Compulsory Jurisdiction Under UNCLOS: Obligations Applicable Pending Delimitation

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Structured Abstract

Article Type: Research Article

Purpose—The paper considers whether the scope of the optional exception to compulsory jurisdiction under article 298(1)(a)(i) of United Nations Convention on the Law of the Sea (UNCLOS) covers disputes arising pending delimitation and which relate to obligations of conduct under 74(3) and 83(3) of UNCLOS.

Design/Methodology/Approach—This paper interprets the relevant provisions of UNCLOS following the rules of interpretation under the Vienna Convention on Law of the Treaties. This paper also refers to the decisions and practices of international courts and tribunals as appropriate.

Findings—This paper finds that it is possible to argue, through a textual and contextual approach to interpretation, that disputes concerning the obligations of conduct should be within the scope of compulsory jurisdiction under Section 2 of Part XV.

Practical Implications—While disputes concerning sea boundary delimitations may be outside the purview of compulsory procedures where a declaration under article 298 is made, states may initiate proceedings based on disputes concerning the obligations of conduct. Importantly, this also opens the door for requesting provisional measures. The possibility of initiating proceedings also urges states to come together and negotiate in favor of a state-to-state solution to their dispute.

Value—This paper adds to the existing literature by arguing that a textual and contextual approach allows for the interpretation that obligations of conduct under paragraph

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3 of articles 74 and 83 of UNCLOS are not excluded by a declaration under Article 298 of UNCLOS. The arguments presented in this paper are valuable to those interested in understanding the scope of article 298(1)(a)(i) of UNCLOS; they may be states, scholars, and judges.

Keywords: compulsory dispute settlement,
disputed maritime areas, obligations pending delimitation

I. Introduction

Disputes concerning the delimitation of the exclusive economic zone (EEZ) and the continental shelf are some of the most high-profile issues of international law of the sea. The United Nations Convention on the Law of the Sea (UNCLOS)[1] provides that delimitation of these maritime zones "shall be effected by agreement on the basis of international law" as per Articles 74(1) and 83(1).[2] Such boundary agreements take time to reach agreement, as they touch upon various political, economic and historical factors.[3] Pending agreement on the delimitation of overlapping maritime zones ("disputed maritime areas"), States concerned have to manage a situation where two equal and potentially valid overlapping legal entitlements exist.

The lack of clarity regarding which State has exclusive rights and jurisdiction in the disputed maritime area is a significant challenge that complicates numerous activities, including those of private companies. Disputes can arise as to whether the States concerned are acting in accordance with their obligations of conduct. UNCLOS contains two distinct but interlinked obligations of conduct in this period.[4] Paragraph 3 provides that States shall make every effort to enter into provisional arrangements and not to jeopardize or hamper the final agreement.[5] The purpose of the first obligation is to get States to agree on the modalities of use of disputed maritime areas pending delimitation.[6] The second obligation in paragraph 3 aims to discourage conduct pending delimitation that has the effect of hampering the final agreement.[7] The aim here is the promotion of cooperative arrangements to ensure that the actions of the parties do not deteriorate the relationship between them in the period up to the conclusion of an agreement on the maritime boundary.

The focus of this article is not the substantive content of the obligations which have been covered elsewhere, but rather a jurisdictional question for an international court or tribunal. Due to the sensitivity of maritime delimitation of the EEZ and the continental shelf, the compulsory jurisdiction entailing binding settlement under Part XV of UNCLOS contains an optional exception. It is optional in the sense that it may be triggered by a State by issuing a declaration under Article 298(1)(a)(i) of UNCLOS rejecting the compulsory jurisdiction concerning certain limited categories of disputes, including "sea boundary delimitations."[8] The written declaration can be made when signing, ratifying, or acceding to UNCLOS and anytime thereafter. Many States have exercised this right to varying degrees (43 States have made declarations out of 170 parties to UNCLOS).[9] However, the text of Article 298(1)(a)(i) is complex, lacking clarity and judicial interpretation concerning its scope. Does the scope of the allowed exception include disputes concerning Articles 74(3) and 83(3) of UNCLOS?

This question has attracted diverging views in the relatively limited scholarship. The question is usually considered in passing by scholars as part of a broader discussion. The common view is that the text of Article 298(1)(a)(i) should cover the whole of Articles 74 and 83 of UNCLOS, arguing that obligations under paragraph 3 are excluded from compulsory procedures entailing binding decisions.[10] The two articles which consider the matter in some depth reach opposite conclusions. Liao concludes that separating disputes concerning obligations under paragraph 3 from maritime delimitation disputes would be artificial.[11] The author provides support for this conclusion by interpreting the words "concerning" and "relating to" as non-limiting and argues that the titles of Articles 74 and 83 suggest that all paragraphs are about maritime boundary delimitation.[12] On the other hand, Sim argues that a declaration under Article 298 should not exclude disputes concerning Articles 74(3) and 83(3) of UNCLOS from the purview of international courts and tribunals through a teleological interpretation based on the object and purpose of UNCLOS.[13] Both arguments have their merits and flaws.

Against this background, this article has two aims. One is to reassess some of the arguments in the literature on the interpretation of the scope of the optional exception. The other objective is to make further arguments by considering the purposes of the provisions under scrutiny. To this end, the article first addresses the meaning of the relevant provisions. Thereafter, the article moves to further examination of the provisions; in particular, the article explores whether disputes regarding obligations of conduct can be separated from disputes about "sea boundary delimitations" by looking at the contents of Articles 15, 74 and 83 and highlighting the distinct purposes within those articles. Then it discusses the possibility of an analogy that can be drawn with the decision in the *South China Sea Arbitration* to answer the question: what disputes relate to sea boundary delimitations?[14] The article then moves on to examine the use of the decision in the *Timor Sea Conciliation* in support of arguments made in the literature about the scope of the optional exception.[15]

II. Article 298(1)(a)(i): Concerning Articles 15, 74 and 83 Relating to Sea Boundary Delimitations

It has been pointed out that "the exact operation of Article 298 remains unclear."[16] The question is whether Articles 74 and 83, including common paragraphs 3 thereunder, fall within the scope of the exception under Article 298(1)(a)(i) of UNCLOS. If that is the case, disputes concerning activities in disputed maritime areas would be outside the scope of compulsory jurisdiction, where a State Party has made a declaration.

Before embarking on the analysis of the text, it is useful to consider the wording of Article 298(1)(a)(i) of UNCLOS titled "Optional exceptions to the applicability of section 2" which provides that:

> 1. When signing, ratifying, or acceding to this Convention or at any time thereafter, a State may … declare in writing that it does not accept any one or more of the procedures provided for in section 2…: (a)(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations…[17]

The general rule of interpretation requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[18] First, it is necessary to determine the meaning of the language in the text, which reflects the intention of the States Parties according to the textual approach.[19] Two key words in the text are "concerning" the interpretation and application of Articles 15, 74 and 83 and "relating to" sea boundary delimitations.[20] Before considering the ordinary meaning, it is useful to have a brief discussion of the context of Article 298(1)(a)(i) of UNCLOS.[21]

2.1 The Context

Article 298 operates within Part XV of UNCLOS, which has as an underlying principle of compulsory jurisdiction for the settlement of disputes.[22] The records of the Third United Nations Conference on the Law of the Sea (Third UN Conference) clearly show that the dispute settlement system under Part XV underwent numerous revisions during the negotiating process.[23] The resulting text is a compromise among the drafters that allowed the inclusion of compulsory procedures into UNCLOS, embodying different ideas about the dispute settlement system. Records of the Third UN Conference show that exceptions were carefully determined to promote acceptance of compulsory jurisdiction under Part XV among States that would otherwise hesitate. The opt-outs from compulsory jurisdiction were devised to create a "workable" compulsory dispute settlement system.[24]

Where disputes are not settled by the means provided for under Section 1, the default rule is compulsory dispute settlement for all disputes concerning the interpretation and application of the Convention, while opt-outs from compulsory jurisdiction are exceptions.[25]

2.2 The Ordinary Meaning

The word "concerning" can be interpreted as meaning "on the subject of something" or "about something," while the term "relating to" can also be understood as "about something." According to the Cambridge Online Dictionary, both words are prepositions. The word "concerning" means "about" and "relating to" means "connected with something." Merriam-Webster Online Dictionary defines "concerning" as "relating to" and "relating to" as a phrasal verb "to connect (something) with (something else)." According to the Oxford English Dictionary, "concerning" means "to refer or relate to; to be about." The word "relating to" does not produce a search result in the Oxford English Dictionary. However, it defines "relating" as "with to, with. To bring (a thing) into relation with." When one searches for synonyms on Cambridge and Merriam-Webster Online Dictionaries for "concerning," the following words appear: "regarding; in/with regard to; and about" and for "relating to," synonyms include "about; in regard to; and concerning." Given the overlap in meanings and synonyms of both words, it is fair to conclude that one is not broader than the other. It is also reasonable to say that both words serve a similar purpose in a sentence, as they can be used interchangeably.

What is critical in this provision is sentence construction, i.e., the use of one preposition after the other, which delineates the scope of the exception. It is useful here to use another

sentence to demonstrate the importance of sentence construction. For example, "the game show's round *concerning* famous quotes *relating to* marriage was fun." Taken in isolation, "concerning" and "relating to" serve similar purposes in this sentence—that is, connecting "something with something else." The sentence means the game show's next round is on famous quotes, but not all famous quotes, only those on marriage. As can be seen, the use of prepositions one after the other has the effect of narrowing down the scope of what is being referred to in this example sentence. The sentence structure of Article 298(1)(a)(i) of UNCLOS has the same effect: States Parties may exclude disputes regarding Articles 15, 74 and 83; however, not all disputes regarding 15, 74 and 83, only sea boundary delimitations.

The interpretation presented above regarding the meaning of the text can be bolstered by examining alternative formulations of the text. If Article 298(1)(a)(i) of UNCLOS were to solely contain the phrase "concerning the interpretation or application of Articles 15, 74 and 83" without any additional qualifiers, it would be inferred that the entirety of those provisions, including the paragraphs, would be covered. However, the addition of the "relating to sea boundary delimitations" immediately after referencing the relevant Articles further specifies the exception's scope. This is a reasonable interpretation for two connected reasons. First, it may be argued that, if the intention was to permit the exclusion of the entirety of Articles 15, 74 and 83, then a simple reference to "concerning Articles 15, 74 and 83" would have been enough to achieve that purpose. Two, if the entirety of Articles 74 and 83 were about "sea boundary delimitations" as their title suggests, it would have been unnecessary to include the phrase "relating to sea boundary delimitations" in Article 298(1)(a)(i) of UNCLOS. Is it not redundant to include "relating to sea boundary delimitations," if the whole of the provisions is about sea boundary delimitations only? The inclusion of the words *relating to sea boundary delimitations* must signify an intention. Otherwise, we would expect mention of disputes concerning the interpretation and application of Articles 15, 74, and 83 without any further qualifications.

Van Logchem and Liao raise a counterargument to the above textual interpretation. The authors consider that it would have been logical to expect the text to refer to paragraphs 1 and 2 of Articles 74 and 83 if the drafters only intended to permit the exclusion of sea boundary delimitations from the scope of jurisdiction.[26] One possible rebuttal to this argument is that the specific phrase "relating to sea boundary delimitations" included after the reference to Articles 15, 74 and 83 has the same effect as a reference to "paragraphs 1 and 2 of Articles 74 and 83." Another point is that the omission of specific references to paragraphs 1 and 2 does not necessarily or convincingly indicate an intention to exclude paragraph 3 from the scope of compulsory jurisdiction.

These textual interpretations, one advanced by this article and the opposite view by Van Logchem and Liao, run into the same problem. It is a misconception to assume that the drafters of the Convention held a common intention.[27] It is also unrealistic to think of the text as flawless and without drafting mistakes. In fact, the arbitral tribunal in the *Dispute Concerning Coastal State Rights* recognized that the interpretation of the terms "concerning" and "relating to" does not clarify whether the optional exception is triggered.[28] The result is that we must endeavor to understand and clarify whether the optional exception covers disputes under paragraph 3. This necessitates answering further questions. Does the substantive content of Articles 74 and 83 match their title? In other words, are they only about sea boundary delimitations?

III. What Disputes Relate to Sea Boundary Delimitations?

3.1 Mismatch of Titles and Contents in Articles 15, 74 and 83

From a textual viewpoint, the general reference to Articles 15, 74 and 83, as opposed to specific paragraphs, in Article 298(1)(a)(i) is the first indication of their exclusion as a whole. The titles of these provisions reinforce this viewpoint. However, taking only the titles into account glosses over the differences in substantive content between (i) Article 15 vs. Articles 74 and 83 of UNCLOS and (ii) within Articles 74 and 83.

Article 15 of UNCLOS concerns delimitation of the territorial sea and, unlike in paragraph 3 of Articles 74 and 83 of the Convention, it does not prescribe any obligation "pending delimitation." Where parties cannot agree on the territorial sea boundary, an automatic rule of delimitation applies, i.e., the boundary is the median line equidistant from the base points.[29] It is suggested that "this makes up for the fact that … there is no express provision here regarding the making of 'provisional arrangements' pending the settlement of disputes."[30] The automatic rule does not apply where a historic title or other special circumstances require a different delimitation method. In such cases, States must negotiate an agreement. However, there is no obligation of conduct pending agreement in this provision. Simply put, Article 15 of UNCLOS solely addresses delimitation.

Articles 74 and 83 of UNCLOS do not only address boundary delimitations but also issues connected to the overall process of delimitation (including dispute settlement by a third party under Part XV). Paragraphs 1, 2 and 4 of Articles 74 and 83 address boundary delimitation. Paragraphs 1 and 4 are, properly speaking, about maritime delimitation; they lay out applicable law to maritime delimitation.[31] The procedural rule in paragraph 2 can be seen as the restatement of the general obligation to settle disputes peacefully. If parties cannot agree on delimitation "within a reasonable time," the States shall refer the dispute to procedures provided for in Part XV of UNCLOS.[32] Paragraph 2 is not about delimitation per se, but about the connected obligation to resort to procedures under Part XV for the settlement of a delimitation dispute. Similarly, paragraph 3 prescribes obligations of restraint and cooperation in disputed maritime areas where parties have yet to agree on a boundary. These obligations are not about sea boundary delimitations per se, but rather about special obligations of conduct placed on coastal States pending agreement on the boundary.[33] Just taking the titles into account ignores such intricacies of the content found under them.

The issues under paragraphs 2 and 3 are not about delimitation per se, that is, the actual drawing of the delimitation line, but they still concern aspects that have some connection to maritime delimitation. For example, the obligations under paragraph 3 arise because the States concerned could not agree on a boundary and have overlapping entitlements. The argument can be made that, given the connection between delimitation and obligations, disputes about obligations can be characterized as concerning the interpretation of Articles 74 and 83 relating to sea boundary delimitations.

It is difficult to deny that there is some connection between these two classes of disputes. Yet, as it will be highlighted below, even disputes that are connected or where one is

the precondition of another can be separated for the purposes of adjudication.[34] The question is, can disputes about obligations of conduct be separated from disputes about sea boundary delimitations? To this end, this article turns to the negotiation history of the provisions and looks at how the obligations serve a distinct purpose for the purpose of delimitation.

3.2 Distinguishing Obligations of Conduct from Delimitation

The view that the whole of Articles 74 and 83 of UNCLOS "relate to" sea boundary delimitations is supported in the literature by drawing attention to how these provisions were negotiated at the Third UN Conference.[35] According to Anderson and Van Logchem, "the question of the legal principles of delimitation and the issue of interim measures pending a final delimitation were interrelated."[36] However, the connection of these issues during negotiations does not follow that a dispute concerning paragraph 3 is a dispute related to sea boundary delimitations and therefore should be excluded from compulsory procedures. From a teleological perspective, the common paragraph 3 serves a distinct purpose from the rest of the paragraphs in Articles 74 and 83 of UNCLOS. Paragraphs 1, 2 and 4 of Articles 74 and 83 are concerned with promoting delimitation of overlapping maritime areas. While these paragraphs deal with maritime boundary delimitation either through agreement or resorting to compulsory procedures entailing binding decisions if no agreement can be reached in the case of paragraph 2, the obligations under paragraph 3 serve a different purpose.

The negotiating history confirms that there are two distinct but complementary obligations under paragraph 3, both of which serve a distinct purpose from the rest of the paragraphs in Articles 74 and 83 of UNCLOS. Numerous proposals on "interim solutions" were made at the Third UN Conference, but there was no consensus on the solutions proposed. For example, several proposals suggested a moratorium on economic activities,[37] and others suggested a provisional median line[38] for the exercise of rights and jurisdiction granted by UNCLOS, neither of which was accepted. The solution found was to grant States the discretion to decide how they would manage the disputed maritime area while obliging States not to jeopardize or hamper the final agreement. As such, paragraph 3 is concerned with promoting cooperative arrangements, or otherwise, and ensuring that the actions of the parties do not deteriorate the relationship between them in the period where there is no agreement on the maritime boundary.

Moreover, the case law also confirms that this paragraph is designed to "promote provisional utilisation of disputed maritime areas pending delimitation."[39] In this regard, the importance of not suspending economic activities pending delimitation has been underlined.[40] Overall, the purpose of paragraph 3 is to ensure that States can peacefully agree on how to use maritime space while at the same time discouraging actions that may damage any future agreement on the boundary. The paragraphs are intended to facilitate and offer a means of managing seas and oceans pending delimitation. These issues can be dealt with separately and independently from issues of maritime boundary delimitation. It is clarified in paragraph 3 of articles 74 and 83 that "[s]uch arrangements shall be without prejudice to the final delimitation."[41] In other words, States cannot rely on provisional arrangements or their activities in disputed maritime areas to influence maritime delimitation or its result. Hence, it is arguable that obligations of conduct do not relate to sea boundary delimitations.

Delimitation, on the other hand, aims toward permanent division of the disputed area, and it is for this reason that the optional opt-out exists under Article 298, i.e., to prevent States from being forced to permanently give up maritime space/entitlements. Paragraph 3 is not concerned at all with the permanent division of maritime entitlements as demonstrated above. Therefore, compulsory settlement of disputes over these obligations does not prejudice the long-term rights or interests of the States concerned. Arguably, compulsory settlement of disputes concerning obligations applicable pending delimitation ensures that those rights and interests are not permanently prejudiced.

Moreover, a dispute arising pending delimitation (whether they are about the obligations of conduct or how to manage overlapping/disputed maritime areas) is a distinct issue from that of delimitation, potentially implicating other provisions[42] and obligations provided for in the Convention.[43] For these reasons, disputes about the obligations of conduct that are not per se about delimitation exercise should not be excluded from the compulsory procedures under Article 298(1)(a)(i) of UNCLOS.

A court or tribunal considering a dispute about obligations pending delimitation would not need to consider anything regarding the sensitive issue of delimitation. In a case that involved no submissions related to the breach of Articles 74(3) and 83(3) of UNCLOS, the Arbitral Tribunal had to decide whether the dispute submitted by the Philippines was "related to sea boundary delimitations." This case is helpful for demonstrating that certain disputes that are connected to sea boundary delimitations can be separated from the actual boundary delimitation dispute for the purposes of adjudication.

3.3 Annex VII Tribunal: A Dispute About Entitlements, Not Sea Boundary Delimitation

In *South China Sea Arbitration,* the Annex VII Tribunal interpreted and applied Article 298 of UNCLOS to determine its jurisdiction.[44] The Philippines made several submissions to the Arbitral Tribunal, which were carefully drafted[45] to raise no issues concerning maritime delimitation given China's declaration according to Article 298(1)(a)(i) of UNCLOS.[46] While neither formally appearing nor participating in the proceedings before the Arbitral Tribunal, China published a "Position Paper" outlining China's argument on why the Tribunal lacked jurisdiction.[47] The Chinese objection to the Tribunal's jurisdiction rested on three arguments: (i) the real dispute concerns territorial sovereignty over maritime features, (ii) parties agreed to settle their relevant disputes through negotiation and, last, (iii) even if the tribunal considered that subject matter of the dispute concerned interpretation or application of UNCLOS, the subject matter falls within the scope of China's declaration excluding maritime delimitation from compulsory procedures under Article 298(1)(a)(i) of UNCLOS.[48]

As mentioned above, the Philippines made no submissions relating to Articles 74(3) and 83(3) of UNCLOS. Among other things, the submissions included disputes concerning maritime entitlements claimed by China based on certain maritime features. The Philippines argued that the Arbitral Tribunal had jurisdiction to decide the status of certain insular features, i.e., rocks that are entitled to a 12-nm territorial sea, low-tide elevations that are entitled to no territorial sea of their own, and islands that are entitled to a 200-nm

exclusive economic zone. A maritime feature deemed as an island would be entitled to an extensive maritime area in comparison to a rock—an important distinction for China and the Philippines.

The Tribunal's reasoning on whether the submissions presented by the Philippines on the status of maritime features were excluded by China's declaration under Article 298 of UNCLOS is relevant for the discussion in this article. The submissions/disputes relating to the status of certain maritime features did not fall under China's declaration under Article 298 of UNCLOS.[49] According to the Tribunal:

> It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.[50]

After this general remark, the Tribunal considered that one of "the first matters" addressed in maritime delimitation is usually "fixing [of] the extent of parties' entitlements" to identify the area of overlap. However, the Tribunal considered that "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of the parties overlap."[51] Put differently, this highlights that matters of entitlement do not relate to sea boundary delimitations. In the words of the Tribunal, "the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries."[52] As such, the Tribunal went on to decide the issues raised by the Philippines without delimiting the maritime boundary.[53] One can make arguments by analogy from the logic of the Tribunal.

First, disputes about obligations of States pending delimitation are not issues considered in the course of the exercise of boundary delimitation. In fact, they are independent of the act of maritime boundary delimitation. This can be deduced from the practice of international courts and tribunals. In three cases where both issues of maritime delimitation and alleged breach of obligations pending delimitation were raised, courts and tribunals considered disputes over obligations independently of their maritime delimitation exercise. Such disputes were not considered during maritime delimitation but separately from the delimitation exercise, meaning in a separate part of the decision.[54] There can be delimitation without a court or tribunal considering the obligations of conduct if none of the parties to a case make submissions on this point. What is remarkable is that delimitation cannot take place without first determining the entitlements of each party. The Arbitral Tribunal found that a question that is separate but essential to delimitation falls outside the scope of Article 298(1)(a)(i). Arguably, a question that is never a precondition or part of the exercise of tackling maritime delimitation (such as disputes about the obligations) should also fall outside the scope of Article 298(1)(a)(i).

The difficulty that this argument runs into is the fact that the status and entitlements of features are dealt with in Articles 13 and 121, and not in Articles 74 and 83 of UNCLOS. Article 298(1)(a)(i) does not mention Articles 13 and 121. For this reason, though they may bear a strong connection to delimitation, Articles 13 and 121 do fall outside the scope of Article 298(1)(a)(i) so long as submissions carefully separate the issues of delimitation and entitlements. Notably, the latter argument also has its critics, given how closely the matter is tied to delimitation.

IV. Timor Sea Conciliation Commission on Article 298(1)(a)(i) of UNCLOS

While no international court or tribunal directly pronounced whether or not disputes concerning interpretation and application of Articles 74(3) and 83(3) of UNCLOS are within the scope of the exception in Article 298(1)(a)(i), the Timor Sea Conciliation Commission had to address this issue, albeit indirectly, because disagreements emerged between the parties regarding the scope of the Commission's competence.[55] Australia objected to Timor-Leste's request to the Commission regarding "transitional arrangements" on the basis that those issues do not fall under the Commission's competence because they do not concern matters in Article 298 of UNCLOS.[56] This view suggests that only matters removed from the compulsory jurisdiction under Part XV may be submitted to compulsory conciliation under Article 298(1)(a)(i) of UNCLOS. In other words, the matters that are within the compulsory jurisdiction cannot be conciliated. This view is examined below later. This was the essence of Australia's objection to the competence over some of Timor-Leste's submissions. It is useful to consider those submissions in more detail.

In the opening session held on 26 August 2016, Timor-Leste specified the issues for the Commission with which she requested assistance:

> First, we hope that the Commission can assist the Parties to reach an agreement on the delimitation of permanent maritime boundaries…
>
> ….
>
> [A] second task for the Commission is to assist Australia and Timor-Leste to agree on appropriate transitional arrangements in the disputed maritime areas, to bring the parties from their current temporary arrangements to the full implementation of their newly agreed permanent maritime boundary.
>
> Finally, a third task for the Commission, and one related to the issue of transitional arrangements, concerns the post–CMATS [Certain Maritime Arrangements in Timor Sea] arrangements. With the expected termination of CMATS, and with it the Timor Sea Treaty, the parties will benefit from the assistance of the Commission in finding the optimal way to come to a mutual position on dissolving the joint institutions and arrangements found in those provisional arrangements and moving on.[57]

In the same opening session, Australia objected that the second and third tasks "are not only outside the notification by Timor-Leste which commenced the proceedings, they are also on any view outside Article 298 of UNCLOS because they do not concern the matters in that article."[58]

The Commission ruled that it had competence to deal with Timor-Leste's second and third requests. Based on this decision, some literature on this topic suggests that the Commission's decision supports the argument that the whole of Articles 74 and 83 of UNCLOS are captured by the exemption.[59] However, there are two separate reasons why the Conciliation Commission's rejection of Australia's objection should not be interpreted to support the argument that paragraph 3 falls within the scope of the optional exception under Article 298(1)(a)(i) of UNCLOS.[60] The first reason is the distinction between "provisional arrangements" on the one hand, and "transitional arrangements" on the other.[61] Second, this exercise by the Conciliation Commission is better viewed as akin to an exercise to

determine incidental competence once it is established that it has competence over the submission, which concerns delimitation of the maritime boundary.

First, the transitional arrangements that Timor-Leste requested the Commission's assistance with are being conflated with the provisional arrangements of a practical nature envisaged by Articles 74(3) and 83(3) of UNCLOS. The key difference between transitional arrangements and provisional arrangements is that the former is entered into to dissolve existing provisional arrangements and prepare for the application of the agreement on the maritime boundary. Provisional arrangements, on the other hand, tend to exist when there is no agreement on the maritime boundary, i.e., pending delimitation. Transitional arrangements are intended to facilitate implementation of the agreed maritime boundary "by bring[ing] the Parties from their current [provisional] arrangements to the full implementation of their newly agreed permanent maritime boundary," and also to bring the already existing provisional arrangements[62] between the parties to an end by "mutually agreed steps."[63]

The fact that there already existed provisional arrangements between the parties, which made direct reference to Articles 74(3) and 83(3) of UNCLOS,[64] makes it illogical to construe Timor-Leste's request for transitional arrangements as "provisional arrangements" within the meaning of paragraph 3. The arrangements that the Commission eventually assisted the parties with were not "provisional arrangements" pending delimitation pursuant to Articles 74(3) and 83(3) of UNCLOS. At best, the request was about existing provisional arrangements between the parties, but only in terms of how to end those arrangements. Therefore, the very general statement of the Commission in paragraph 97[65] needs to be read in light of the request and the actual findings.[66] Put simply, one should exercise caution in interpreting the extract cited above as confirming the exclusion of Articles 74(3) and 83(3) of UNCLOS from the purview of binding procedures.

Second, one must also note that the scope of a conciliation commission's competence is subtly different from the scope of the optional exception under Article 298(1)(a)(i) of UNCLOS. In its own words, the Commission's mandate was to "comprehensively engage with the Parties to address the issues necessary to achieve an amicable and durable settlement."[67] As such, when the Commission concluded that it had competence to deal with the dispute concerning maritime delimitation, the request regarding transitional arrangements came under its incidental competence because they would help assist in the resolution of the dispute relating to "sea boundary delimitations." The Commission's exercise, establishing the scope of issues that it could deal with, is an issue of incidental competence within the context of conciliation.[68] A conciliation commission's finding of competence cannot be determinative of whether such disputes are excluded from compulsory dispute settlement by an Article 298 declaration.

V. Conclusion

The scope of compulsory dispute settlement of UNCLOS is limited. A dispute must be within the limits of jurisdiction set in the Convention and the optional exceptions to jurisdiction that States may decide to avail themselves of. However, declarations made under

Article 298 are not taken at face value.[69] It is for the court or tribunal to examine the submissions and the scope of the relevant optional exception to decide whether the claimant State identified a question for the court or tribunal separate from boundary delimitation concerning the interpretation and application of the Convention. Such questions of subject matter jurisdiction are undoubtedly questions of law, *compétence de la compétence* for a court or tribunal to decide.

By considering the ordinary meaning of the text in Article 298(1)(a)(i) within its context in light of the object and purpose of the text, it is argued that the optional exception should not cover disputes concerning the obligations under paragraph 3 of Articles 74 and 83 of UNCLOS. This article also showed that disputes about obligations of conduct have been addressed separately from maritime delimitation by courts and tribunals, demonstrating the separability of the related disputes. The main hurdle to this interpretation is the fact that while obligations of conduct address an issue different to maritime delimitation, textually they fall under the heading of Articles 74 and 83 of UNCLOS. It is expressed in this article that this textual fact should not be taken at face value. One needs to acknowledge different functions served by different parts of the provisions and the differences between Article 15 on the one hand, and Articles 74 and 83 on the other.

It should be possible for a court or tribunal to address disputes about the interpretation and application of the obligations of conduct and related rights and obligations in the Convention, conscious of the limits on the submissions and without advancing or detracting from parties' claims of maritime boundaries. Indeed, the Annex VII Arbitral Tribunal in *Guyana v. Suriname* highlighted the role that courts and tribunals can play where a dispute arises concerning the obligations under Articles 74(3) and 83(3) of UNCLOS when parties are reluctant to consent to a third party settling the boundary dispute.[70]

Notes

1. United Nations Convention on Law of the Sea (adopted December 10, 1982, entry into force November 16, 1996) 1883 *UNTS* 397 (hereinafter UNCLOS).

2. UNCLOS, arts. 74(1) and 83(1).

3. Michael Byers and Andreas Østhagen, "Settling Maritime Boundaries: Why Some Countries Find It Easy, and Others Do Not," in Dirk Werle et al., eds., *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese* (Brill | Nijhoff 2018) pp. 162–168, https://doi.org/10.1163/9789004380271_028.

4. PCA, *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the LOSC in the Matter of an Arbitration Between Guyana and Suriname*, Award of September 17, 2007, available online at PCA website: https://pcacases.com/web/sendAttach/902 (hereinafter *Guyana v. Suriname*) para. 459; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire),* Judgment, ITLOS Reports 2017, p. 4, para. 626 (hereinafter *Ghana v. Côte d'Ivoire*).

5. UNCLOS, arts. 74(3) and 83(3).

6. *Ghana v. Côte d'Ivoire,* para. 627.

7. *Guyana v. Suriname,* para. 465.

8. UNCLOS, art. 298(1)(a)(i).

9. The declarations made are available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed October 31, 2025.

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11. Liao (n 10), p. 310.

12. *Ibid.*

13. Christine Sim "Maritime Boundary Disputes and Article 298 of UNCLOS," *Asia-Pacific Journal of Ocean Law and Policy*3 (2018), p. 232, https://doi.org/10.1163/24519391-00302005. Also, Robert Beckman and Christine Sim, "Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues," in Myron H Nordquist, John Norton Moore, and Ronan Long, eds., *Legal Order in the World's Oceans* (Brill Nijhoff, 2018), pp. 228, 248, https://doi.org/10.1163/9789004352544_013.

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15. PCA, *In the Matter of the Marine Boundary Between Timor-Leste and Australia before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea*, The Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, available at https://pcacases.com/web/view/132 (hereinafter *TS Conciliation Report*).

16. Sim (n 13), p. 234.

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18. Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force January 27, 1980), 1155 UNTS 331, Article 31(1) (hereinafter VCLT).

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21. VCLT, art. 31.

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25. Andreas Zimmermann and Jelena Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS," *The Law & Practice of International Courts & Tribunals* 12 (2013), pp. 431–461, 447, https://doi.org/10.1163/15718034-12341266.

26. Van Logchem (n 10), p. 195; Liao (n 10), p. 310.

27. Douglas Guilfoyle, "The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?" *Asian Journal of International Law* 8 (2018), pp. 51, 52, https://doi.org/10.1017/S2044251317000133.

28. PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine V Russian Federation)* (Award Concerning the Preliminary Objections of the Russian Federation) (February 21, 2020) para. 378.

29. UNCLOS, art. 15.

30. Symmons, art. 15, para. 22.

31. *Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), Judgment*, ITLOS Reports 2022–2023, paras. 90 and 95 (hereinafter *Mauritius v. Maldives*).

32. UNCLOS, arts. 74(2) and 83(2).

33. Beckman and Sim (n 13), p. 247.

34. James Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation," *Ocean Development & International Law* 48 (2017) pp., 269–283, https://doi.org/10.1080/00908320.2017.1328924.

35. For example, see Liao (n 10), p. 312.

36. David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping

Maritime Claims," in Jayakumar, Koh, and Beckman, eds., *The South China Sea Disputes and Law of the Sea* (Edward Elgar, 2014), p. 200, https://doi.org/10.4337/9781783477272.00015.

37. For example, Ireland: *Draft Article on Delimitation of Areas of Continental Shelf Between Neighbouring States*, UN Doc. A/CONF.62/C.2/L.43 (August 6, 1974); also number of suggestions were made during the meetings of the Negotiating Group 7, i.e., an informal suggestion by Papua New Guinea, Conf Doc. NG7/15 (May 9, 1978).

38. Netherlands: *Draft Article on Delimitation Between States with Opposite or Adjacent Coasts*, UN Doc. A/CONF.62/C.2/L.14 (July 19, 1974); See similar proposal by Japan UN Doc. A/CONF.62/C.2/L.31 / Rev.l. (August 16, 1974).

39. *Guyana v. Suriname*, para. 460.

40. *Ibid.*

41. UNCLOS, arts. 74(3) and 83(3).

42. UNCLOS, arts. 56(2) and 58(3).

43. UNCLOS, art. 192 ("General Obligation to Protect and Preserve the Marine Environment").

44. See, for example, Ted L. McDorman, "The South China Sea Arbitration: Selected Legal Notes," *Asian Yearbook of International Law* 21 (2015), p. 3.

45. Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Oxford University Press, 2023), pp. 215–216.

46. *South China Sea Arbitration Award on Jurisdiction and Admissibility*, para. 101.

47. *Ibid.*, para. 14; "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (December 7, 2014), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201412/t20141207_679387.html.

48. *Ibid.*

49. *South China Sea Arbitration Award on Jurisdiction and Admissibility*, paras. 155–7.

50. *Ibid.*, para. 155.

51. *South China Sea Arbitration Award on Jurisdiction and Admissibility*, para. 156.

52. *Ibid.*, para. 157.

53. This decision is not without criticism, see Zou and Ye (n 10); McDorman (n 44).

54. *Guyana v. Suriname*, para. 453; *Ghana v. Côte d'Ivoire,* para. 541; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* Judgment of October 12, 2021, ICJ Reports 2021, para. 198.

55. PCA, *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*, Decision on Australia's Objections to Competence (September 19, 2016) (hereinafter *Timor-Leste Australia Conciliation Decision on Competence*) para. 93, https://pcacases.com/web/sendAttach/10052.

56. *Timor-Leste Australia Conciliation Decision on Competence*, para. 94.

57. Opening Session in Timor Sea Australia Conciliation, August 29, 2016, pp. 48–49, https://pcacases.com/web/sendAttach/1889.

58. *Ibid.*, p. 70.

59. Indeed, the literature relies on this pronouncement in support of the exclusion of the whole of articles 74 and 83 of UNCLOS, see Zou and Ye (n 10), p. 336; Liao (n 10), pp. 311–312.

60. According to Sim, "It would be an error to interpret the…statements…as an exclusion of these disputes from compulsory dispute settlement. The commission's statements must be read in the context of a conciliation." Sim (n 13) p. 250.

61. Jianjun Gao, "The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence," *Ocean Development & International Law* 49 (2018), pp. 208, 220, https://doi.org/10.1080/00908320.2018.1479370.

62. "TST" and "CMATS Treaty."

63. Opening Session in Timor Sea Australia Conciliation (n 57), p. 49.

64. The preamble to the CMATS Treaty reads: "TAKING INTO ACCOUNT the United Nations Convention on the Law of the Sea …, In particular, Articles 74 And 83 which provide that the delimitation of the Exclusive Economic Zone and continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution; FURTHER TAKING INTO ACCOUNT, in the absence of delimitation, the obligation for States to make every effort in a spirit of understanding and cooperation to enter into provisional arrangements of a practical nature which are without prejudice to the final determination"; also the Preamble to

the Timor Sea Treaty is nearly identical, but Article 2(a) explicitly provides that "This treaty gives effect to international law as reflected in….under Article 83 Which requires States…to enter into provisional arrangements…This treaty is intended to adhere to such obligation."

65. Quoted Above, p. 17.

66. It is clear from the report and recommendations of the commission that the transitional arrangements the commission assisted parties with were intended to help move away or dissolve the existing "provisional arrangements."

67. TS Conciliation Report, para. 62.

68. Sim (n 13), p. 250.

69. UNCLOS, arts. 309 and 310.

70. *Guyana V Suriname,* paras. 446, 482 and 484.

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