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Interim solutions under the exclusive economic zone regime: New analyses and prospects

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ABSTRACT

The world is facing today a global population explosion that is already straining the land-extracted resources, leading to countries turning to their ocean floors and waters where huge discoveries are shedding light on further hydrocarbon reserves, poly-metallic nodules and biological resources, a major breakthrough in fields like the medical and energy, to say the least. The need to exploit and manage these resources is greater than ever, but far from being evident when maritime claims overlap. This article aims at studying the complexity of the exclusive economic zone (EEZ) regime and highlighting the interim solutions mechanisms proposed by this regime when EEZ claims overlap, in order to show how UNCLOS was one big step ahead of rising maritime disputes, whilst reflecting the Parties' willingness to secure a fast and peaceful way towards exploiting and managing resources.

KEYWORDS

UNCLOS; montego bay convention; exclusive economic zone; continental shelf; specific legal regime; obligations under articles 74 and 83; jurisprudence

The exclusive economic zone (EEZ) is a legal concept that was first introduced in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), as an innovation that sheds light on one of the most complex legal regimes created till date, but also an endeavour into conciliation between the freedom of the seas and State sovereignty.

While being regarded as part of modern international law, the concept of the EEZ is rooted in post-World War II regional State practice, especially Latin-American and later African,[1] that clearly shows how the law of the sea was witnessing a legal void. In an attempt to fill it, States sought – at various degrees that included sometimes upsetting the rule of law – to extend territorial jurisdiction over one specific maritime area adjacent to the territorial seas but also part of the high seas regime at that time, and coinciding with the continental shelves; a maritime area dominated by flag State jurisdiction but of crucial importance to the coastal State, since it includes the world's primary fish stock. With coastal States' unilateral claims of sovereignty at sea being more and more prominent preceding the finalisation of UNCLOS, the international community found itself in great need of regulating this maritime area.

The need for such regulation was further accentuated with oil and gas offshore discoveries throughout the twentieth century, later followed by heightened concerns over

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control of offshore hydrocarbon reserves. It is indeed no coincidence that UNCLOS III negotiations were kicked off amidst the oil embargo imposed by the Organization of the Petroleum Exporting Countries (OPEC) Arab member States on the United States (US) and other countries, including the Netherlands, Portugal, and South Africa, that supported Israel during the 1973 Yom Kippur War. The US had become increasingly dependent on foreign oil, with Kuwait, Saudi Arabia, Iran, Iraq, Libya, and Algeria ranking among the top 10 major crude oil producers in the late 1960s, and the embargo strained its economy so much that it triggered measures to promote domestic energy independence and energy conservation, highlighting worldwide, like never before, the importance of national hydrocarbon reserves discoveries and management.

Today, with the world facing a global population explosion that already strains the land-extracted mineral resources, leading to countries turning to their ocean floors where huge amounts of polymetallic nodules have been found, the need to exploit and manage the seabed non-living resources is greater than ever, but far from being evident when maritime claims overlap. In this context, the article aims at studying the complexity of the EEZ legal regime. It intends to highlight the interim solutions mechanisms set in place by it with regard to EEZs overlapping claims, in order to show how UNCLOS was one big step ahead of rising maritime disputes, whilst reflecting the Parties' willingness to secure a fast and peaceful way towards exploiting and managing resources.

The complex legal nature of the EEZ regime

The EEZ is defined geographically as "an area beyond and adjacent to the territorial sea"[2] (Article 55) comprised of "the waters superjacent to the sea-bed and the sea-bed and its subsoil" (Article 56(1)(a)), that "shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured" (Article 57), and which outer limits delimitation are defined by Article 74. Article 55 completes the definition of the zone on a legal note by putting it under the governance of a "specific legal regime" established in Part V of UNCLOS, of which the main purpose is to define and govern the coastal States' rights and jurisdiction and other States' rights and freedoms in the zone.

One can see the complex nature of this regime just by considering the definition of the EEZ. The zone is introduced as a specific legal regime of its own, all the while encompassing other provisions of UNCLOS when relevant to Part V. Not only is it indicative through Article 55, its sui generis nature is further confirmed by Article 86 that defines, even if in a negative form grammatically speaking, the scope of application of the high seas regime to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, […]". The Article goes onward by precising not to entail any abridgement of the freedoms enjoyed by all States in the EEZ "in accordance with Article 58", in so far they are not incompatible with Part V.

This interpretation cuts short attempts at identifying the zone with the territorial sea regime or assimilating it with the high seas regime with preferential rights to coastal States. What started first as a compromise became later a legal subtlety that balances between the freedom of navigation inherited from the high seas traditional concept and the extension of the coastal State sovereignty on such a large maritime zone – a

balance that confers the EEZ a unique hybrid nature of its own, disclosing what the negotiations aimed at achieving: a zone of transition[3] for economic purposes.

Articles 56 and 58 are key to understanding the legal nature, purpose, and scope of the EEZ as a regime. Article 56(1)(a) defines the rights of the coastal State in the zone by three main categories: "sovereign rights, jurisdiction and other rights". Sovereign rights are stated first and, as their name simply suggests, are rights attributed to coastal States on the basis of their sovereignty on the coast.[4] They are divided into two sets that mainly target economic purposes. Being the only sovereign rights that a coastal State can enjoy under the EEZ regime, it is clear that the EEZ, as its name shows, is a zone of economic sovereignty, meaning, it has to do with the natural and energy resources of the zone rather than the maritime space per se, which remains open to the traditional freedoms of navigation and communication.[5]

In the scope of the first set of sovereign rights, a coastal State enjoys vis-à-vis its natural resources the right to conduct four acts stated in pair in Article 56(1)(a) as in "exploring and exploiting, conserving and managing". The provisions under Part V are mainly related to the living resources of the waters superjacent to the sea-bed with a focus on the conservation and management mechanisms, in the absence of provisions specifically related to the EEZ non-living resources. It is indeed of utmost interest to notice that the superjacent waters living resources are governed by a sub-regime that consists of 17 out of the 21 total articles (articles 61–67 and 69–73) displayed in Part V, a fact that is very compatible with the wordings of paragraph 1(a) where the provision emphasises first on "the superjacent waters to the sea-bed".[6]

This clearly demonstrates that the EEZ regime governs primarily and mostly the coastal State's sovereign rights over the superjacent waters' living resources. This type of sovereignty is economic oriented and typically functional, as it provides the coastal-State with the proper mechanisms to determine the three main domains concerning the allowable catch.[7] The coastal State's discretionary power, according to this sub-regime, can also be shown in the exceptions set out in Article 297(3) as to the applicability of Section 2 in the context of disputes arising from the interpretation or application of UNCLOS provisions with regard to fisheries. Sovereign rights over non-living resources do not fall under this exception, according to the Permanent Court of Arbitration (PCA).[8]

While these provisions technically cover more than three-quarters of Part V, Article 56(1)(a) provisions also include the seabed and its subsoil, which leaves no doubt that both maritime areas are part of this regime. When coming to the living and non-living resources of the seabed and its subsoil, the only two provisions under the EEZ regime cross-reference the continental shelf regime. Article 56(3) indicates that the rights attributed to the coastal State with respect to the seabed and its subsoil are to be exercised according to part VI, while Article 68 related to sedentary species, by cross-referencing Article 77(4), becomes the only provision under the EEZ regime to refer to the living resources of the seabed and its subsoil where, as per the same article, the sub-regime of superjacent waters living resources does not apply, paving the way for the continental shelf regime to rule.

This delicate mixture of complexity and clarity shines right here, whereby although the sea-bed and the subsoil are included in the zone, the continental shelf is not assimilated in the EEZ regime but both regimes simply coexist in harmony. The International

Court of Justice (ICJ) establishes this distinction loud and clear.[9] One of the differences worth mentioning is Article 77(3), according to which the coastal State's rights over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation but exist ipso facto and ab initio by virtue of the State's sovereignty on land. The Court calls them inherent rights which, in order to acquire them, the coastal State is not required to take any formal steps[10] or even establish the continental shelf outer limits,[11] unlike in the EEZ where there are no such provisions under Part V.[12] An EEZ needs to be claimed by the coastal State since sovereign rights are acquired rights. The Court further confirms that although there can be a continental shelf where there is no EEZ, there cannot be an EEZ without a corresponding continental shelf.[13]

Concerning the non-living resources of the superjacent waters, the EEZ regime does not say much. It is understood that these resources are minerals that can be extracted from waters and comprised within Article 56(1)(a) in the second set of sovereign rights as "other activities for the economic exploitation and exploration of the zone". The EEZ regime's ingenuity lies in this very description that shows how the Parties to UNCLOS foresaw the future technology advancements and wanted to integrate them, as long as they pertain to the main conceptual categories drawn to carry the distribution of rights and duties between the coastal States and other States.[14] UNCLOS here serves as a great framework convention.

This vision is further corroborated by the example this same provision gives, that is, the production of energy from water, currents, and winds. While the Parties to UNCLOS had also in mind the exclusion of military activities, which is perfectly compatible with the principle of good faith (Article 300) and the peaceful uses of the seas (Article 301), energy production would require the construction of installations,[15] such as wave barrages and windmills. It is in this context among others that Article 56 gives the coastal State jurisdiction for the establishment and use of artificial islands, installations, and structures. It is a jurisdiction that serves the exercise of sovereign rights without specifically targeting natural resources. Such jurisdiction is governed by the corresponding subregime detailed in Article 60 to which Article 80 cross-refers, in yet another great example of the EEZ and continental shelf regimes coexistence.

The other two jurisdictions similar in nature are provided by Article 56(1)(b) to coastal States in the domains of marine scientific research and the protection and preservation of the marine environment. Relevant UNCLOS provisions apply here, such as Article 246 establishing the coastal States' jurisdiction to marine scientific research in the EEZ and on the continental shelf, as well as articles 208 and 214 regulating coastal States' jurisdiction as to pollution control from their sea-bed activities and law enforcement pertaining to such.

In addition to this, coastal States are given regulatory and legislative power with an important margin of discretion by the various mechanisms set out in EEZ subregimes, as part of the jurisdiction needed to exercise sovereign rights. Examples include Article 73 on enforcement of laws and regulations and Article 62 (4) that allows the coastal State to establish laws and regulations for living resources utilisation and enumerates the domains related to such (in a non-exhaustive list, since the provision mentions "inter alia").

The coastal State's EEZ jurisdiction is thus an exclusive competence derived from a sovereign right as a natural legal consequence to it, meaning it is economic oriented

and of functional nature, which is why the discretionary power is attenuated in Article 56 (2) by two main limitations. First, when exercising their rights and performing their duties in the EEZ, the coastal States shall have due regard to other states' rights and duties, such as the freedoms of all States in the EEZ and the rights of land-locked States (Article 69) and geographically disadvantaged States (Article 70). Second, they shall act in a manner compatible with UNCLOS provisions. It is one more great example of the balance between coastal States' sovereign rights and the freedoms of other States in the zone. A third limitation can be considered here as per Article 74 (3), refraining from acting in a way that jeopardises or hampers the reaching of the final agreement.

A third category of rights is attributed to coastal States by the EEZ regime under Article 56(1)(c) as "other rights". Apart from the set of rights given by the continental shelf regime that apply under the EEZ regime through Article 56(3), such as the right to lay submarine cables and pipelines on the seabed (with limited jurisdiction as per Article 79(3) and (4)), drilling (Article 81), and tunnelling (Article 85), a coastal State can also enjoy the right to visit (Article 110), the right of hot pursuit (Article 111), the right to prevent infringement of its customs, fiscal, immigration, and sanitary laws and regulations in its contiguous zone (Article 33), and rights in the event of resource deposits in the Area which lie across limits of national jurisdiction (Article 142), to name a few.

The same provision also names duties upon coastal States. In this regard, the EEZ regime establishes in a direct fashion a set of duties contained in articles 74 and 75, related to a series of obligations of conduct to respect when EEZs overlap, and the duty of the due publicity to maritime boundaries charts or lists of geographical coordinates. Other UNCLOS duties also apply under the EEZ regime, such as the duty to protect and preserve the marine environment (Article 193); the prompt release of vessels and crew (Article 292); the search and rescue service regarding the safety on and over the sea (Article 98(2)); the duty to protect archaeological and historical objects found at sea (Article 303); and most importantly, cooperation among States and between States and regional/international organisations that is highly promoted throughout UNCLOS in numerous domains. The duty of coastal States to cooperate is further highlighted by Article 123 in enclosed or semi-enclosed seas.

Now, moving to the other States' rights and duties in the EEZ, Article 58(1) establishes rights and freedoms of all States, including landlocked, by cross-reference to Article 87 of the high seas regime. While Article 87 comprises, inter alia, five freedoms accorded to all States in the high seas, Article 58 only retains the first three by naming them, which are the freedoms of navigation, overflight, and laying submarine cables and pipelines subject to Part VI. It is logical since in the EEZ, the Article 87 fourth freedom enters in the domain of coastal State's exclusive competence, the fifth is a coastal State's sovereign right and ruled by Part V, and the sixth is also part of the coastal State's jurisdiction.

The provision adds to all States the right to conduct in the zone other internationally lawful uses of the sea, provided they are related to the first three freedoms and compatible with other UNCLOS provisions, as the Article gives an example, "those associated with the operation of ships, aircraft and submarine cables and pipelines". Here again, the example implies the exclusion of military uses of the zone that violate the peaceful purposes.[16] Article 58(2) gives it more clarity by establishing the applicability to the EEZ regime of articles 88–115 of the high seas regime, as well as other pertinent rules of

international law, as long as they are compatible with Part V. As for paragraph 3, the provision puts three limitations on all States while exercising their rights and performing their duties. Not only do they have due regard to the coastal States' rights and duties but they also comply with the coastal State's laws and regulations and follow other UNCLOS provisions and rules of international law, as long as they are compatible with Part V.

The EEZ attribution of rights on the basis of coastal States' economic sovereignty and other States' freedom of navigation highlights one of this regime's complexities. The broad wordings, such as "other rights" in Article 56(1)(c) and "other internationally lawful uses of the sea" in Article 58(1), entail a certain degree of ambiguity because of a lack of precision. Disputes may occur from the application of articles 55, 56 and 58, and residual rights situations may arise where it is unclear whether some uses of the sea fall in the rights and jurisdiction of the coastal State or the freedoms and rights of other States. Article 59 addresses this issue in the event of a conflict of interests where UNCLOS does not attribute rights or jurisdiction to either category of States. This Article provides for settlement mechanisms on the basis of equity and considering all the relevant circumstances, meaning, measuring the respective importance of interests involved to the parties as well as to the international community as a whole. The balance would shift in favour of coastal States when economic interests arising from natural resources of the zone are the principal concern.[17] In this perspective, Article 59 can be a guideline for both diplomatic and judicial settlements of such disputes.

Interim regimes under Article 74

The legal subtlety of the EEZ regime shines brighter in creating a balance between the coastal States' rights and duties in overlapping EEZs. The complexity of Article 74 is further highlighted in maintaining this balance during EEZ delimitation disputes. A series of obligations of conduct is established on involved States, while giving settlement guidelines for international courts and tribunals and providing States with a great tool, interim regimes, under which provisional solutions can be reached pending the final delimitation agreement, in order to allow Parties to the dispute to keep benefitting economically from the disputed areas in a spirit of cooperation.

A quick view to the origin of Article 74 leads to Article 83 of UNCLOS. Both were negotiated together, as they contain the exact same provisions, with one difference being that Article 83 had a predecessor, Article 6(2) and (3) of the 1958 Geneva Convention, according to which the continental shelf delimitation must, unless the parties agree otherwise, be conducted on an equidistant line basis, except when other special circumstances dictate differently. UNCLOS III negotiations for these two articles also took into account jurisprudence contained in the 1969 North Sea Continental Shelf case where the ICJ finds the equidistance principle not to embody or crystallise any pre-existing or emergent rule of customary law but a purely conventional rule,[18] and that the continental shelf delimitation is instead to be effected principally by agreement in accordance with equitable principles, taking account of all the relevant circumstances.

Principles of equidistance and delimitation by agreement divided the negotiators whose State interests were highly at stake as to continental shelf delimitation. At the time UNCLOS III negotiations were being conducted, hydrocarbon resources were

being either explored or on the verge of being exploited, which led to many disputes around the world on continental shelves delimitation that were still pending diplomatic or judiciary solutions. The compromise reached in the end explains the general approach of articles 74/83.

Indeed, instead of specifying the equidistant line or any other method for drawing a boundary, like Article 15 of UNCLOS, Article 74(1), echoing the aforementioned jurisprudence, simply chose to establish the agreement between States as the legal basis for delimitation, to an extend that paragraph 4 provides that all questions related to EEZ delimitation are determined in accordance with such agreement when there is one entered into force between the concerned Parties.[19]

Reaching an agreement implies the necessity of conducting negotiations.[20] The obligation to negotiate is therefore enshrined in these provisions in the wordings, "*shall* be effected by agreement", and further accentuated on several instances by the Court, according to which such negotiations have to be meaningful to the concerned parties with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement.[21] However, the obligation to negotiate in good faith is one of conduct and not one of result. Therefore, a violation of this obligation cannot be based only upon the result expected by one side not being achieved.[22]

Paragraph 1 also provides guidance for reaching such agreement: international law as referred to in Article 38 of the ICJ Statute that enumerates the four main international law sources. The Court considers that this apparently simple and imprecise formula allows for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation process, but also for the consideration of international law general principles and contributions made by the decisions of international courts and tribunals and learned writers to the understanding and interpretation of this body of legal rules.[23] It is true that when UNCLOS was negotiated, there was not yet any law, conventional or customary, ruling the EEZ per se, since it is a new legal concept only introduced by UNCLOS. This explains why Article 74 provisions were negotiated with Article 83 that contained provisions of a similar nature[24] inspired by a predecessor and a jurisprudence. Today, 40 years after UNCLOS, State practice has started to emerge and is interpreted in various texts of jurisprudence and teachings.

In addition to the guidance set forth by paragraph 1, the agreement between States is reached "in order to achieve an equitable solution". This can only be done through meaningful negotiations based on equity, whereby the Parties arrive at an agreement in accordance with equitable principles. Delimitation is therefore reached by a rule of law based on equity during a process where it is not a question of applying equity simply as a matter of abstract justice but of applying a rule of law which itself requires the application of equitable principles.[25] This process is further compatible with the guidance provided by the provision, as no one delimitation method can ensure equity when applied in all cases but will lead instead to relative injustices, for which reason the Court considers necessary to seek not one method of delimitation but one goal.[26]

In case of failure to reach such agreement, paragraph 2 provides that parties shall resort to Part XV[27] procedures. Failure happens when the agreement is not reached "within a reasonable period of time". This broad wording for a time limit is clarified

in the Barbados *vs* Trinidad and Tobago case, where the Court considered a reasonable amount of time a series of nine rounds of formal negotiations held over three years between both countries. The rounds covered questions of delimitation and its impact on hydrocarbon resources and fisheries, but failed despite efforts of both sides. Disagreement was most importantly on applicable law and interpretation of articles 74/83. This is a key moment to the Court where failure to reach agreement on applicable rules shows failure of any further attempt to agree on any particular boundary line. Accordingly, to insist upon a specific line having been tabled by each side in the negotiations would be unrealistic and formalistic, and any further attempts to negotiate will show in advance every sign of being unproductive. It represents the moment when the dispute is established and the Parties have the obligation to move to judiciary settlement[28] as per paragraph 2 which, according to the Court, subjects the continuation of negotiations only to the same temporal condition.[29]

Failure to reach a delimitation agreement also entails on parties to the dispute two other obligations that are interlinked: to enter into provisional arrangements of a practical nature; and not to jeopardise or hamper the reaching of the final agreement. Both include interim measures and are, in essence, incentive and preventive.[30] Paragraph 3 sets further elements and conditions to the implementation of both. First, they are to be fulfilled pending the final agreement on delimitation that is still being reached by adjudication or conciliation and "in a spirit of understanding and cooperation", which accentuates the duty to act in good faith and the duty to cooperate reiterated throughout UNCLOS provisions. Second, States concerned "*shall* make every effort". "Shall" indicated the presence of a duty, an obligation upon the parties. "Every effort" is a broad wording and can be subject to interpretation[31] but by being broad, it encompasses more possibilities parties can choose in order to fulfil the obligation. "Make every effort" indicates a conduct. Both are therefore obligations of conduct that target the disputed area: the first being one to act in a certain manner, the second, one to refrain from acting in a certain manner. The connexion between them is further highlighted by the text through the preposition "and", confirming the application of the aforementioned wordings on the second obligation as much as on the first.[32] The provision adds a timeline in the wording "during this transitional period", referring to the period after the maritime delimitation dispute is established until a final delimitation by agreement or adjudication is achieved.[33]

The "provisional arrangements of a practical nature" enter into force on a temporary basis, pending the reaching of the final agreement, as the word "provisional" suggests. Indeed, paragraph 3 specifies that they will be without prejudice to the final delimitation. The word "arrangements" is used to include various forms of agreements, such as Memorandums of Understanding (MoUs), Exchange of Notes, and treaties. The practical nature refers to their ability to provide interim operational solutions to actual problems, while setting aside delimitation issues or territorial questions involving the dispute. Such arrangements do not entail a party's renunciation of any right/claim, or the recognition or affirmation of the other party's right/claim. They rather indicate UNCLOS intent to require of the Parties a conciliatory approach that could lead to negotiations in order to reach a provisional arrangement.[34]

While being an obligation to act in good faith and not one to reach an agreement,[35] this provision promotes interim regimes that could pave the way for provisional

utilisation of the overlapping areas pending delimitation,[36] which falls in the context of the priority given by UNCLOS to marine resources exploitation, especially in the scope of sovereign rights under the EEZ regime. Promoting equitable and efficient utilisation of the sea and ocean resources is one of the goals consecrated in the Preamble to UNCLOS, the achievement of which will contribute to realising a just and equitable international economic order. It is in this view that the Court considers this obligation to constitute an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as activities do not affect the reaching of a final agreement.[37]

A second situation covered by paragraph 3 is when no provisional agreement has been reached between the Parties that could regulate their conduct in the disputed area.[38] It means that unilateral acts conducted by a Party are legally admissible as long as they do not jeopardise or hamper the reaching of the final agreement. But it also means that activities conducted jointly or unilaterally by the Parties and falling under a provisional agreement are legally admissible, even if they may jeopardise or hamper the reaching of a final agreement, as they are conducted as per agreement that does not prejudice the final one.

On the other hand, in the context of a disputed area that is the subject of claims made in good faith by the Parties, and where the maritime boundary has not been settled prior to an international judiciary decision, maritime activities undertaken by one Party are not considered a violation of the other Party's sovereign rights in such area when they are conducted before the issuance of such decision, even though this decision later attributes, partially or entirely, the disputed area to that other Party.[39] However, they can constitute a violation of the obligation not to jeopardise or hamper the reaching of the final agreement when they cause irreparable prejudice to the other Party's rights. This being said, other States can still enjoy their freedoms in the disputed area according to Article 58(3).

Following the same perspective, a criterion appears to shape the view of the jurisprudence when evoking acts that could jeopardise or hamper the reaching of the final agreement: the permanent nature of the risk caused by such acts. This criterion has driven the Court and the Tribunal to prescribe provisional measures according to Article 41 of the ICJ Statute and Article 25 of International Tribunal for the Law of the Sea (ITLOS) Statute (derived from Article 290 of UNCLOS). Activities that lead to a permanent physical change of the disputed seabed, such as drilling and other exploitation activities of hydrocarbon reserves, constitute a violation of this obligation.

In the same reasoning, one could conclude that acts entailing a permanent damage to the marine environment of the disputed area, such as toxic or non-toxic contamination activities, fish stock over-exploitation (that also cause prejudice to the rights of the parties), and the installation of offshore structures,[40] are also a violation. This is corroborated by the Court when making a distinction between activities with a transitory character that do not prejudice the reaching of the final agreement, such as seismic exploration activities, and activities that risk irreparable prejudice to the Parties' position, such as acts causing physical damage to the sea-bed or subsoil, or to the natural resources of the disputed marine area, acts involving the establishment of installations on or above the seabed, and operations involving the actual appropriation or other use of the disputed area's natural resources.[41]

Furthermore, this criterion covers acts that can produce a critical change in the status quo of the dispute by aggravating or extending it. Jurisprudence has been consistently pronounced many times on this point, of which by the ICJ in the Fisheries Jurisdiction order[42] and ITLOS in the Ghana/Côte d'Ivoire order.[43] To the Court, taking any law enforcement measures against the other party's ships because of engagement in fishing activities in the disputed waters and practicing fisheries exploitation in a way that exceeds the annual rate preceding the dispute are acts that change the status quo, and therefore constitute a violation of paragraph 3. Similarly to the Tribunal, engaging in new drillings in the disputed area, disclosing information on the disputed area's exploration activities that were not public before the dispute, not taking responsibility vis-à-vis the prevention of serious harm to the marine environment by monitoring all exploration activities already undertaken in the disputed area, also meet the criterion and constitute such violation.

It is in this context that provisional measures seek to maintain a status quo, on which parties to the dispute have relied for decades and upon which significant commercial investments have been made.[44] They reflect the delicate balance which international courts and tribunals maintain by preventing parties from undertaking any unilateral activity that might affect the other party's rights in a permanent manner, while being careful not to stifle the parties' ability to pursue economic development in the disputed area, as the dispute resolution process can be time-consuming.[45] Equally, the parties' engagement in preserving the status quo shows good faith and could lead to cooperation in the shape of provisional arrangements. It is an important aspect of UNCLOS objective of strengthening peace and friendly relations between nations and of settling disputes peacefully.[46]

New analyses and prospects

When it comes to State practice vis-à-vis interim regimes, provisional arrangements take the shape of moratoriums on certain activities in the disputed area, joint cooperation on fisheries exploitation, joint development agreements (JDAs) on hydrocarbon exploitation, agreements on environmental cooperation, or agreements on allocation of criminal and civil jurisdiction.[47] Successful JDAs often stay alive either by being amended and incorporated in the final agreement or becoming a unitisation agreement, especially when preserving the unity of the deposits or when resources straddle international boundaries. On this point, joint exploitation has been particularly encouraged by international courts and tribunals.[48]

In other cases, States conclude interim agreements that draw a provisional boundary line between the parties pending the final delimitation, whereby the line is without prejudice to the final boundary but offers a certain degree of stability that attracts foreign oil companies, allowing the parties to issue oil concessions in disputed maritime areas that become less risky for investment. Such provisional agreements are usually replaced by the definitive delimitation treaties. It is the case of the 2002 agreement between Tunisia and Algeria[49] that establishes a single maritime boundary for a renewable period of six years, still pending final delimitation.

However, among the various provisional arrangements, some fail to reach the desired goal, but others bear fruit, irrespective of their form and despite the ineffectiveness, and

sometimes absence, of the delimitation process. Their success shows that negotiating in good faith, coupled with a minimum level of trust between the parties to the dispute, can provide practical solutions to launch the resources exploitation. What allows the agreement to prevail profitably to the parties is their political willingness to commit to the joint venture. Interim regimes could pave the way for future peaceful delimitation talks, as the parties would have been working together for years in a spirit of understanding and cooperation.

The Timor-Leste and Australia case is a shining example. Both signed three provisional arrangements: the 2002 JDA for hydrocarbon exploitation in overlapping continental shelves; the 2007 JDA for unitisation of two hydrocarbon fields straddling the eastern boundary; and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) that included a moratorium (Article 4) and a provisional boundary of the water column (Article 8). In 2013, amid delimitation disputes in the Timor Sea, Timor-Leste initiated arbitral proceedings[50] pursuant to the 2002 agreement, only to request their termination in 2017 following its unilateral termination of CMATS. Both parties having agreed to negotiate permanent maritime boundaries, the issue was submitted in 2016 for conciliation under Article 298 and Annex V of UNCLOS, and successfully led them to sign the permanent delimitation treaty in 2018. Some previous provisional arrangements were replaced by new transitional arrangements included in the treaty, providing a continuity for affected investors in the Timor Sea oil and gas sector. This treaty is also a milestone, as it was reached through the first conciliation conducted under UNCLOS. The provisional arrangements played the role of the facilitator towards reaching the final agreement.

Another great example of a successful interim joint venture is the 2002 JDA between Angola and Congo-Brazzaville after delimitation talks failed. This JDA establishes a joint development zone of 696 square kilometres in the undelimited area and splits in equal shares between the parties the revenues from Congo's Haute Mer and Angola's Block 14. It paved the way for further cooperation in Lianzi oil field discovered in the same zone, leading both States to sign an agreement in 2012 that splits Lianzi revenues equally between stakeholders of Angola's Block 14 and Congo's Haute Mer licence. This peaceful settlement in the form of provisional arrangements is due to initiate in 2022 a new round of delimitation negotiations.

To conclude, UNCLOS has provided States with a formidable tool that is the interim regimes. It offers a way to a peaceful settlement of their dispute, strengthens peace and friendly relations between them and allows them to start making profits by exploiting their maritime resources even before the dispute is settled. With good faith and political will, the States that abide by it will only gain benefits from UNCLOS rules on interim regimes.

Notes

1. Gemma Andreone, "The Exclusive Economic Zone," in *The Oxford Handbook of the Law of the Sea*, eds. Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (Oxford: Oxford University Press, 2015), p. 160.
2. See https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last accessed online February 28, 2022). The UNCLOS articles and references mentioned hereafter are taken from this document.
3. J.-P. Quéneudec, "La zone économique," *RGDIP* 2 (1975): 321–53.

4. In this context, Advocate General Cruz Villalón stated in his opinion delivered on the judgment of the European Union (EU) Court of Justice, in January 17, 2012, *Salemink*, Case C-347/10, EU:C:2012:17, para 52:

   Thus, in addition to sovereignty in the sense of a characteristic allowing the exclusive exercise of official authority with absolute jurisdiction, there also exist under international law and within the framework of its legal order, "sovereign rights", or entitlements to exercise official authority, on a conditional and limited basis, in areas which do not in principle fall under State sovereignty. If sovereignty is the expression of a primary official authority, which is recognised and delimited by international law, sovereign rights derive from the will of the international community and it is here that their basis, content and limits can be found.

   These words summarise best the legal nature of sovereign rights.
5. René-Jean Dupuy, *L'océan partagé* (Paris: Pedone, 1979), p. 83.
6. It was to Peru that we owe the actual wording of Article 56, reflecting the logical order in which the three maritime spaces should be enumerated, since the EEZ comprises primarily the sea and subsidiarily the seabed and subsoil. Center for Oceans Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (The Hague: Nijhoff, 1993), 541 (hereafter Virginia Commentaries).
7. Jean Carroz, "Les problèmes de la pêche à la Conférence sur le droit de la mer et dans la pratique des Etats," *RGDIP* 3 (1980): 714.
8. Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, PCA, Reports of International Arbitral Awards (RIAA) XXX, September 17, 2007, pp. 1–144, para 415 (hereafter Guyana/Suriname).
9. Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports (1985), p. 13, para 34.
10. North Sea Continental Shelf, Judgment, ICJ Reports (1969), p. 3, para 19; Virginia Commentaries, *supra* 4, p. 491.
11. Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, International Tribunal for the Law of the Sea (ITLOS) Reports (2012), p. 4, para 409.
12. The reason is that Article 77 takes its wording from Article 2 of the 1958 Geneva Convention where, according to the ICJ, the continental shelf constitutes a natural prolongation of the State's land territory into and under the sea. North Sea Continental Shelf *supra* 10, para 19.
13. Continental Shelf (Libyan Arab Jamahiriya/Malta), *supra* 9 .
14. Francisco Orrego Vicuña, *The Exclusive Economic Zone Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989), p. 73.
15. Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1991), p. 138.
16. James Kraska, "Military Operations," in *The Oxford Handbook of the Law of the Sea*, eds. Rothwell et al., *supra* 1 , p. 868.
17. Virginia Commentaries, *supra* 6, p. 569.
18. North Sea Continental Shelf, *supra* 10, para 69.
19. Paragraph 4 was agreed upon at UNCLOS III without any conflict of views. The existing agreement according to the provisions of paragraph 4 is a *lex specialis* in the context of Article 311(5). Virginia Commentaries, *supra* 6, p. 815.
20. The obligation to negotiate constitutes a special application of a principle which underlies all international relations, recognised in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. North Sea Continental Shelf, *supra* 10, para 86.
21. Ibid., para 85.
22. Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports (2017), p. 4, para 604 (hereafter Ghana/Côte d'Ivoire).
23. Award in the Arbitration relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago, PCA,

RIAA XXVII, April 11, 2006, pp. 147–251, para 222 (hereafter Barbados/Trinidad and Tobago).

24. TheCourt, in the Gulf of Maine case, points out at the symmetry of the two texts, especially in the event when the Court is asked to draw a single maritime boundary delimitating the continental shelf and EEZ together. Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports (1984), p. 246, para 96.
25. North Sea Continental Shelf, supra10, para 85.
26. Ibid., para 92.
27. Under Part XV, States may exclude articles 15, 74, and 83 from the compulsory procedures entailing binding decisions (articles 286 to 296) by making a declaration in writing to this effect as per Article 298(1)(a). In this case, compulsory recourse to conciliation applies under Annex V.
28. Barbados/Trinidad and Tobago, *supra* 23, para.193–200.
29. Ibid., para 199. In this context, the ICJ also states that if, following unsuccessful negotiations, judicial proceedings are instituted and one of the parties then alters its claim, Article 74 would not require that the proceedings be suspended while new negotiations were conducted. While the Court is not a negotiating forum, the new claim would have to be dealt with exclusively by judicial means and any other solution would lead to delays and complications in the delimitation process. UNCLOS does not require such a suspension of the proceedings. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports (2002), p. 303, para 244.
30. Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," *The American Journal of International Law* 78, no. 2 (1984): 366.
31. Virginia Commentaries, *supra* 6, p. 815.
32. Ghana/Côte d'Ivoire, *supra* 22, para. 629.
33. Ibid., para 630.
34. Guyana/Suriname, *supra* 8, para 461.
35. Ghana/Côte d'Ivoire, *supra* 22, para 627.
36. Guyana/Suriname, *supra* 8, para 460.
37. Ibid.
38. Ghana/Côte d'Ivoire, *supra* 22, para 630.
39. Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports (2012) (II), p. 718, para 250 ; Ghana/Côte d'Ivoire, *supra* 22, para 592; Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, ICJ Reports (2021), para 203.
40. It can be the case of offshore wind farms that are subject to a great debate within the EU, as they have been reported to harm the fishing activity by affecting biodiversity, damaging the seabed, changing the currents, and creating a constant vibration. This led the EU to launch, in 2019, the own-initiative procedure 2019/2158(INI) on the impact on the fishing sector of offshore wind farms and other renewable energy systems, which led the European Parliament to adopt, in July 2021, the non-legislative resolution P9_TA-PROV(2021)0338 on the need to avoid the potential negative impact caused by offshore wind turbines on certain ecosystems, fish stocks, and biodiversity, later welcomed by the European Commission (follow-up SP(2021)598-0).
41. Aegean Sea Continental Shelf, Interim Protection, Order of September 11, ICJ Reports (1976), p. 3, para 30.
42. Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of August 17, ICJ Reports (1972), p. 30.
43. Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of April 25, ITLOS Reports (2015), p. 146.
44. Ghana/Côte d'Ivoire, *supra* 22, para 603.
45. Guyana/Suriname, *supra* 8, para 470.
46. Ibid., para 465.

47. Robert Beckman and Leonardo Bernard, "Framework for the Joint Development of Hydrocarbon Resources," *Asian Yearbook of International Law*, Vol. 22 (Leiden: Brill, 2016), p. 93.
48. Guyana/Suriname, *supra* 8 , para 463; Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), PCA, RIAA XXII, December 17, 1999, pp. 335–410, para 86; North Sea Continental Shelf, *supra 10* , paras 97 and 99; Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports (1982), p. 18, para 118.
49. Treaty No. 39821 in United Nations Treaty Series (UNTS) 2238, p. 197.
50. PCA Case No. 2013-16, termination order of March 20, 2017.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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