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Navigating Undelimited Waters: States' Rights and Obligations in Addressing Maritime Disputes, with a Focus on the East Sea

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Abstract
The phenomenon of coastal States pushing their boundaries further into the sea has resulted in the enlargement of maritime territories. Consequently, that has given rise to conflicts regarding the assertion of sovereignty and sovereign rights over overlapping maritime areas among these coastal States. As States intensify the extraction of resources from the waters, these already intricate disputes become further complicated. In the East Sea, most ASEAN countries, including Vietnam, still have unresolved maritime disputes with their neighboring nations.
The United Nations Convention on the Law of the Sea (UNCLOS) outlines obligations for concerned states, particularly in Articles 74(3) and 83(3). These include the duty to exert every effort to establish interim arrangements of a practical nature and to refrain from actions that could impede or obstruct the eventual attainment of a final agreement. However, the UNCLOS does not have a specific explanation for the above obligations, leading to the incomplete resolution of conflicts between States in the overlapping maritime areas, mainly when a State unilaterally undertakes law enforcement activities in the above maritime areas.
The article aims to elucidate the overlapping maritime areas in the context of the East Sea, thereby analyzing and exploring the rights and responsibilities of coastal States in resolving disputes in undelimited maritime areas. Examining the legal frameworks, maritime territorial claims, and mechanisms for dispute resolution becomes imperative in understanding the complexities of this region.

Keywords: Undelimited Maritime Areas, Maritime Disputes, States's Rights and Obligations, UNCLOS, East Sea

Introduction

The ocean has always played an essential role in many aspects, such as economic, military, and political. Today, when the land becomes too narrow to meet population growth, energy is scarce, ecosystems are degraded, the environment becomes overloaded, and the ocean becomes a promised land for all countries. In that context, coastal States tend to "extend to the sea," develop maritime strategies, and increase their potential to exploit and use the sea.
The phenomenon of coastal States pushing their boundaries further into the sea has resulted in the enlargement of maritime territories. Consequently, that has given rise to conflicts regarding the assertion of sovereignty and sovereign rights over overlapping maritime areas among these coastal States. As States intensify the extraction of resources from the waters, these already intricate disputes become further complicated. In the East Sea[1], most ASEAN countries, including Vietnam, have not resolved their maritime disputes with neighboring countries.
UNCLOS outlines obligations for concerned states, particularly in Articles 74(3) and 83(3). These include the duty to exert every effort to establish interim arrangements of a practical nature and to refrain from actions that could impede or obstruct the eventual attainment of a final agreement.[2] However, UNCLOS does not have a specific explanation for the above obligations, leading to the incomplete resolution of conflicts between States in the overlapping maritime areas, mainly when a State unilaterally undertakes law enforcement activities in the above maritime areas[3].

[1] The East Sea is alternatively referred to as the South China Sea or the West Philippine Sea.
[2] The United Nations Convention on the Law of the Sea, 1982, https://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm, accessed April 30, 2023.
[3] UNCLOS, op.cit., note 2.

Defining the rights and responsibilities of coastal States within intersecting maritime zones and subsequently implementing measures to handle and resolve conflicts remains a significant aspect of international political and legal relations, both presently and in the future. The article aims to elucidate the overlapping maritime areas in the East Sea, thereby analyzing and exploring coastal states' rights and obligations in resolving disputes in undelimited maritime areas. Examining the legal frameworks, maritime territorial claims, and mechanisms for dispute resolution becomes imperative in understanding the complexities of this region.[4]

Method and Materials

This research employs a qualitative methodology to gather and scrutinize literature aiming to elucidate the overlapping maritime areas in the context of the East Sea, thereby analyzing and exploring the rights and responsibilities of coastal States in resolving disputes in undelimited maritime areas. Qualitative methods offer suitable instruments for exploratory investigations, enabling the researcher to gain an in-depth understanding of the subject matter. Additionally, the authors utilize information sourced from documents, books, and articles, particularly those from international organizations. They further enhance their research by engaging in discussions and consultations with fellow researchers and practitioners to obtain diverse perspectives and critical insights into pertinent issues.

Results and Discussion

1. Undelimited maritime zones under the concept of maritime delimitation

As per UNCLOS, the coastal State has the authority to delineate maritime zones under its sovereignty, encompassing internal waters and territorial sea, as well as the maritime zones under national sovereign rights and jurisdiction, such as the contiguous zone (CZ), exclusive economic zone (EEZ), and continental shelf (CS). That illustrates the essence of the principle known as "The land dominates the sea," according to which the land's jurisdiction serves as the foundation for establishing and expanding national sovereignty and sovereign rights at sea. It should be noted that the area of the land territory does not play an essential role because sovereignty over that territory is the foundation for the expansion of national power to the sea.[5]

The EEZ refers to the maritime area located beyond the territorial sea and adjacent to it, extending up to 200 nautical miles from the baselines used to delineate the territorial sea's extent.[6] The CS belonging to a coastal State encompasses the ocean floor and its subsoil extending beyond its territorial waters, reaching to the natural extension of its land territory or up to 200 nautical miles measured from the baselines, whichever is closer to the outer edge of the continental margin of that State.[7] If the outer edge of the CS stretches beyond 200 nautical miles, the coastal State is permitted to employ appropriate techniques for establishing the outer boundary of the CS. However, this demarcation line should not surpass 350 nautical miles from the baseline or 2,500 meters from the isobath, a line connecting points on the seabed at a depth of 2,500 meters, within a distance not exceeding 100 nautical miles.[8]

It is widely acknowledged that UNCLOS considerably expands the jurisdiction of coastal States. These States possess sovereignty over their territorial sea and exert their rights and jurisdiction over extensive maritime zones, including the EEZ and CS. Can the unilateral extension of these maritime areas be construed as a form of "maritime delimitation" carried out by the coastal State?

In the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the concept of "delimitation" appears solely in Article 12. This article specifies that the delimitation line of the territorial seas of two States positioned directly facing or beside each other should be delineated on large-scale charts that are officially acknowledged by the coastal States.[9] Article 6, paragraph 3 of the 1958 Geneva Convention on the Continental Shelf contains comparable clauses. It is indicated that when establishing the limits of CS, any lines drawn in line with the principles outlined in Article 6(1)(2) should be specified based on charts and geographical features as they are present on a specific date, with consideration given to fixed permanent identifying points on the land.[10] The term "delimitation" recurs in Article 15 (territorial sea delimitation), Article 74 (EEZ delimitation), and Article 83 (CS delimitation) of UNCLOS. According to Article 83(1) of UNCLOS, the delimitation of the CS between States sharing opposite or adjacent coastlines should be determined by mutual agreement in accordance with international law, as stipulated in Article 38 of the Statute of the International Court of Justice (ICJ), aiming to achieve an equitable resolution. In the above cases, the maritime delimitation of maritime arises when (i) States possess opposite or adjacent coastlines, (ii) States possess the legal right to define relevant maritime zones, (iii) overlapping entitlements exist.

However, the term "delimitation" is also mentioned in a number of other articles of UNCLOS. According to Article 50, an archipelagic State has the authority to set closing lines to delineate internal waters within its archipelagic waters, as detailed in articles 9, 10, and 11. In this context, "delimitation" refers to delineating a nation's maritime

[4] Prescott V, Schofield C. The Maritime Political Boundaries of the World. 2nd ed. Leiden, Martinus Nijhoff Publishers, 2005; Charney J, Alexander L (eds.). International Maritime Boundaries. Vol. I-VII, Brill, Nijhoff, 2016.

[5] The principle of "The land dominates the sea" has been referenced in decisions by the ICJ. See Judgment of February 20, 1969, in the North Sea Continental Shelf Case, *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 51; Judgment of December 19, 1978, in the Aegean Sea Continental Shelf Case, *Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978*, p. 36; Judgment of March 16, 2001, in the Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, ICJ Reports 2001*, p. 97.

[6] Articles 55, 57 of UNCLOS.

[7] Article 76, paragraph 1 of UNCLOS.

[8] Article 76, paragraphs 2, 5 of UNCLOS

[9] Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, United Nations, Treaty Series, vol. 516, p. 205.

[10] Geneva Convention on the continental shelf, April 29, 1958, United Nations, Treaty Series, vol. 499, p. 311.

zones. Put differently, the coastal State independently defines maritime areas in compliance with the international law. Consequently, the term "delimitation" encompasses two distinct meanings: Defining boundaries for sea areas under a country's sovereignty and sovereign rights, or determining boundary lines in cases of overlapping sea areas between relevant States.

Not defined in international treaties, how do international jurisdictions view delimitation? In its judgment dated December 19, 1978, concerning the delimitation of the CS in the Aegean Sea, the ICJ declared that delimitation entails the precise delineation of the line (or lines) where the spatial extension of the rights and sovereign powers of the two States occurs. According to the Court, delimitation is only mandated in cases of overlapping maritime zones, where it becomes essential to establish a boundary line between relevant States.[11] This view continues to be confirmed in many decisions of international jurisdictions. In the Decision dated October 29, 2015, on determining the jurisdiction resolving disputes in the Philippines-China case, the Tribunal concluded that a dispute regarding the establishment of maritime zones is independently and distinctly from disputes over delimitation in overlapping maritime areas. Maritime delimitation shall be conducted only when overlapping sea areas exist between opposite or adjacent States.[12]

Thus, distinct from the unilateral legal action of a State in establishing maritime zones, overlapping areas occur when two or more States in opposite or adjacent positions establish maritime zones and overlap each other, namely that the entitlements of parties overlap. However, it should be noted that each State's maritime claims must adhere to the regulations outlined in UNCLOS. In other words, the States concerned must have the same legal entitlement recognized by international law, especially UNCLOS. As per UNCLOS, the designation of maritime zones under sovereignty of coastal States may result in overlapping territorial sea when States are opposite or adjacent. Furthermore, establishing maritime zones on the basis of sovereign rights and jurisdiction can result in overlapping EEZ and CS. Given that the territorial sea is confined to a maximum width of 12 nautical miles from the baselines, areas without clear delimitation primarily overlap in the EEZ and CS.

2. States's Obligations in undelimited maritime areas

In cases of overlapping EEZ and CS, the States involved are obligated to earnestly, in good faith, peacefully resolve disputes according to the provisions outlined in Article 74(3) (EEZ) and Article 83(3) (CS) of UNCLOS. Until a formal agreement is reached as stipulated in paragraph 1 of the above articles, the concerned States must, in a spirit of mutual understanding and cooperation, to make efforts to establish temporary arrangements and refrain from actions that may impede or hinder the eventual agreement. These interim arrangements should not prejudice the ultimate delimitation.

Articles 74 and 83 outline two main responsibilities for coastal States: the duty to strive for practical interim arrangements and to refrain from prejudicing or obstructing the ultimate resolution of the dispute. These are conduct-based obligations that necessitate the cooperation and goodwill of States during the implementation process and do not mandate a predetermined outcome. While these obligations specifically pertain to the EEZ and CS, they may to some extent apply to overlapping territorial sea as well.[13]

Obligation to exert maximum effort to establish practical interim agreements

The requirement to engage in endeavors to reach practical interim agreements, as outlined in paragraphs 3 of Articles 74, 83, necessitates the involved States to proactively initiate and implement measures and solutions within their capabilities to reach provisional agreements while awaiting a final resolution of maritime delimitation. With the expectation for each state to exert its utmost efforts, the Convention does not seek to impose an outcome obligation but rather emphasizes a conduct obligation. States are not required to reach an agreement, a specific measure, or a standard solution; however, each State needs to act towards a common voice in dispute settlement. That also imposes on States a duty of goodwill and conscientiousness to manage and resolve conflicts.[14]

Indeed, both before and after the enactment of UNCLOS, international jurisdictions have echoed similar sentiments in various disputes. For instance, in its 1969 decision concerning the delimitation of the North Sea CS, the ICJ determined that the principle of conscientiousness and good faith during negotiations does not obligate disputing parties to reach a consensus on provisional measures.[15]

In the Heathrow Airport User Charges case, the Arbitral Tribunal clarified that the obligation to exert maximum effort towards achieving an objective constituted a conduct obligation, requiring the parties to maintain an ongoing commitment to strive for the fulfillment of the provisions' objectives. However, this duty is not absolute, as a party may provide valid reasons to justify why the goals were not achieved despite their best efforts, absolving them from any culpability for the outcome.[16]

In the maritime delimitation dispute between Guyana and Suriname, the Arbitral Tribunal likewise confirmed that the obligation in question mandates the parties to engage in negotiations in good faith. It encouraged a conciliatory approach to negotiations, wherein the disputing parties would be open to making compromises to achieve an

[11] *Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, para. 85, p. 35.*

[12] PCA, Award on jurisdiction and admissibility, Philippines v. China, 29/10/2015, para. 156, p. 61.

[13] Nordquist MH (ed.). United Nations Convention on the Law of the Sea 1982. A Commentary. Vol. II, 1993, at 815 and 984; Milano E, Papanicolopulu I. State responsibility in disputed areas on land and at sea. Paper presented at the 20th Anniversary Conference of the International Boundaries Research Unit, "The State of Sovereignty", Durham University, 1.-3.4.2009, at 612.

[14] Lagoni R. Interim Measures Pending Maritime Delimitation Agreements. AJIL 78 1984, 345 et seq., at 349; Ong DM. Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law? AJIL 93 1999, 771 et seq., at 797.

[15] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, paras. 85-87, pp. 47-48.

[16] Arbitration concerning Heathrow Airport Use Charges (USA/United Kingdom) (1992) XXIV RIAA, para. 73.

interim agreement.[17] The Tribunal's view suggests that several actions could be identified as contravening the stipulations outlined in paragraphs 3 of Articles 74 and 83, such as refusing to send representatives to participate in negotiations, failing to respond to requests for negotiation, rejecting the request of the disputing State or fail to notify the acts intended to be carried out in the overlapping area.[18] The Arbitral Tribunal also recommended several appropriate actions that States should take, such as trying to get proposals to negotiate dispute settlement, accepting the offer of negotiations of the State concerned, and providing provide the disputing party with complete and detailed information about the activities to be undertaken; try to cooperate in carrying out activities in the encroachment zone; information sharing and exploration results in overlapping areas.[19] The Arbitral Tribunal identified the aforementioned actions within the framework of the dispute between specific States, but seem to be accepted by the States with two groups of acts: Those that must be performed so as not to violate the obligations outlined in paragraph 3 of Articles 74, 83 and acts that are not required to be completed but are consistent with this provision.[20]

UNCLOS mandates states to pursue provisional agreements but does not specify any particular format for these arrangements. That makes it possible to understand that an interim arrangement can exist in the form of an international treaty or political instrument and can cover a variety of solutions ranging from management and exploitation of resources to notification and information sharing for activities taking place in overlapping waters. Paragraphs 3 of Articles 74, 83 exclusively mention provisional settlements of a practical nature. Consequently, whether binding or advisory, an interim agreement holds practical significance, aids in conflict resolution, optimally utilizes resources in overlapping waters, and does not influence the eventual outcomes of maritime delimitation.[21]

State practice indicates the existence of provisional agreements in diverse formats, ranging from establishing temporary boundaries[22] to defining shared development zones,[23] profit-sharing agreements,[24] and setting up Joint Commissions or programs for joint resource exploitation or other interim measures.[25] The specifics of these provisional arrangements are determined by the mutual agreement of the disputing parties, considering their interests, and typically involve cooperative management and exploitation of resources, encompassing both living and non-living resources in overlapping regions. Nonetheless, these interim agreements do not influence the final resolution of disputes involving the concerned States.

Obligation not to prejudice or impede the ultimate resolution of the dispute

In accordance with the stipulations outlined in paragraph 3 of articles 74, 83 of UNCLOS, in addition to the obligation to seek an interim settlement, the States concerned also have an obligation not to prejudice or impede the final dispute resolution. The above provision is not only aimed at promoting States to negotiate to resolve disputes actively but also sets limits on unilateral activities of States, thereby contributing to the management and reconciliation of conflict and creating a premise for future dispute resolution.

Disputed States have the ability to independently conduct certain activities in overlapping areas, provided they do not encroach upon the rights of other parties. According to the perspective of the Arbitral Tribunal in the maritime delimitation case between Guyana and Suriname, unilateral actions that result in permanent alterations to the environment are prohibited in overlapping areas. While seismic exploration activities are acknowledged as permissible, activities such as oil and gas exploitation fall into the category that cannot be unilaterally undertaken and must be agreed upon by the relevant states.[26]

The Arbitral Tribunal's conclusion was influenced by the ICJ's ruling in the Aegean Sea case, where the ICJ applied three criteria: i) the potential for harm to the seabed or subsoil; ii) the temporary or permanent nature of the activity, presence of artificial installations, and iii) the exploitation, appropriation, and utilization of resources. In the Guyana and Suriname case, the Tribunal applied these criteria to ascertain whether the parties had violated the obligations outlined in paragraphs 3 of Articles 74, 83 of UNCLOS.

It is worth noting that the Tribunal appears to have not fully taken into account the broader context of the dispute, particularly the underlying tensions between the involved countries. In this context, any action by one party can lead to a strong response from the other. One party's resource exploration activity may be determined by the other party to be infringing, prejudicing dispute settlement, in particular, if this activity is carried out without the exchange of information.

In the aforementioned cases, the legal decisions solely addressed the exploitation of mineral resources without mentioning marine resources. According to the criteria

[17] Guyana and Suriname, Award of 17.9.2007, 47 ILM 166 (2008) (Guyana/Suriname Award), para. 461.
[18] Guyana/Suriname Award, para. 473.
[19] Guyana/Suriname Award, para. 477.
[20] Milano E, Papanicolopulu I. State responsibility in disputed areas on lamd and at sea. op. cit., at 614.
[21] Anderson D, Logchem Y. Rights and Obligations in Areas of Overlapping Maritime Claims in Jayakumar S, Koh T, Beckman R (eds). The South China Sea Disputes and the Law of the Sea. Edward Elgar, 2014 206.
[22] Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People's Democratic Republic of Algeria (11 February 2002), 2238 UNTS 197; Exchange of Notes dated 18 October 2001 and 31 October 2001 between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, 2309 UNTS 21.
[23] Agreement between Japan and Korea concerning joint development of the southern part of the continental shelf adjacent to the two countries, (1974) 1225 UNTS 1978.
[24] Agreement between Australia and East Timor relating to the unitization of the Sunrise and Troubadour fields (2003) (Smith DC, Australia – East Timor. Report Number 6-20(3), in: Colson DA, Smith RW (eds.). International Maritime Boundaries. Vol. V, 2005, 3867 et seq.).
[25] Exchange of letters on an interim agreement on joint measures of fisheries and fisheries regulations in the Barents Sea between Norway and Russia (1978) (Oude Elferink AG. The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation. 1994).
[26] Guyana/Suriname Award, para. 467.

outlined, activities such as exploration and fishing by disputing States in overlapping waters appear permissible as long as they do not cause harm to the seabed or result in permanent environmental changes. However, this issue remains unresolved with no definitive conclusion. Furthermore, lack of cooperation between the concerned States may contravene the provisions outlined in Article 61 of UNCLOS.

3. Exercising authority in undelimited maritime areas

Under the principles set forth in UNCLOS, which emphasize the precedence of land over sea, the coastal State holds sovereign rights and jurisdiction within its EEZ and CS. Within the EEZ, the coastal State maintains control over the exploration, exploitation, conservation, and management of both living and non-living natural resources found in the water column, seabed, and subsoil. Furthermore, the coastal State exercises authority over other economic activities within the EEZ, including the extraction of energy from water, currents, and winds.[27]

The coastal State holds sovereign rights over the CS for the purpose of exploring and exploiting its natural resources. These rights over the CS are inherent and immediate, existing regardless of whether there is actual or formal occupation or explicit declaration. These rights are exclusive, meaning that other nations are not permitted to engage in exploration and exploitation of natural resources within the coastal State's CS without the coastal State's consent, even if the coastal State itself is not actively exploring or exploiting the resources of the continental shelf.[28]

Within the EEZ and CS, the coastal State possesses the sole authority to build, authorize, and oversee the construction, utilization, and operation of artificial islands, installations, and structures. Additionally, the coastal State maintains exclusive jurisdiction over these facilities, including the issuance and enforcement of legal regulations pertaining to customs, fiscal matters, health standards, security measures, and immigration.[29]

Concerning their geographical placement, the EEZ and CS do not fall within the national territory, indicating that coastal States do not hold sovereignty but rather exercise sovereign rights and jurisdiction. However, they are also distinct from the high seas. In terms of legal status, these areas represent a unique maritime zone encompassing both the rights of the coastal State and those of other countries. On one hand, it guarantees the coastal State exclusive jurisdiction over activities such as the construction and installation of maritime structures, as well as the exploration and exploitation of natural resources. On the other hand, it grants other countries certain freedoms akin to those enjoyed on the high seas, such as freedom of navigation. This arrangement addresses two key issues in the legal status of these maritime zones: Expanding the sovereign rights and jurisdiction of the coastal State while ensuring a measure of stability in the sea, respecting the shared interests of the international community.

Each disputed State has the same legal entitlement if its EEZ and CS overlap. Hence, in essence, these States have the ability to exercise their sovereign rights in the intersecting waters, on the condition that they adhere to the stipulations of international law, notably UNCLOS. Paragraphs 3 of Articles 74, 83 of UNCLOS mandate states to conscientiously, in good faith, and peacefully address their disputes, but they do not outright forbid them from exercising their jurisdiction in the overlapping waters.

Essentially, the coastal State's assertion of sovereign rights and jurisdiction in overlapping waters is not inherently deemed to contravene the mandates outlined in paragraph 3 of Articles 74, 83. The validity of such actions should be considered based on a balance of factors affecting the final dispute settlement solution.

First, preventing all activity in the overlapping area is neither necessary nor required. One side's drastic blockade can lead to conflicting consequences, increase tensions, and even lead to armed conflict. In this regard, the responsibility to strive for the establishment of interim arrangements that are pragmatic in nature will be of paramount importance, contributing to the harmonization of activities of the countries concerned and avoiding the escalation of conflicts. Disputed States can agree on how to cooperate in exercising sovereign rights and jointly conduct and effectively manage resources in overlapping waters.[30]

Second, it is imperative to refrain from unilateral actions that exacerbate the dispute and pose threats to international peace and security. In this regard, the obligation to refrain from actions that hinder or obstruct the ultimate resolution of the dispute assumes significant importance. Especially in situations marked by tense disputes, the exercise of sovereign rights by one party may provoke retaliatory measures from the other party. Therefore, concerned States should exercise restraint and not take actions detrimental to the dispute settlement process.

4. Mechanism of dispute settlement

UNCLOS's Part XV addresses the mechanism for resolving disputes concerning the Convention's interpretation and application, encompassing various key topics. These include: i) delimiting maritime zones; ii) defining the legal status of geological structures at sea; iii) addressing the exercise of a State's sovereignty, sovereign rights, and jurisdiction at sea; iv) discussing maritime rights exercised by States (such as freedom of navigation, innocent passage, transit, and passage through archipelagic waters); v) managing the exploitation and conservation of marine resources; vi) initiatives aimed at safeguarding the marine environment; vii) promoting marine scientific research; and viii) regulating activities related to the exploitation and utilization of the Area, recognized as the common heritage of mankind.

In accordance with the principle of resolving disputes peacefully, as outlined in Article 279 of UNCLOS, States Parties are required to settle any disputes arising from the interpretation or application of the Convention through peaceful means, adhering to Article 2, paragraph 3, of the United Nations Charter. They are encouraged to seek solutions using the methods outlined in Article 33,

[27] Article 56 of UNCLOS.
[28] Article 77 of UNCLOS.
[29] Articles 56, 60, 77 of UNCLOS.

[30] See, for example, the 1978 agreement on joint measures of fisheries and fisheries regulations in the Barents Sea between Norway and the Soviet Union (now Russia), and the 1999 agreement between France, Italy and Monaco for the creation of the Pelagos Sanctuary for Mediterranean marine mammals.

paragraph 1, of the Charter. This fundamental principle governs the entirety of the dispute resolution process. Notably, the Convention prohibits reservations,[31] obligating member States to adhere to the dispute settlement provisions outlined in Part XV of the Convention.

UNCLOS grants members the privilege to opt for peaceful methods in addressing conflicts and disputes that emerge, whether through diplomatic or judicial channels, direct dialogue, or with the assistance of a third party. In cases where agreement cannot be reached, the dispute will be settled through mandatory procedures, resulting in legally binding decisions.[32]

The compulsory procedures leading to binding decisions are delineated in Section 2 of Part XV. In this scenario, the parties have the option to select, through a written declaration, one or more avenues to settle the dispute: (i) the International Tribunal for the Law of the Sea; (ii) the ICJ; (iii) Arbitral tribunal (Annex VII); (iv) Special Arbitral tribunal (Annex VIII). In the absence of a declaration, the jurisdiction of the Arbitral tribunal (Annex VII) is automatically accepted by the parties. The decision rendered by this Tribunal is conclusive and obligatory for the disputing parties.[33]

However, UNCLOS includes provisions for exceptions that allow interested parties to forego applying the dispute settlement mechanism outlined in the Convention. These exceptions are detailed in Article 297, specifically covering:

- Disputes concerning the exercise of sovereign rights and jurisdiction by the coastal State;
- Disputes regarding the discretionary authority of the coastal State to authorize marine scientific research within its EEZ and CS, as outlined in Article 246, and the coastal State's right to suspend or terminate such research in accordance with Article 253;
- Disputes pertaining to the coastal State's exercise of sovereign rights over living resources in its EEZ.

Furthermore, UNCLOS permits disputing parties, through a written declaration at the time of signing, ratification, or accession to the Convention, to exclude certain specific disputes from the UNCLOS dispute settlement mechanism, including:

- Disputes related to or delimiting maritime zones as delineated in Articles 15, 74, and 83;
- Disputes concerning the establishment of territorial sovereignty, historic bays, or historic titles;
- Disputes regarding military activities conducted by state vessels and aircraft for non-commercial purposes;
- Disputes concerning law enforcement activities of the coastal State regarding the exercise of sovereign rights and jurisdiction, as referenced in paragraphs 2 and 3 of Article 297, pertaining to marine scientific research and the exploitation of marine biological resources;
- Disputes falling under the jurisdiction of the United Nations Security Council.[34]

[31] Article 309 of UNCLOS.

[32] Article 287 of UNCLOS. See Charney J. The Implication Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea. A.J.I.L., 1996, p. 69

[33] Article 287, paras. 1-3 of UNCLOS.

[34] UNCLOS, article 298. See Oda S. Dispute Settlement Prospects in the Law of the Sea. *I.C.L.Q.*, 1995, p. 863-864.

Therefore, disputes concerning maritime delimitation outlined in Articles 74 and 83 are subject to an exemption, and if a State Party issues a declaration under Article 298 of the Convention, the aforementioned mechanism of dispute settlement will not be applicable. The question is whether a dispute related to the performance of an obligation specified in paragraph 3, Articles 74 and 83 falls under the above exception. No dispute concerning this exception is resolved in international jurisdiction; therefore, interpretation remains open to countries and researchers.[35]

5. The context of the East Sea

In Southeast Asia, most ASEAN countries still need to settle border and territorial disputes with their neighbors. Some countries have made significant progress; others are still on the way to finding a final solution.

Concerning maritime disputes, Vietnam has entered into various agreements, including the Historic Waters Agreement with Cambodia (1982), the EEZ and CS Delimitation Agreement with Thailand (1997), the Agreement on cooperation of joint exploitation of overlapping areas with Malaysia (1992), the Gulf of Tonkin Delimitation Agreement and the Fisheries Agreement with China (2000), the CS Delimitation Agreement with Indonesia (2003)[36] and the EEZ agreement with Indonesia (2022).[37]

However, Vietnam still faces many outstanding disputes. Vietnam has an overlapping maritime area with Malaysia. Although these countries have signed a joint exploitation agreement, they must still delimit the maritime boundary between them. Similarly, the Gulf of Thailand has overlapping areas of Vietnam, Thailand, and Malaysia. Currently, the parties agree that while the sovereignty of each party has yet to be clearly defined, they should work together to exploit this overlapping area effectively. In addition, Vietnam and China are negotiating to settle a dispute over the delimitation of the maritime areas outside the Gulf of Tonkin.

While it is not possible to come to a final delimitation solution, Vietnam and relevant countries can negotiate to come to temporary arrangements to exploit and use resources in the overlapping sea and, at the same time, contribute to the management of the conflict, avoid further complicating the dispute situation which could hinder a final resolution. However, a significant challenge involves the identification of overlapping maritime areas in the East Sea that have not been delimited. If ASEAN countries maintain a unified stance in adhering to UNCLOS for delineating

[35] See Liao X. The Road Not Taken: Submission of Disputes Concerning Activities in Undelimited Maritime Areas to UNCLOS Compulsory Procedures. Ocean Development & International Law, 52:3, 2021, p. 297.

[36] Bộ Ngoại Giao. Giới thiệu một số vấn đề cơ bản của luật biển ở Việt Nam. Hà Nội, Nxb. Chính trị quốc gia, 2004, tr. 111-160. (Ministry of Foreign Affairs. Introduction to some fundamental issues of the law of the sea in Vietnam. Hanoi, Publishing House National politics, 2004, pp. 111-160).

[37] Darmawan AR. What does the Indonesia–Vietnam EEZ Agreement mean for the region? https://cil.nus.edu.sg/blogs/what-does-the-indonesia-vietnam-eez-agreement-mean-for-the-region/, accessed February 07, 2024.

maritime zones, China persists in unilateral actions that encroach upon the rights of other nations in the region.

China issued an annual fishing ban, starting on May 1 and lasting 3 months, including part of the Tonkin Gulf and the Paracel Islands (Hoang Sa) of Vietnam's sovereignty. Part of the ban on fishing violated the sovereignty of Vietnam over Hoang Sa, the legal rights and jurisdiction of Vietnam determined by UNCLOS, and the Delimitation Agreement in the Tonkin Gulf between two countries. Furthermore, China's unilateral fishing ban is inconsistent with the ruling issued by the Tribunal in the 2016 Philippines-China case. Besides, China has implemented the "gray zone tactic," hindering and interfering with the rights of Southeast Asian countries to exploit marine resources, pushing Southeast Asian fishermen away from their traditional fishing area to preserve the resources for large Chinese fishing boats. Chinese claims and activities at sea create challenges and potentially many conflicts at sea, hindering the process of fishing cooperation in the East Sea.[38]

In 2009, China submitted a Diplomatic Note to the Secretary-General (UN), which included the illegal "Nine-dash line" map, asserting its illegal claim over a significant portion of the East Sea area. However, in a subsequent Note (CML/14/2019) dated December 12, 2019, China omitted any mention of the "Nine-dash line," which had been invalidated by the Tribunal in the Philippines-China case and denounced by the international community. Instead, China introduced a new and arguably implausible claim regarding the "Nanhai Zhudao" (also referred to as the "Four Sha" claim).[39] China asserts an unlawful claim over the "Four Sha," comprising Dong Sa (Pratas), Trung Sa (Macclesfield; although China claims Scarborough as part of Trung Sa), Tay Sa (Hoang Sa under sovereignty of Vietnam), and Nam Sa (Truong Sa under sovereignty of Vietnam). China expects to legalize its claim by using terminologies that confuse the archipelago concept specified in UNCLOS. Although the way of changing, China's tactic remains the same: Claims a large sea area to impose its control in the East Sea.[40]

Facing China's absurd claim, Vietnam clearly viewed Diplomatic Note No. 22/HC-2020 on March 30, 2020[41]. Previously, during the Philippines-China case, Vietnam submitted a declaration on December 5, 2014, asserting that the maritime features outlined in the Philippines' submission do not possess the EEZ and CS due to their legal classification as rocks or low-tide elevations as prescribed by UNCLOS. Following the court's ruling on July 12, 2016, Vietnam issued a supportive declaration and expressed intentions to provide a statement on the ruling's content at a later date.[42]

Regarding the legal status and characteristics of maritime entities in the East Sea, Vietnam possesses the legal foundation and comprehensive historical evidence to affirm sovereignty over Truong Sa and Hoang Sa in accordance with international law provisions. The determination of maritime areas, both from the mainland and maritime features, must adhere to UNCLOS principles. Specifically, the maritime zones of high-tide features in Truong Sa and Hoang Sa should be established under the paragraph 3, Article 121 of UNCLOS. The baseline for these features cannot be established by linking the outermost points of the furthest entities. The claims of States in the East Sea exceeding the limits prescribed in UNCLOS, including the illegal claim of China's historical rights, all of which have no legal value. Consequently, Vietnam maintains a stance consistent with the Tribunal's findings and applies the decision's content to ascertain the legal nature of Truong Sa and Hoang Sa.[43]

In the July 12, 2016 ruling, the Tribunal affirmed that Truong Sa is not a single unit but includes many maritime features with different legal entitlements. Therefore, the coastal States cannot apply straight or archipelagic baselines surrounding Truong Sa.[44] Drawing upon the understanding of principles outlined in international law, particularly UNCLOS, the Tribunal concludes that Gac Ma (Johnson), Chau Vien (Cuarteron), Cross (Fiery Cross), Ken Nan (McKennan), and Gaven Bac (Gaven North) are classified as rocks under paragraph 3, Article 121. Consequently, these features do not qualify for an EEZ or CS. In contrast, Mischief, Xubi (SUBI), Gaven Nam (Gaven South), Tu Nghia (Hughes), and Co May (Second Thomas) are deemed to be low-tide elevations as defined in Article 13. Regarding other high-tide features in Truong Sa, the Tribunal examined key features such as Ba Binh (Itu Aba), Thi Tu (Thitu), Dua (West York Island), Spratly Island, Song Tu Dong (North East Cay), and Song Tu Tay (South West Cay). These features are categorized solely as rocks according to Article 121, paragraph 3. Building on this assessment, the Tribunal extends similar conclusions to the remaining smaller features in Truong Sa. Consequently, the Tribunal determines that no maritime features in Truong Sa possess an EEZ or CS.[45]

The Tribunal's ruling has clarified the entitlement of maritime zones around maritime entities in the East Sea. It establishes that high-tide features are solely classified as rocks under Article 121, paragraph 3. Many countries in the region and worldwide have similar views because it shows

[38] See Morris LJ. Gray Zone Challenges in the East and South China Sea. January 7, 2019, http://www.maritimeissues.com/politics/gray-zone-tactics-and-their-challenge-to-maritime-security-in-the-east-and-south-china-sea.html, accessed April 30, 2023.

[39] https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf, accessed April 30, 2023.

[40] Ku J, Mirasola C. The South China Sea and China's "Four Sha" Claim: New Legal Theory, Same Bad Argument. Lawfare, September 25, 2017, https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument, accessed April 30, 2023.

[41] https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN22HC-2020vn.pdf, accessed April 30, 2023.

[42] https://tuoitre.vn/viet-nam-hoan-nghenh-phan-quyet-vu-philippines-kien-trung-quoc-1135789.htm, accessed April 30, 2023.

[43] Diplomatic Note of Vietnam No. 22/HC-2020 on March 30, 2020, https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN22HC-2020vn.pdf, accessed April 30, 2023.

[44] The South China Sea Arbitration (Philippines v. China), July 12, 2016, https://pca-cpa.org/en/cases/7/, pp. 236-237.

[45] Ibid, p. 474.

compliance with international law, including UNCLOS. However, China's intention of delaying and not implementing the Tribunal's decision makes the cooperation process in the East Sea difficult and faces significant challenges.[46] The unilateral behavior of each country has the potential for conflict, causing tension and can lead to the erosion of trust and influence on regional cooperation.[47]

Parallel with negotiations and faced with the challenges of identifying undelimited maritime areas, the settlement option under the mechanism of UNCLOS can also be considered. When applying the dispute settlement provisions outlined in UNCLOS, it's crucial to consider two key points: i) the matter at hand must be directly linked to interpreting and applying the Convention, and ii) it must not fall under the exceptions specified in Articles 297 and 298.

Among Southeast Asian countries, Timor Leste is the only State that has made a statement choosing all four jurisdictions as provided in Article 287. Thailand has made a statement regarding applying specified exceptions in Article 298. The other Southeast Asian countries did not make any statements. These countries acknowledge the jurisdiction of the Arbitral Tribunal under Annex VII and agree to resolve all disputes concerning the interpretation and application of UNCLOS provisions through this Tribunal.[48]

For its part, China did not issue a statement on the choice of jurisdiction. Therefore, other countries can bring proceedings against China according to the arbitration procedures outlined in Annex VII. However, on August 25, 2006, China made a declaration invoking the mentioned exceptions, specifying the following: China does not agree to any of the procedures outlined in Section 2, Part XV concerning disputes mentioned in paragraph 1(a)(b)(c), Article 298. Consequently, for disputes enumerated in paragraph 1(a)(b)(c), Article 298, China is not bound to settle them through the discussed mechanism above.[49]

In its relations with ASEAN countries, Vietnam faces maritime disputes with Thailand and Malaysia. Thailand has invoked an exception under Article 298, meaning that these disputes can only be resolved at the Arbitral Tribunal with the agreement of the involved parties. Malaysia has refrained from expressing a position regarding the selection of jurisdiction and the application of exceptions so that the disputes can be resolved in arbitration at the request of a disputing party. China does not have a declaration to choose a jurisdiction so that the dispute can be resolved at arbitration. Nevertheless, China asserts the use of exceptions; thus, if a dispute arises with China concerning maritime delimitation, the mechanism outlined in the Convention can be employed with the agreement of the parties involved.

Conclusion

In summary, UNCLOS serves as a crucial legal foundation for parties to delineate their maritime territorial claims in the East Sea. Numerous countries, including Southeast Asian nations such as the Philippines, have utilized the Convention's dispute resolution mechanism. Vietnam can draw upon the practical experiences of other countries in resolving disputes in the region, including those concerning maritime delimitation and the implementation of sovereign rights in overlapping waters.

Disputes in the East Sea remain intricate and carry a potential risk of conflict. While the involved nations have yet to find a definitive resolution to these disputes, fostering negotiations and signing the Code of Conduct (COC) is imperative. However, countries must specifically outline measures to restrain and prevent the escalation of conflicts, particularly in areas where waters overlap. The challenge lies in accurately delineating overlapping maritime zones in the East Sea. The ruling by the Court in the Philippines-China case has provided guidance to countries on how to define these overlapping zones in the East Sea clearly. Nonetheless, China persists in making illegitimate claims that surpass the limits stipulated in UNCLOS, such as asserting historic rights. That further complicates the resolution of disputes, making it challenging for ASEAN countries and China to reach an agreement in the foreseeable future.

[46] Note 000191 on 06/3/2020 of Philippines; Note 126/POL-703/V/20 on 26/5/2020 of Indonesia; Letter A/74/874–S/2020/483 on 01/6/2020 of USA; Note 20/026 on 23/7/2020 of Australia; Notes on 16/9/2020 of UK, Germany and France, https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html, accessed April 30, 2023.

[47] See Herdt SD. Meaningful Responses to Unilateralism in Undelimited Maritime Areas. Journal of Territorial and Maritime Studies 6 (2), 2019, pp. 5-26; Afriansyah A, Darmawan AR. Enforcing Law in Undelimited Maritime Areas: Indonesian Border Experience. The International Journal of Marine and Coastal Law 37, 2022, pp. 282-299.

[48] See http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed April 30, 2023.

[49] See http://www.un.org/depts/los/convention_agreements/convention_declarations.htm, accessed April 30, 2023.