OBLIGATION TO NEGOTIATE IN RESOLVING THE MARITIME DELIMITATION DISPUTES

Written by ***YouLin Zhao***

1st Year PhD Candidate, Institute of Boundary and Ocean Studies, Wuhan University, China

ABSTRACT

Negotiation is an important part of disputes resolution mechanism under United Nations Convention on the Law of the Sea (thereinafter **UNCLOS**). The duty to negotiate the maritime delimitation disputes are governed, *grosso modo*, by two principles: Firstly, Article 74(1) and 83(1) require that parties are under an obligation to negotiate in good faith; Secondly, according to Article 286 of LOS Convention, states should exhaust all possibilities to negotiate before a court or a tribunal exercises its jurisdiction. However, in some circumstances, the final boundary could not be reached thorough negotiate. In order to solve this problem, pursuant to Article 74(3)/83(3), states are under an obligation to negotiate in good faith to conclude interim arrangements, such as joint development zone or provisional boundary. As mentioned above, China should negotiate in good faith with other interested countries, even if a final agreement could not be reached, an appropriate interim arrangements shall be concluded.

Keywords: Negotiation; Maritime Delimitation; Principle of Good Faith; Exhaust All Possibility to Negotiate; Interim Arrangements; South China Sea disputes

INTRODUCTION

Negotiation is and remains the prime and most frequent and cost-effective mode of settling international disputes,[1] so is it in maritime boundary delimitation. In this paper, we argue that the obligation to negotiate the maritime boundary is a tri-fold concept. Firstly, this obligation implies that maritime boundaries must not be determined in the unilateral manner and that parties shall act in good faith during the proceedings. Secondly, the concerned parties are obliged to exhaust all possibilities to negotiate before the disputes are submitted to compulsory procedures. Thirdly, if the parties fail to reach a final maritime boundary agreement, interim arrangement should be sought to handle the disputes.

The existing literature of negotiation under international demonstrates the significant role of negotiation in settling maritime disputes, in the period from 1942 to 1992, there are far more agreements than settlements by courts. 120 boundaries were settled by agreements while merely 20 cases (16.6 per cent) reached the courts and arbitration.[2] Scholar has also illustrated the relationship between negotiation and other ways of dispute settlement.[3] Academic literature has explained how equitable principles can be applied to maritime boundary delimitation in specific cases.[4] To our regret, there is a lack of clarity to the meaning of obligation to negotiate in resolving maritime boundary disputes. There is also much to explain to what extent that the obligation to negotiate require from the parties. Although negotiation seems to be known for it's highly flexibility in resolving dispute, it shall not totally become the *domaine réservé* of parties' prerogative. In other word, best practices and even established law should guide and rule. This article aims to fill this gap by seeking to provide a more comprehensive assessment of principles governing the negotiations of maritime boundary delimitation. Even if the negotiation of final maritime boundary does not succeed, the States shall still negotiate to reach an interim arrangement pending final delimitation.

---

[1] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation*(Cambridge University Press, 2015), p.645.

[2] *Ibid*

[3] Matsui Yoshiro, International Law, (China University of Political Science and Law, 2004): P. 231. Yoshiro holds a view that "In many cases, negotiations are the premise of submission to mediation or judicial settlement. Because of the need for clear arguments... Although the negotiations have their flaws, it is still the most important dispute settlement method."

[4] Nelson, L. "The Roles of Equity in the Delimitation of Maritime Boundaries", *American Journal of International Law*, vol. 84(1990), 849-856.

The paper proceeds as follows: Section 2 discusses the principles governing the negotiation of maritime boundary disputes. Section 3 assumes that even if a final deal fails to be reached, disputing States are still obliged to negotiate interim arrangements under 74(3)/83(3). Section 4 offers a brief conclusion and analyses the contingent role of negotiation to resolve maritime boundary disputes among coastal countries bordering South China Sea.

PRINCIPLES CONCERNING NEGOTIATION OF MARITIME BOUNDARY DELIMITATION

This section begins with examining and analyzing precedents vis-à-vis maritime boundary disputes by means of negotiation. We try to explore and explain the basic legal requirements of negotiation, namely, good faith and exhaustion of all possibility.

The obligation to negotiate in good faith:

The meaning of negotiation in good faith in precedents

a. The obligation to negotiate before 1982

Good faith is a general principle of international law, it could be found in Article 2(2) of UN Charter:"All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with the present Charter." This clause has been purposefully integrated into UN Charter to support the shift from voluntarist to a constitutional approach of international law.[5]

Such was the situation in the 1969 North Sea Cases. The court stated:

> "The parties are under an obligation to enter into negotiation with a view to arriving at an agreement, they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insist upon its own position without contemplating any modification of it.[6] The agreement should…confirm with 'equitable principle'."[7]

[5] JP Müller, Vertrauensschutz im Völkerrecht (Heymann Köln 1971), p. 22, 43, 48, and 63.

[6] ICJ Reports 1969, p. 47, para. 85(a).

[7] ICJ Reports 1969, p. 50-51.

In the court's opinion, this duty to negotiate and to seek agreement arises out of customary rules relating to continental shelf and merely constitutes special application of equitable principles underlying all international relations, and negotiation is recognized into Article 33 of the Charter of United Nations as one of the methods of for the peaceful settlement of international disputes.[8] And Judge Amoun in the aforementioned case, he held that "good faith is no more than a reflection of equity and which was born from equity". The Court invoked good faith to deal with an obligation to negotiate, the obligation to negotiate an agreement in good faith in accordance with equitable principles so as to ensure that the negotiations were meaningful.

Then in 1971 Iceland unilaterally announced that it was extending its exclusive fishing zone to 50 nautical miles, thereby terminating agreements it had with Germany and the UK. A dispute ensued before the ICJ, namely Fisheries Jurisdiction cases in 1974,[9] the Court stressed the need to reconcile the disputed fishing rights through negotiations and held that：

> "In respect of the fishery rights in the areas between the fishery limits agreed upon between Iceland and the United Kingdom, the parties were under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences.[10] In this case each state must in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12 mile limit, thus bringing about an equitable apportionment of the fishing resources."[11]

What is common to North Sea Continental Shelf cases and 1974 Fisheries Jurisdiction cases is the stress on the obligation to negotiate in good faith with a view to arriving at an agreement. Since such negotiations may not be a mere formality without substance, it is natural that the tribunal should have stressed the principle of equity in its order, judgment, opinion or

[8] Grisel, Etienne, "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases," *American Journal of International Law* vol. 64 (1970), p. 588.

[9] Reinhold, Steven. "Good Faith in International Law," *UCL Journal of Law and Jurisprudence* vol. 2 (2013): p. 57.

[10] 1974 ICJ Report. p. 34, para. 79(3).

[11] 1974 ICJ Report, p. 33.

declaration.[12] It is submitted that equity not only serves as a basis of the obligation to negotiate, but it also implies the duty to negotiate in a flexible manner with a view to achieving a fair compromise.[13]

After that in 1978 Aegean Continental Shelf case, the court also stressed the equitable obligation to negotiate in good faith and to seek agreement. However, the court relied solely on expectations exerted by Resolution 395(1976) of Security Council, that calling on Greece and Turkey to resume direct negotiations and appealed to them to do everything within their power to reach mutually acceptable solutions.[14] It merely served as a political tool aimed at encouraging the negotiating process. Thus in this case, the legal foundation is still the equitable principle. Namely, the obligation to negotiate in good faith has not yet been completely instituted in any treaty.[15]

b. Article 74(1)/83(1) of UNCLOS regime

A codification of the delimitation of the exclusive economic zone (EEZ) and continental shelf was scripted as Articles 74 and 83 of UNCLOS at a late stage of Third United Nations Conference on the Law of the Sea. Articles 74 and 83 of the UNCLOS indicate that delimitation of the Exclusive Economic Zone and of the continental shelf, respectively, "shall be effected by agreement on the basis of international law … in order to achieve an equitable solution". In seeking such an agreement, the normal legal principles of negotiation apply, together with some specific rules applicable to delimitation. Articles 74 and 83 confirm the general obligation of the States concerned to behave in "good faith" in order to reach an agreement on the delimitation.[16] In the course of their negotiations in good faith, the Parties were also to take relevant factors into account with a view to achieving equitable result. Accordingly, the UNCLOS devolves the development of rules and principles of delimitation to general

[12] Miyoshi, Masahiro. "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf with Special Reference to the Discussions at the East-West Centre Workshops on the South-East Asian Seas," *International Journal of Estuarine and Coastal Law* vol. 3 (1988), p. 13.

[13] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (Cambridge University Press, 2015), p.678.

[14] S.C. Res. 395, 31 U.N. SCOR (1953d mtg.) at 15, U.N. Doc. S/INF/32 (1976).

[15] Koymen, Avukat Feridun, "The Aegean Sea Continental Shelf Problem - Presentation of the Turkish Case," *International Business Lawyer* vol. 6 (1978), p. 504.

[16] Oswald K. Seneadza. "The law and practice in maritime boundary delimitation: lessons for the resolution of dispute between Côte d'Ivoire and Ghana", *Commonwealth Law Bulletin*, vol.37(2) (2011), p. 301.

international law, and so any comment on the future of delimitation is a matter that must be on the basis of the terms of the UNCLOS.[17]

This was confirmed by the further decision of ICJ in the three-year period from 1982–1985. In 1984, after its review of the principles of international law, the court of Maine case formulated a "fundamental norm" of maritime delimitation:

> "No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with genuine intention of achieving a positive result."[18]

The Chamber reaffirmed the primary role of agreement in delimitation of maritime boundaries. And reaffirmed the obligation to reach an agreement carries with it the duty to negotiate in good faith. Which had been first emphasized by *North Sea Continental Shelf* cases. But in the present case the Chamber went further, the Chamber does extract a general principle requiring good faith negotiation toward an agreement.[19] The court pointed out that "good faith" requires the negotiating parties, by once more joining in a common endeavor, will surely be able to surmount any difficulties to make the negotiations a success. Only in this way can they ensure the positive development of their activities in the important domains concerned.[20]

However, apart from specifying how the States concerned must endeavor to find a solution on the question of delimitation, the content of Article 74 and 83 is vague in some sense. The vagueness is for a reason. The drafting conference encountered great difficulty in agreeing on a concrete provision. While some countries want to be clear on this subject, those with rugged coastlines tend to strategically leave an ambiguous clause so as to interpret it in its own favor. Hence the LOS Convention got agreement on a very controversial matter were consciously

[17] David Freestone, Richard Barnes, and David Ong, *Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), p. 138.

[18] Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1984 I.C.J. No. 67, p. 299.

[19]Terres, Nora T. "The United States/Canada Gulf of Maine Maritime Boundary Delimitation," *Maryland Journal of International Law and Trade*, vol. 9 (Spring ,1985), p. 158.

[20] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Cannada v. U.S.), 1984 LC.J. (Judgment of Oct. 12), para. 344.

designed to decide as little as possible, and not set forth clear-cut solutions in articles 74 and 83, and both articles just envisage an equitable result.[21]

c. Emerging trends of development of the meaning of obligation to negotiate in good faith

The choice of drafters of UNCLOS to leave articles 74(1) and 83(1) as vague as possible paves the way for the progressive development of "methods" of maritime delimitation through the creative contribution by State practice and Court decisions. And the method for resolution of maritime boundary dispute might be influenced by a variety of considerations when negotiating.[22] More importantly, any method chosen by both parties should be based on the principle of good faith for the purpose of achieving an equitable result.

The court in the Cameroon v. Nigeria case (2002) confirmed the duty to negotiate in good faith, which is formed by the applicable law. The court stated:

> "These negotiations did not lead to an agreement. However, Articles 74 and 83 of the United Nations Law of the Sea Convention do not require that delimitation negotiations should be successful; Such as all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith."[23]

In this case, Nigeria claimed that the Court was unable to carry out any delimitation, because there was a requirement of prior negotiations that had not been satisfied. Nigeria's argues that according to Articles 74(1) and 83(1) of Los Convention, the parties to a dispute over maritime delimitation must first attempt to resolve it by negotiation. Nigeria conceded that negotiations had taken place in relation to some parts of the delimitation, but argued that much of the boundary had never been discussed.[24] On this point, however, the Court recalled its judgment on admissibility and jurisdiction in which, when the same point was raised, it found that

[21] Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, Para. 116.

[22] Oswald K. Seneadza. "The law and practice in maritime boundary delimitation: lessons for the resolution of dispute between Cote d'Ivoire and Ghana", *Commonwealth Law Bulletin*, vol.37(2) (2011), p. 305.

[23] Land and Maritime Boundary between Cameroon and Nigeria(Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p. 303, para. 244.

[24] Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), Judgment of 10 Oct 2002, ICJ Rep, para. 107-111.

negotiations on the entire maritime delimitation had taken place. Explaining that to satisfy the Convention's requirements, it is not necessary for negotiations to be successful.[25]

In light of these case studies, we can find the role of equity is of significance during the negotiations of maritime boundary delimitation. The parties negotiate in good faith trying to understand the opposing view and respecting each other's interests, it seems quite possible to achieve an equitable result and conclude an agreement, which also will strengthen the good relationship between the neighbor States.[26]

Opposition of good faith:

As illustrated above, good faith is a fundamental principle of international law directly related to honesty, fairness and reasonableness. But negotiate to enter into an agreement may be not in good faith, for example, for an unjust and dishonest purpose. Thus the meaning of good faith could be illustrated and contrasted by counter-examples.

There is one case of negotiating in bad faith, namely espionage. For instance, Australia and East Timor reached an interim agreement in 2006, this agreement named The Australia-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). CMATS provides for a 50:50 revenue split for the entire Greater Sunrise Field, which straddled the northeast area of cooperation and an area that was undisputedly Australia's continental shelf. Approximately 80 per cent of the field was within an area of Australia's exclusive jurisdiction.[27]

However, in April 2013, East Timor instituted arbitral proceedings against Australia at the Permanent Court of Arbitration in relation to a dispute arising under the 2006 'CMATS Treaty'. Timor Leste alleges that the CMATS Treaty is invalid because Australia engaged in espionage in the course of negotiating the Treaty. Timor Leste asserts the treaty is invalid on the basis

[25] Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), Judgment of 10 Oct 2002, ICJ Rep, para. 239-245.

[26] Nugzar Dundua, *Delimitation of maritime boundaries between adjacent States* (The Nippon Foundation Fellow, 2006-2007), p. 85.

[27] Gullett W, "Reconciliation in the Timor Sea: Progress by Australia and Timor Leste towards Amicable Development of Offshore Resources", *The Korean Journal of International and Comparative Law*, vol. 4 (2016), p. 106.

that Australia did not conduct negotiations in good faith.[28] It is obvious access to information in a treaty negotiation that was obtained through espionage may limit the parties' ability to negotiate freely and fairly, it could be seen as one form of action in contrary to the principle of good faith.

A series of legal actions, protests and diplomatic forays ensued for Australia had bugged Timor-Leste's Prime Minister's meeting room during the negotiations, leading up to the Compulsory Conciliation process to settle the disputes. On 9 January 2017, Timor-Leste, Australia and the Conciliation Commission issued a joint statement. The two countries agreed to terminate the 2006 CMATS Treaty in its entirety.

On 30 March, Australian Parliament's Joint Standing Committee on Treaties (JSCT) issued its report, together with a press release. Senator Sarah Hanson-Young represented the Australian Greens to make its Additional Comments, she pointed out that Australia did not negotiate the CMATS Treaty in good faith, having spied on East Timorese Cabinet discussions regarding the Treaty in 2004. To assert otherwise would be to ignore a wealth of evidence against Australia.[29]

The obligation to exhaust all possibility to negotiate

Pursuant to Article 279 of UNCLOS, States Parties shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter. Such as negotiation, enquiry, mediation, conciliation, arbitration, or other peaceful means of the parties' own choice. According to 286 of UNCLOS, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section. The obligation to seek settlements provided by Article 33 of UN charter under Article 279 reflects the customary law principle, namely peaceful settlement of disputes.[30] And these peaceful means of their own choices, should be triggered prior to resorting to the compulsory procedures entailing

[28] Gullett W, "Reconciliation in the Timor Sea: Progress by Australia and Timor Leste towards Amicable Development of Offshore Resources", *The Korean Journal of International and Comparative Law*, vol. 4 (2016), p. 108.

[29] Parliament Of The Commonwealth Of Australia, Joint Standing Committee On Treaties, Report 168, Certain Maritime Arrangements - Timor-Leste, p. 29.

[30] The ICJ characterized the principle of peaceful dispute settlement as jus cogens in the Nicaragua Case (Nicaragua v. United States of America) (1986) ICJ Rep. p. 14.

compulsory binding decisions. This provision is nearly identical to that included in Article 22 of compromise agreement between Georgia v. Russian, named CERD in Elimination of All Forms of Racial Discrimination case. Article 22 reads as follows:

> "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision."

In this *Georgia v. Russian Federation Elimination of All Forms of Racial Discrimination* case. Negotiation shall be attempted and exhausted before ICJ exercises its jurisdiction.[31] The court held that this compromissory clause had permitted the jurisdiction of the ICJ only where states engaged in some effort at diplomatic resolution and had reached a deadlock.[32] Russian federation pointed out that when evaluating whether or not negotiations have been attempted and have reached a deadlock depend on the following factors, such as the duration of negotiations and the authenticity of efforts to reach a negotiated conclusion.[33] Russia Federation's claim was confirmed by court. Although the ICJ has not imposed the optimal conditions for fruitful negotiation, it has nonetheless laid the groundwork for future courts to conduct a more rigorous analysis of states' efforts to negotiate.[34] The court found that Georgia's statements to Russia—both direct statements and those made through the Security Council—were not made as far as possible with attempts to initiate diplomatic talks, and thus did not satisfy the requirement to deploy negotiation as precondition for solving maritime boundary disputes.[35]

This case imposed a higher standard for negotiation and barred third party dispute settlement—better guarantee that complaining states at least attempt to reach bona fide agreements before

[31] Application of Int'l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 50 I.L.M. 607, para. 144 (Apr. 1, 2011).

[32] Application of Int'l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 50 I.L.M. 607, para. 159(Apr. 1, 2011).

[33] Application of Int'l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 50 I.L.M. 607, para. 150(Apr. 1, 2011).

[34] William P. Lane, "Keeping Good Faith in Diplomacy: Negotiations and Jurisdiction in the ICJ's Application of the CERD", *International and Comparative Law Review*, vol. 35 (2013), p. 46.

[35] Application of Int'l Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 50 I.L.M. 607, para. 181-182(Apr. 1, 2011).

invoking the court.[36] A heightened threshold of negotiation which will in turn encourage states to make more than *pro forma* efforts at initiating consultation before turning to the court or conciliation.[37]

Thus in the general cases, negotiations and other settlements under Article 33 of UN Charter shall be exhausted before submitted to compulsory jurisdiction. However, in special circumstances, according to Article 298(1)(a)(i) of UNCLOS, a State may, without prejudice to the obligations arising under section 1 of Part XV, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to disputes relating to sea boundary delimitations. A state shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2.

Article 298(1)(a)(i) described in UNCLOS, negotiation serves as precondition for solving maritime boundary disputes through conciliation. Hence it would appear that there is a specific obligation under 298(1)(a)(i) to negotiate, notwithstanding the obligation arising under section 1 of Part XV. It is noteworthy that Article 298 does not permit sea boundary delimitation disputes to be exclude from all of the disputes resolution provision of UNCLOS, it simply means that there is no obligation to resolve the disputes through compulsory procedures entailing binding decisions. Thus making a declaration under Article 298 does not mean that there is no longer an obligation to settle dispute, instead the parties are still under an obligation to settle their disputes under section 1. Thus we can deduce that the specific obligation to negotiate based on 298(1)(a)(i) can apply the same criteria of negotiation under section 1 of Part XV. Namely the obligation under 298(1)(a)(i) has the same extent and nature as the obligation to negotiate under section 1 of Part XV.[38] The negotiation of maritime boundary disputes shall be exhausted before submitted to conciliation under Annex V, Section 2.

[36] William P. Lane, "Keeping Good Faith in Diplomacy: Negotiations and Jurisdiction in the ICJ's Application of the CERD", *International and Comparative Law Review*, vol. 35 (2013), p. 43.

[37] David J. Scheffer, "Non-Judicial State Remedies and the Jurisdiction of the International Court of Justice", *Stanford Journal of International Law*, vol. 27 (1990), p. 154.

[38] Anne Sheehan, "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes", *University of Queensland Law Journal*, vol. 24 (2005), p. 179.

As to the qualification that conciliation may be instituted only after the parties have not reached an agreement within a "reasonable time", it seems likely that the conciliation commission would examine firstly, whether there have in fact been "meaningful" negotiations and secondly, whether a party has concluded that the possibilities of negotiating to reach agreement have been exhausted, rather than imposing fixed time limit.[39]

As for the nature of meaningful negotiation, it will not be the case when either of them insists upon its own position without contemplating any modification of it. [40]Meaningful negotiations can reflect the genuine attempt to negotiate and to seek an agreement to resolve the disputes.

In addition, the meaning of exhausting all possibility to negotiate in Article 298(1)(a)(i) was demonstrated in Conciliation between Timor-Leste and Australia, the commission found that negotiations on maritime boundaries between Australia and East Timor did take place between 2003 and 2006 in the lead up to CMATS. While CMATS is an agreement resulting from those negotiations, it does not purport to resolve the dispute over permanent maritime boundaries. It is at most a provisional arrangement under Articles 74(3) and 83(3). Thus this prior negotiations between the Parties did not produce an agreement on sea boundary delimitation.[41] Moreover, negotiations do appear to have taken place between the Parties regarding CMATS between September 2014 and March 2015 in the context of attempts to resolve the matter before the tribunal in the *Timor Sea Treaty Arbitration*, also without success.[42] Therefore the commission concluded that the possibility of negotiating to reach agreement have been exhausted, satisfying the requirements of Article 298(1)(a)(i) regarding the competence of the Compulsory Commission.

[39] Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers, 1989), p. 127.

[40] ICJ Reports 1969, p. 47, para. 85(a).

[41] Conciliation between Timor-Leste and Australia Decision on Australia's Objections to Competence, The Democratic Republic Of Timor-Leste v. The Commonwealth Of Australia, 2016, para. 79.

[42] Conciliation between Timor-Leste and Australia Decision on Australia's Objections to Competence, The Democratic Republic Of Timor-Leste v. The Commonwealth Of Australia, 2016, para. 80.

THE OBLIGATION TO NEGOTIATE INTERIM ARRANGEMENTS IN THE ABSENCE OF SETTLED MARITIME BOUNDARIES

Where the states are not able to reach any agreement of drawing maritime boundary by negotiation, one of the parties may agree to make some concessions or all the parties involved may make mutual compromises in order to eliminate the differences between them. The compromise involves the establishment of interim arrangements over the disputed area according to both paragraphs 3 of Article 74 and 83.[43] They stipulate that pending agreement on delimitation on the basis of international law, in order to achieve an equitable solution, the States concerned shall make every effort to enter into provisional arrangements of a practical nature in a spirit of understanding and cooperation and, during this transitional period, not to jeopardize or hamper the conclusion of the final agreement. Hence, article 74(3) and 83(3) of the LOS Convention impose obligations on the States concerned (i) to make every effort to enter into provisional arrangements, and (ii) not to jeopardize or hamper the reaching of a final agreement. The first point will be emphasized in this article.

Interpretation of the paragraphs 3 of Article 74 and 83

In the interpretation of the provisions, pursuant to Article 31 and 32 of the Vienna Convention on the Law of Treaties, in interpretation, the focus shall be on literal, contextual and teleological considerations.[44]

By literal interpretation, since Articles 74(3)/83(3) utilize, the term "arrangement" rather than "agreement" or "treaty", it would be worthwhile to examine the legal nature of the "arrangement". The question has arisen that whether the "arrangement" constitutes a particular form of instrument? The UN Fish Stocks Agreement used the term "arrangement" to indicate co-operative mechanism.[45] In state practice, "arrangement" not only can be a legal binding treaty, but also in a form of non-binding mechanism. For instance, in the *Fisheries Jurisdiction*

[43] Mensah Thomas, "Joint Development Zones As An Alternative Settlement Approach In Maritime Boundary Delimitation", in Ranier Lagoni and Daniel Vignes(eds.), *Maritime Delimitation* (The Netherlands, Martinus Njhoff, 2006), p. 145.

[44] Article 31 and 32 of the Vienna Convention on Law of Treaties, 1155 U.N.T.S. 331.

[45] Article 1 of the UN Fish Stocks Agreement, it defined the term as follows: "arrangement" means a co-operative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in sub-region or region for one or more straddling fish stocks or highly migratory fish stocks.

Case, the discussions between the Prime Ministers of the two countries in 1973 led to the conclusion of an "Interim Agreement in the Fisheries Dispute", then the Court went on to examine the relationship between the interim agreements, it said that:

> "The judgment of the Court . . . will not completely replace with immediate effect the interim agreement, which will remain *a treaty in force*. In so far as the judgment may possibly deal with matters which are not covered in the interim agreement, the judgment would . . . have immediate effect."

Thus in *Fisheries Jurisdiction case* the term "arrangements" has the same meaning with "agreement" to indicate the Exchange of Notes, which is a treaty. However, in practice, co-operation between the law enforcement agencies of two countries has been taking place through less formal arrangements. United States government has entered into special arrangements with several countries in a view of co-operation in the field of law-enforcement at sea and in most cases the arrangement is oral and operates case by case.[46] Hence these arrangements of United States are intended to be informal, i.e. not intended to be legally binding. As the arrangement of a practical nature is not an agreement on final delimitation, the arrangement can be less formal than the agreement on final delimitation. The arrangement can be in the form of Exchange of Notes, Agreed Minute, Memorandum of Understanding and so on.[47]

By teleological interpretation, according to the first sentence of paragraph 3 of Articles 74/83, the interested states shall "in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature". In other words, States are under a heavy obligation to negotiate in good faith to conclude arrangements of a practical nature pending delimitation. This obligation to make every effort to enter into provisional arrangement of a practical nature in a spirit of co-operation is in line with preamble of UNCLOS that settling all issues relating to the law of the sea in a spirit of mutual understanding and cooperation.

However, under Article 74(3) and 83(3), only a general obligation to co-operate applies when deposits lie across already delimited boundary lines or are situated in areas of overlapping

[46] John Siddle, "Anglo-American Co-operation in the Suppression of Drug Smuggling", *International and Comparative Law Quarterly*, vol 31(1982), p. 738.

[47] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 25.

claims. The substantive content of this cooperative requirement is uncertain.[48] The separate opinion of Judge Jessup in the North Sea cases notes that the principle of international cooperation is well established under customary international law.[49] Then in 2007, the Tribunal in Guyana v. Suriname had the opportunity to pronounce on the issue. The tribunal held that the first obligation contained in Article 74(3) and 83(3) of UNCLOS is designed to promote interims regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation. It added that this obligation imposes on the parties "a duty to negotiate in good faith".[50] While the obligation to negotiate stipulated in 74(3) and 83(3) is clear, the outcome of such negotiation is unforeseeable. In other words, concerned parties are under the obligation to negotiate in good faith to enter into provisional agreements, there is no further obligation to arrive at a definitive conclusion to these negotiations, such as joint development agreement or other similar arrangements.[51]

The tribunal held that this obligation to make every effort to enter into provisional arrangement of a practical nature was violated by Suriname with its conduct in the CGX incident.[52] Suriname should have actively attempted to engage Guyana in a dialogue, but instead resorted to self-help in threatening the CGX oil-rig.[53] Guyana had also violated that obligation by not seeking to engage Suriname in discussions concerning the drilling at an earlier stage in a spirit of co-operation.[54]

By contextual interpretation, What Articles 74(1)/83(1) of the Convention require is that the delimitation of maritime boundaries "shall be effected by agreement". In the *North Sea*

[48] Ong D M, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?", *American Journal of International Law*, vol 93 (1999), p. 784.

[49] The separate opinion of Judge Jessup in the North Sea Cases, 1969 ICJ Report, p. 82.

[50] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007(Guyana v. Suriname Award), para. 460.

[51] H. Yu, Joint Development of Mineral Resources, as Asian Solution? In *Asian Yearbook of International Law* (Dordrecht, Martinus Nijhoff Publishers, 1992), p. 100.

[52] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007(Guyana v. Suriname Award), para. 474.

[53] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007(Guyana v. Suriname Award), para. 476.

[54] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007(Guyana v. Suriname Award), para. 477.

Continental Shelf Cases the ICJ relied on the "good faith", and "equitable principles" to require State " to have an obligation to enter into negotiations with a view to arriving at an agreement".[55] Thus Paragraph 1 of Article 74/83 institute obligations to negotiate in good faith in order to reach agreement on maritime boundary delimitation, however, it does not require that delimitation negotiations should be successful.[56] And According to paragraph 3 of Articles 74/83 of the LOS Convention, pending agreement as provided for in paragraph 1, the States concerned…shall make every effort to enter into provisional arrangements of a practical nature. The term 'make any effort' is fully compatible with the principles relating to the obligation to negotiate in good faith under paragraph 1,[57] paragraphs 3 of 74/83 also does not entail an obligation to successfully reach an agreement, but require States to negotiate in good faith in order to reach the interim arrangements.

State practice as interim arrangements under 74(3)/83(3) of UNCLOS

For policy-maker of states, there are various instances of relevant provisional arrangements, and every option has its advantages. In state practice, the examples of such arrangements include joint development zones and provisional boundaries (*de facto* boundary or provisional line). Generally speaking, joint exploitation zones either of the continental shelf or for fishing purposes are by far the most widely used form of interim measure in practice. Indeed, joint development zones had been in use in a number of areas throughout the world even before the adoption of the LOS Convention.[58] However, it does not mean that all joint development zones have the same characteristics. It is to be noted that there are variations between the arrangements even in the same category of the provisional arrangements.

Joint Development Zones

The British Institute of International and Comparative Law defined a joint development zone as "*an agreement between two States, developing inter-State co-operation and national measures to share jointly in agreed proportion of offshore oil and gas, in a designated zone of*

[55] 1969 *ICJ Reports*, para. 85(a).

[56] Land and Maritime Boundary between Cameroon and Nigeria(Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p. 303, para. 244.

[57] Territorial and Maritime Disputes between Nicaragua and Honduras in the Caribbean Sea(Nicaragua v. Honduras), Judgment, ICJ Reports 2007, p. 659, para. 321(4).

[58] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 95.

the seabed and subsoil of the continental shelf to which both or either of the participating States, their rights are entitled in international law".[59] It appears that the need for a joint development zone arises when there is a possibility of the existence of oil and gas deposits, and coastal States wish to exploit the resources before they reach an agreement on a maritime delimitation.[60]

There are many instances of States having recourse to a joint development zone in an area of overlapping claims, so that neighboring states may profit from the resources of the area despite no definitive maritime boundary has been determined.[61]

When boundaries are uncertain and difficult to achieve, especially between countries with disparate legal, economic and political systems, states would continue to reach interim arrangements while negotiations proceed. For instance, the claims of Malaysia and Thailand to a disputed area of continental shelf in the Gulf of Thailand initiated the negotiation process to co-cooperate in the joint development of the hydrocarbon resources, which culminated in the adoption of the 1979 Memorandum of Understanding and 1990 joint development agreements between the two countries.[62] Article VI (1) of the 1979 Memorandum of Understanding provides that, notwithstanding Article III(1) that established the Malaysia-Thailand Joint Authority for a period of fifty years, if both parties arrive at a satisfactory solution on the problem of the delimitation of boundary of the continental shelf before the expiry of the said fifty-year period, the Joint Authority shall be wound up.[63] Thus this joint development arrangement is of interim nature, it is dependent on future continental shelf delimitation agreement.

---

[59] H. Fox ed., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International Law, 1989), p. 45.

[60] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 97.

[61] Klein, Natalie, "Provisional measures and provisional arrangements in maritime boundary disputes." *The International Journal of Marine and Coastal Law*, vol 21 (2006), p. 433.

[62] Ong D M, "The 1979 and 1990 Malaysia—Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?", *International Journal of Marine & Coastal Law*, vol 14, (1999), p. 209.

[63] 1979 Memorandum of Understanding Between Malaysia and the Kingdom of Thailand on the Establishment of the Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, Article VI(1), III(1).

This category of interim arrangements are similar to another joint development arrangement between Australia and Indonesia in 1989 Timor Gap Treaty, this treaty was agreed in 1989 to fill the gap between the maritime boundaries of the respective countries which were delimited by agreement in 1971 and 1972.[64] In 1988 the Foreign Ministers of Australia and Indonesia released a joint statement that establishing a zone of co-operation in the Timor Gap in respect of petroleum exploration and exploitation. Slightly more than one year later in 1989, this joint statement was followed up by a definitive treaty.[65] The treaty was no longer in force when East Timor seceded from Indonesia in 1998, Australia and East Timor negotiated a new treaty called Timor Sea Treaty to replace the Timor Gap Treaty.

Then in 1992, Malaysia and Vietnam signed a Memorandum of Understanding, this agreement also concerns a disputed area of the continental shelf in the Gulf of Thailand which has been subject to overlapping claims by both countries for many years.[66] According to Article 3(b) of this understanding, the two national oil companies of Malaysia and Vietnam will enter into a commercial arrangement between themselves for the exploration and exploitation of petroleum in the defined area subject to the approval of the respective governments. The co-operation in this agreement obviously eschews institutional tendencies and intended to facilitate the nominated national oil companies in the efforts to secure investment partners in the search for oil and gas.

Provisional boundaries

As described above, States have developed variations of joint development zones to meet their specific needs and policy objectives. However, other forms of co-operative arrangements which are not based upon joint zones but upon provisional boundaries (*de facto* boundary or

[64] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, ATS 31; Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, ATS 32.

[65] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, *Australasian Legal Information Institute - Australian Treaty Series 1991*.

[66] Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf involving the Two Countries to enable joint exploitation of petroleum in the Defined Area, which is better known as Block PM3 Commercial Arrangement Area (CAA).

provisional line), have also been examined. We will also analyze examples of such arrangements and relevant issues.

As for *de facto* boundary, which means State *A* draws a boundary that is favorable to itself and its determination keeps this boundary being very strong. Also there is an urgent need for State *B* to fish in the area beyond this boundary. There is a need, then, for State *B* to agree on an agreement tacitly recognizing the presence of the *de facto* boundary but at the same time saving its official position that it does not recognize this *de facto* boundary.[67]

For example, in 1977, USSR and Japan used to make the fisheries arrangement on the basis of *de facto* boundaries, both Japan and USSR never embarked upon negotiations for the delimitation of their maritime boundaries.[68] In May 1977 they concluded the two provisional fisheries agreements – one was to give access to Japanese fishermen to the USSR exclusive fisheries zone and the other was to give access to USSR fishermen to the Japanese fisheries zone. In implementing the agreements, Japan has acted upon the reality that the USSR exercised jurisdiction in the disputed islands, and recognized the equidistance line between the disputed islands and the Japanese islands as *de facto* maritime boundaries.[69] Based on this, the map by the Japanese fisheries organization for fishermen used the equidistance line as a fisheries boundary between Japan and Soviet Union.

If we look at the provisional agreement of 1977 between USSR and Japan, although this de facto boundary appears to be favorable to USSR, there is also an urgent need for Japan to fish in the area beyond the de facto boundary in USSR EEZ. Thus there is a need for Japan to agree on a fisheries agreement tacitly recognizing the presence of this *de facto* boundary.

As for provisional lines, which means a single provisional boundary can be drawn for the purpose of control of the exploitation of specific resources. When a State accepts a line as a provisional boundary for a specific purpose, there might be a signal to the other State that this

[67] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 128-129.

[68] Alex G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A* Case *Study of the Russian Federation*, (Martinus Nijhoff Publishers, 1994), p. 310.

[69] Statement of the Japanese government of 25 February 1977, reproduced in 28 *Japanese Annual of International Law*, p. 86.

line has possibility being transformed into a permanent one, if the latter is willing to compromise.[70]

For example, in 1981, Australia and Indonesia agreed on the "Provisional Fisheries Surveillance and Enforcement Line (PFSEL)" through a Memorandum of Understanding.[71] The PFSEL divided the disputed area in a way that delivered 70 per cent of it to Indonesia.[72] The PFSEL purported to serve as a provisional line pending final delimitation, beyond which one party could not exercise its enforcement action against the fishing vessels of the other party.

In 1997 the two countries reached agreement on maritime boundaries of the continental shelf, exclusive economic zone and joint development zone. In the package, they utilized the pre-existing PFSEL (single provisional fisheries line) as the exclusive economic zone boundary with a minor modification and an additional boundary line further to the west of the PFSEL. We can find in the beginning the purpose of the provisional line between Australia and Indonesia was limited only for the enforcement jurisdiction on fishing vessels,[73] and then both of them agreed to utilize this provisional boundary as a permanent one in the final delimitation of 1998.

States practice concerning the joint development zones and provisional boundaries can provide a practical guide to other States that are searching for provisional arrangements under the provisions of Articles 74(3)/83(3) of the LOS Convention in disputed areas in the other parts of the world.

CONCLUSION

As illustrated above, the negotiation, as a significant form of dispute resolutions, shall obey the rule of law. Therefore, if the disputes among China and other interested States could be

[70] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 140.

[71] Victor Prescott, "Report Number 6-2(4): Australia-Indonesia (Fisheries) ", *International Maritime Boundaries*, p. 1238-1243.

[72] Victor Prescott, "Report Number 6-2(4): Australia-Indonesia (Fisheries) ", *International Maritime Boundaries*, p. 1232.

[73] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 141.

resolved by negotiation of final maritime delimitation, all countries bear the obligation to negotiate in line with two principles, which includes:

Firstly, the parties to a dispute should enter into and conduct negotiations in good faith, with a view to arriving at agreements. Article 74(1) and 83(1) of the UNCLOS implies proper obligation to negotiate in good faith. Hence China should perform its obligations in good faith, and to conduct the negotiations to be meaningful. Furthermore, China would not fulfill its obligation once there is a violation of good faith, for instance, fraud or espionage.

Secondly, the concerned states are under obligation to exhaust all possibility to negotiate the maritime boundary. Article 286 institute obligations that negotiations and other settlements stipulated under Article 33 of UN Charter shall be exhausted and attempted before turning to compulsory procedure. Although pursuant to Article 298 China exercise its right to opt out of the compulsory procedures. There is an obligation for States to negotiate in a reasonable time under Article 298, arising under section 1 of Part XV. Even if states could exclude the compulsory procedure, they still have obligation to negotiate to the same extent as the standard instituted in section 1 of Part XV. Namely they should still exhaust all possibility to negotiate before the cases are submitted to conciliation. If the maritime boundary disputes between China and other States arise after the entry into force of UNCLOS, China has obligation to exhaust all possibility to negotiate before the case be submitted to compulsory conciliation.

However, if no maritime boundary has been drawn among neighboring coastal states, under 74(3) and 83(3) of the UNCLOS, States concerned bear an obligation to negotiate in good faith to reach interim arrangements before final maritime delimitation. There are various instances of provisional arrangements pending ultimate delimitation, including joint development zone and provisional boundaries, which can help neighboring coastal states to promote some exploitation activities in disputed areas, and they can still preserve their positions on the final delimitation.[74] Thus China and other interest State could negotiate in good faith to enter into an appropriate interim arrangement in the overlapping area pending final delimitation.

On August 2, 2018, state councilor and Foreign Minister of China named Wang Yi noted that China and ASEAN countries reached the agreement on the Single Draft Negotiating Text of

[74] Kim, Sun Pyo, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijoff Publishers, 2004), p. 316.

the Code of Conduct (COC) in the South China Sea.[75] Although the Negotiating Text is confidential, Wu Shicun, an influential South China Sea expert believes that the COC will involve some provisions to encourage parties in the region to promote maritime cooperation and joint development in the South China Sea. China and interested Countries should engage in cooperation of certain form before the settlement of disputes, in order to create a good external environment for the final settlement of the South China Sea issue, and increase mutual political trust between the disputed countries.[76] Overall, joint development of petroleum and fishery resources can be a step forward towards the final settlement of maritime boundary disputes in the South China Sea.

[75] Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi: The Agreement of the Single Draft Negotiating Text of the Code of Conduct (COC) in the South China Sea Proves that China and the Countries of the Association of Southeast Asian Nations (ASEAN) Are Capable of Reaching Regional Rules Adhered to by All*, 2018/08/02, available at:https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1583333.shtml.

[76] China Liberation Daily, *Water links to water, promoting the cooperation in South China Sea*, available at: http://www.nanhai.org.cn/info-detail/22/6658.html.