▶ Limited scope of technical investigation
- ▶ Disadvantage:
 - ▶ Underlying maritime boundary dispute remains unresolved

Self-standing claim for violation of Articles 74(3)/83(3) and request for provisional measures (cont'd)

- ▶ Article 298 declarations present a jurisdictional hurdle – but not necessarily a bar
- ▶ It may be argued that a dispute over the violation of obligations of self-restraint and cooperation do not relate to “sea boundary delimitations” or “historic bays or titles” but to a separate duty to cooperate and exercise self-restraint in the interim
- ▶ This point of the law has not been tested in international courts and tribunals
- ▶ In any event, opportunities for conciliation and, ultimately, arbitration remain, pursuant to Article 298(1)(a)

Requesting provisional measures within the framework of a maritime boundary dispute

- ▶ Bring a maritime delimitation case
- ▶ Request provisional measures to restrain activities that violate the adverse State's obligation to cooperate and act with self-restraint
- ▶ Advantage:
 - ▶ The final award will delimit maritime zones and resolve the core dispute between the parties
- ▶ Disadvantage:
 - ▶ More time-consuming
 - ▶ Declarations under Article 298(1)(a) could in this case bar the jurisdiction of a court or tribunal under the compulsory procedures in section 2 of Part XV UNCLOS

Claim for violation of Article 300 and request for provisional measures re Articles 74(3) and 83(3)

- ▶ Bring a self-standing claim for a violation of Article 300:

“States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”
- ▶ Article 300 cannot be avoided via an Article 298 declaration
- ▶ In *SBT*, the Arbitral Tribunal stated that:

“The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS.”

Claim for violation of Article 300 and request for provisional measures re Articles 74(3) and 83(3)

- ▶ The jurisprudence is not entirely clear
- ▶ It may be argued that Article 300 cannot support a self-standing claim:

“[I]t is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when ‘the rights, jurisdiction and freedoms recognised’ in the Convention are exercised in an abusive manner”. (*M/V “Louisa” Case*, Judgment, para. 137).
- ▶ However, this formulation in itself is utterly meaningless and adds nothing
- ▶ Proceedings under Part XV UNCLOS for breach of Article 300 (good faith and abuse of rights) in respect of Articles 74(3) and 83(3): the exact point of the law has not been tested in international courts and tribunals and there is currently no jurisprudential precedence under UNCLOS

Other potential tactics

- ▶ Dispute resolution based on joint development agreements or other bilateral and multilateral treaty regimes
- ▶ Recourse through a regional organisation or global body, e.g., the UN Security Council
 - ▶ Article 33(1) UN Charter – peaceful settlement of disputes
 - ▶ Article 34 UN Charter – the Security Council may investigate any dispute or situation leading to international friction or dispute in order to determine whether it could endanger the maintenance of international peace and security
 - ▶ Could increase international pressure on a State that violates its obligations to cooperate and to exercise self-restraint

Conclusions

- ▶ If negotiations have been disrupted by the unilateral actions of one of the negotiating parties, there may be recourse to international adjudication with respect to violation of Articles 74(3) and 83(3), by:
 - ▶ (1) bringing a stand-alone claim for compensation and declaratory relief with a request for provisional measures to restrain further violations
 - ▶ (2) bringing a request for provisional measures within the context of a general delimitation claim
 - ▶ (3) bringing a claim for violation of Article 300 combined with a request for provisional measures
- ▶ An Article 298 declaration may present a jurisdictional hurdle with respect to option (1) and option (2)
- ▶ Article 300 should raise no such problem but might raise others

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