

Original Paper

Unilateral Activities in Disputed Maritime Areas and Meaningful Responses

Luo Xiangjin¹

¹ College of Marine Living Resource Science and Management, Shanghai Ocean University, Shanghai, China

Received: May 1, 2024

Accepted: May 17, 2024

Online Published: May 17, 2024

doi:10.22158/elp.v7n1p42

URL: <http://dx.doi.org/10.22158/elp.v7n1p42>

Abstract

Unilateral activities conducted in a disputed maritime area pending maritime delimitation are considered to be a violation of the pre-delimitation obligations imposed by Article 74/83(3) of the 1982 United Nations Convention on the Law of the Sea, which may trigger State responsibility. The obligations contained are negotiation in good faith and self-restraint. However, this is not a prohibition of all activities in disputed maritime areas. Through a study of the relevant case law of the international courts and tribunals, this article finds leniency towards unilateral activities in disputed maritime areas, i.e., some exceptions are permitted. In the South China Sea, reaching a final delimitation agreement can be a difficult and long-term task due to competing interests and the numerous countries involved. Facing unilateral activities undertaken in such an area, the appropriate and meaningful responses are significant to safeguard maritime rights and interests.

Keywords

United Nations Convention on the Law of the Sea, Pre-delimitation obligations, Unilateral activities, Disputed maritime areas in the South China Sea

1. Introduction

It is noteworthy that just under half of current international maritime boundary delimitation issues have been fully resolved. Due to differences in the size of the maritime area and the type of resources within, resolving the issue of disputed maritime areas can be quite challenging. Unilateral activities refer to unauthorized resource exploration and exploitation or other activities in disputed maritime areas without the consent of the other parties until the delineation of disputed maritime areas. Under the 1982 UN Law of the Sea Convention (LOSC or the Convention) and the law of international responsibility, the unilateral activities of the parties in disputed maritime areas are considered wrongful. According to

relevant case law, international courts and tribunals do not completely prohibit development activities in disputed maritime areas. This article aims to define the permissible unilateral activities in disputed maritime areas in light of international judicial precedents, taking into account the pre-delimitation obligations. This work also discusses actions that can be taken in response to unilateral activities by other states in disputed maritime areas, given the wrongfulness of such activities. Then this work presents strategies and measures to address the challenges faced by China in disputed maritime areas in the South China Sea due to the unilateral activities of other countries.

2. The International Legal Regime Governing Unilateral Activities

There is no specific provision in international law on unilateral activities by the parties in disputed maritime areas before maritime delimitation, the basis in international law can be traced back to the pre-delimitation obligations of States Parties to LOSC.

2.1 Article 74/83(3) of LOSC

Article 74(3) of Part V, and Article 83(3) of Part VI of LOSC (hereinafter referred to collectively as Article 74/83(3) of the Convention, for reasons of commonality) provide that: “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation”. This provision regulates the international obligations of the parties before maritime delimitation and is usually considered as two obligations of a different legal nature. The first is the obligation to reach “provisional arrangements of a practical nature” with “every effort”, while the second is the obligation “not to jeopardize or hamper the reaching of the final agreement”.

2.1.1 Obligation to “Make Every Effort” to Enter into “Provisional Arrangements of A Practical Nature”

The phrase “to make every effort” actually means that the parties should assume an obligation to “negotiate in good faith”/“pactum de negotiando”. That is, the parties should negotiate a future maritime delimitation treaty or agreement, which is mandatory and not a voluntary choice of the parties, and the violation of which is a breach of international law and may give rise to international responsibility. In the specific negotiation process, to “make every effort” requires that the parties not unreasonably or unnecessarily delay the negotiation or fail to negotiate by the agreed procedure and that the negotiation be conducted to reach an agreement so that the negotiation does not become a mere formality and is not meaningless. It is necessary for the parties to exchange information, or at least to propose an exchange of views, in the course of the negotiations. However, the obligation to negotiate does not mean that the parties have to reach an agreement; by its nature, it is a “process-oriented” obligation of conduct. It has been argued that the good faith attitude “to make every effort” can be demonstrated in negotiations by compromises and concessions of certain claims and interests, and is

not confined to direct exchanges of legal opinions or confrontations between the parties (Ye, 2016, pp. 99-109; Ye, 2021, pp. 127-139). About the specific method of negotiation, the international judicial practice requires only that it be reconcilable and that the specific content of the negotiation be left to the discretion of the parties to the dispute.

“Interim arrangements of a practical nature” comprises two concepts, “practicality” and “interim arrangements”. “Practicality”, i.e., operability, requires that the interim arrangement reached should function as it should, in other words, to regulate the activities of the parties or contracting parties to the agreement in disputed maritime areas. Some scholars have further explained that operability means that the agreement reached has substantive content, is worded, specifies the rights and obligations of the parties, has a concrete implementation program, and is not confined to some provisions of principle or a repetition of general international regulation, or is merely a symbolic declaration (Ye & Zhang, 2014, pp. 19-27). Otherwise, it is difficult to say that it has achieved “practicality”. The term “provisional arrangements” refers to transitional arrangements agreed upon by the States concerned before the delimitation of maritime boundaries for the joint development of the disputed area, or for some level of cooperation or freezing of the relevant activities for a certain period. Interim arrangements are transitional in nature, and their application is theoretically limited to the period before maritime delimitation or during the lifetime of the disputed area, i.e., from the time when several States make simultaneous claims to a particular maritime area or zone to the time when the final line is drawn.

2.1.2 Obligation “Not To Jeopardize or Hamper the Reaching of the Final Agreement”

“Not to jeopardize or hamper the reaching of the final agreement” means, in effect, that the parties to a dispute must not aggravate the dispute or impede its settlement, and is also known as the obligation of mutual restraint. The obligation of mutual restraint does not prohibit any activities in the disputed maritime areas, and the suspension of economic activities in the disputed maritime areas should be avoided from the point of view of dispute settlement and economic development, as long as they do not prejudice the conclusion of a final delimitation agreement. Exclusive economic zones and continental shelves are created for resource development expected that the maritime delimitation dispute will be resolved in the short term. Considering the economic development factor, a complete moratorium on all activities in the disputed maritime areas may not be reasonable and could worsen the current state of the dispute. The arrangement of mutual obligations of restraint reflects the objectives that the Convention is intended to achieve, namely, equitable and efficient use of the resources of the oceans and seas, the strengthening of peaceful and friendly relations among States, and the peaceful settlement of disputes. This requires the parties to balance the need for economic development with the obligation of restraint concerning unilateral exploitation in the disputed area. The duty of mutual restraint is an obligation of conduct, whereby States must act “in a spirit of understanding and cooperation” before delimitation. At the same time, it is a “result-oriented concept”, which hinges on whether the conduct in question has the effect of jeopardizing or hampering the conclusion of a final agreement.

Regarding the scope of application of the obligation of mutual restraint, both temporal and spatial aspects are noteworthy. About the temporal scope of its application, the Convention only limits it to “during the transitional period”, without specifying the beginning and the end of the transitional period. The beginning of the period of application is clearly when a delimitation dispute arises or is likely to arise. Regarding the cessation of the obligation of mutual restraint, the view that the obligation of mutual restraint exists only in the absence of provisional arrangements before delimitation or in areas not covered by provisional arrangements (Zhang, 2018, pp. 18-34; Ye, 2021, pp. 127-139). The obligation of mutual restraint not to prejudice or impede applies throughout the transitional period, and in maritime areas where the legal status is yet to be clarified, regardless of the final attribution, prudence and restraint will be exercised as long as no final delimitation agreement has been reached. The spatial scope of the application of this obligation was disputed, with views being expressed that the obligation was limited to disputed maritime areas with overlapping claims (Vasco, 2014). It has also been argued that since delimitation can only be determined by taking into account the claims of the parties and the relevant circumstances, and since the unitary and fluid nature of the sea makes it possible for unilateral acts, such as the exploitation of transboundary resources, carried out in the proximity of the disputed area to result in prejudice to the interests of the other party, the obligation should apply to the entire undelimited sea area. However, this theory remains at the theoretical level only and has no practical reality. The scope and definition of disputed maritime areas are unclear, both because of the difficulty of identifying regional territorial sovereignty disputes (e.g., islands) and because of differences in the claims of the parties. In practice, the obligation may be breached even in respect of acts occurring outside the disputed or undelimited maritime areas. It may not be necessary to define the spatial extent of the obligation of mutual restraint, but rather to focus on the extent to which unilateral acts of exploitation jeopardize or impede the conclusion of an eventual agreement. Under this theory, the risk of a breach of the obligation of restraint would be much greater for unilateral acts of exploitation in disputed maritime areas than for exploitation in undisputed maritime areas.

2.2 Other Provisions of LOSC and the Principle of Good Faith

Other provisions of LOSC also reflect its object and purpose by imposing general obligations on the conduct of the parties in the disputed area. This means, for example, that an equitable outcome of maritime delimitation is the overriding objective, as provided for in Article 74/83(1) of the Convention. However, the content of this criterion for achieving an equitable result is not further specified and is left to the interpretation of the International Court of Justice and the States themselves. The principle of equity binds the parties to “negotiate in good faith” on issues relating to maritime delimitation, which implies that the parties, in negotiating their respective claims, should be based on international law and be reasonably proportional and that the allocation of rights and resources should be subject to a certain degree of arm’s length dealing. Article 123 of the Convention requires the parties to fulfill their obligation to cooperate, including in the field of exploitation and use of the disputed maritime areas. The obligation of due regard in the Convention as a whole is reflected in articles 56, 58, 60, 77, 80, 81,

and 246 of the Convention, which provide potential legal rules for the conduct of the parties for exploitation in disputed areas. In international judicial practice, the minimum level of this duty of due regard consists of at least some consultation with other States claiming rights. The general principle of good faith is reflected in the good faith and prohibition of abuse of rights set out in Article 300 of the Convention.

The principle of “good faith” is a long-established principle in international law and the basic principle governing the exercise of rights and the fulfillment of legal obligations. Coastal States have, in principle, sovereign rights and jurisdiction in disputed maritime areas, but before maritime delimitation, their claimed rights are in a state of uncertainty, and the principle of good faith restricts how States can exercise their sovereignty or jurisdiction. The principle of good faith requires that the parties should not exercise their rights in a manner that is detrimental or intended to be detrimental to the rights of others or intended to exacerbate tensions and that they should actively engage in effective negotiations to promote the peaceful settlement of disputes, i.e., engage in good faith and cooperate. In other words, there is a need to show reasonable regard for the rights of other States. Essentially, good faith is a limitation on State sovereignty that is necessary to protect other States and their trust and reliance on international law (Steven, 2013, pp. 40-63). The “good faith” and “bad faith” of a State party to a disputed maritime area can be screened in three ways: first, whether the State in question is convinced that it has sovereign rights in the area in question; second, whether it knew or should have known of the existence of claims by other coastal States to the area in question; and third, whether, even if it was aware of the existence of a dispute in a particular area, the State in question was aware of the existence of such claims (Sean, 2020).

2.3 The Law of International Responsibility

An internationally wrongful act of a State in breach of an international obligation of that State entails the international responsibility of that State. Unilateral acts of exploitation are unlawful in two respects: first, because their unilateral nature violates the obligation to negotiate in good faith and the obligation to cooperate; and secondly, because the object of their activities, i.e., the resources of the disputed area, is affected in a way that may be injurious to the rights of the other parties, in violation of the obligation of mutual restraint and due regard. It is worth noting that the infringement of the sovereignty of the other parties concerned is not relevant to the triggering of international responsibility in the disputed area, and that infringement of sovereignty is not a prerequisite for the determination of a breach of article 74/83, paragraph 3, of the Convention, which imposes on States the obligation to refrain from carrying out activities in the undelimited area that could jeopardize or impede the conclusion of a final agreement (Nicholas, 2019, pp. 345-368). The diversity of legal interests in the disputed area, such as the sovereign rights of the other parties, the marine environment, and the sustainability of living marine resources, also makes unilateral acts of exploitation need to be viewed with caution and rigor.

3. International Judicial Practice Concerning Unilateral Activities

In the international judicial practice on unilateral exploitation, international courts or tribunals have further interpreted the two obligations to be complied with before the delimitation of maritime boundaries and have laid down more specific requirements, thus gradually clarifying the limits of the illegality of acts of unilateral exploitation.

3.1 Aegean Sea Continental Shelf Cases

In the Aegean continental shelf cases, Greece requested the Court to order Turkey to refrain from carrying out exploration activities in the disputed maritime areas. The Court ultimately refused to order provisional measures, stating that Turkey's actions did not pose a risk of irreparable damage to the rights claimed by Greece for the following reasons: such seismic exploration, carried out through sound waves generated by explosions, did not involve any risk of physical damage to the seabed; the activities in question did not involve the establishment of installations and were of a temporary nature; and it had not been demonstrated that Turkey had commenced any action involving the physical possession or other use of the natural resources of the disputed area of the continental shelf. The Court held that an important criterion for determining whether hydrocarbon activities in undelimited maritime areas are sufficiently prejudicial to the rights of another State to justify the adoption of provisional measures is whether they cause irreparable damage to the geological structure of the seabed and subsoil. In this case, the Court distinguished between unilateral exploitation activities based on actual changes in the marine environment. The Court differentiated between "temporary" and "permanent" acts of exploration carried out by the parties. According to international law, exploration activities that could cause permanent physical damage to the seabed, subsoil, and natural resources, such as establishing installations on the continental shelf or physically encroaching on its resources, are considered "permanent" exploration and should be prohibited. This is to prevent irreparable damage to the resources of the continental shelf. In this case, the Court did not make any negative assessment of Turkey's unilateral exploration activities, nor did it call for the cessation of such behavior. The Court considered that the seismic exploration activities carried out by both parties in the disputed maritime areas, which were temporary in nature, did not violate international law, but rather expressed the sovereign rights of the coastal State over the continental shelf. Another key point is that the Court referred to the exclusive competence of a State regarding access to information on natural resources in the continental shelf area. However, appropriate means could compensate for this and prevent irreparable harm to the relevant rights.

3.2 Guyana/Suriname Case

The case concerning Guyana and Suriname was the first to address Article 74/83(3) of the Convention. The arbitral tribunal examined exploration and exploitation activities in undelimited maritime areas. The tribunal interpreted Article 74/83(3) of the Convention and held that these provisions reflect the need to avoid a moratorium on economic development in the disputed area. Mutual restraint does not imply a complete prohibition of all activities in the disputed area. The Convention permits two types of

activities in the disputed area: activities carried out by the parties according to provisional arrangements of a practical nature, and unilateral acts that do not jeopardize or impede the achievement of an agreement on the final maritime boundary. The Arbitral Tribunal acknowledged the difference between actions that result in permanent physical alterations, such as drilling operations, and those that do not, such as seismic surveys. Based on this reasoning, the tribunal concluded that activities that do not cause irreversible physical changes should be permitted and not prevent the final agreement from being reached. However, unilaterally carried out drilling is considered unlawful as it may jeopardize the reaching of the final agreement. "... activities that would justify the use of an exceptional power due to their potential to cause irreparable prejudice, would easily meet the lower threshold of hampering or jeopardizing the reaching of a final agreement... the risk of physical damage to the seabed or subsoil, therefore appropriately guide this Tribunal's analysis of an alleged violation of a party's obligations under Articles 74(3) and 83(3) of the Convention". At the same time, the tribunal noted that "... international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process".

3.3 Ghana/Côte D'Ivoire Case

This case examines the obligation in article 74/83(3) of the Convention again follows the Guyana/Suriname case, and focuses on whether unilateral hydrocarbon exploitation in the disputed area gives rise to international responsibility. The Chamber did not require Ghana to cease its ongoing unilateral oil exploitation in the disputed maritime area. Instead, it only required Ghana to refrain from engaging in new drilling activities, unless such activities would cause irreparable prejudice to the rights of Côte d'Ivoire. The decision was based on the fact that the unilateral act of exploitation would cause serious harm to the marine environment. The judgment in the Ghana/Côte d'Ivoire case differs from that in the Guyana/Suriname case. The Tribunal noted that the delimitation judgment was constitutive, determining the attribution of the disputed maritime area and that unilateral acts committed before the delimitation and claimed based on good faith were lawful. However, the tribunal introduced the concept of "knew or ought to have known" about the obligation of "good faith" on the part of the parties. This means that the drilling activities were being carried out in a field adjacent to the license block of the other party, and in what the other party perceived to be the disputed waters (Zhang, 2018, pp. 18-34). This case illustrates that international judicial bodies recognize unilateral exploitation by a disputing state in disputed waters, without further defining the criteria to be applied. The Special Chamber ultimately found that Ghana's unilateral mining activities did not violate the obligation of self-restraint. This was because Ghana had complied with the order for provisional measures by suspending its activities in the disputed maritime area. Additionally, Ghana had conducted its activities only in the maritime area that was ultimately attributed to it. The judgment emphasized that the breach of obligation occurred in the maritime areas claimed by the parties, rather than in the disputed maritime areas. It focused on the suspension of activities in the disputed area, rather than on factors such as the

nature of the activities carried out.

The Tribunal interpreted two obligations under the Convention. Regarding the obligation of the parties to “negotiate in good faith”, the Tribunal held that the uncompromising position of the parties in the negotiations and the initial closure of the judicial settlement route did not violate that obligation. The assessment of whether the parties fulfilled their obligation to negotiate in good faith should only be made if there is an indication by the other party that negotiations are necessary due to a provisional arrangement. Additionally, the relationship between the two states should take into account the other state’s tolerance of unilateral acts of exploitation. Regarding the obligation of “non-harm and non-obstruction”, the Tribunal concluded that Ghana had fulfilled its obligation by discontinuing its exploitation. However, it is unclear how this fact led to the determination that there was no breach of the obligation in Article 74/83(3) of the Convention. The Special Chamber did not make a substantive decision on the obligation to exercise self-restraint throughout the disputed maritime area. It is important to note that any action or abstention by either party to avoid the aggravation or extension of the dispute shall not be construed as a renunciation of any of its claims or as recognition of the claims of the other party to the dispute.

3.4 Commentary

The case of Guyana/Suriname serves as an example of the test for physical changes in the marine environment. However, the idea that unilateral development activities that do not cause physical changes are generally permissible did not receive support in the subsequent discussion of the issue. This is also true for access to and use of information on resources in undelimited areas that may cause irreversible damage (Stephen, 2008, pp. 119-128). Considering the context of the relations between the concerned States, a flexible approach may be necessary to establish criteria based on the nature of the activities in question (David & Youri, 2014). For instance, the Ghana/Côte d’Ivoire case referred to the suspension of existing exploitation activities. The judgment emphasizes the duty of self-restraint, which obliges parties to make every effort not to jeopardize or impede the reaching of a final agreement in a spirit of understanding and cooperation. This understanding of the duty of self-restraint implies that the criteria for classification may be limited depending on the nature of the activity in question.

In the Ghana Côte d’Ivoire case, the Chamber distinguished its position from its previous cases. In general, a violation of Article 74/83(3) of the Convention does not depend on whether the activities are carried out in the maritime area of a State or violate its sovereign rights. It is sufficient to prove a breach of an obligation if the activities are carried out in an undelimited or disputed maritime area if the State is aware of the claims made in good faith by one or more States, and if the activities may jeopardize or impede the conclusion of a definitive agreement. A breach of obligation is enough to demonstrate that the activity may be illegal, even if it occurs within the State’s territory (Nicholas, 2019, pp. 345-368).

The Ghana/Côte d'Ivoire case conflicts with the previously established notion that a State has sovereign rights over its exclusive economic zone and continental shelf. This case uses the doctrine of constituent elements of delimitation. According to the philosophy of that case, the parties' exclusive rights were uncertain before the delimitation. The delimitation agreement or judgment made their exclusive rights certain. The Chamber's assessment in the Substantive Decision focused solely on whether Ghana's suspension of activities in the disputed maritime area breached the obligation of restraint. The nature of the impact of Ghana's unilateral act of hydrocarbon exploitation was not examined. It is important to consider the outcome of the delimitation, as it determines the lawfulness of the act. The lawfulness of unilateral oil exploitation activities does not depend on their impact on the delimitation of the disputed area, but rather on the allocation of waters between the parties after the delimitation. It is unclear how the fact of suspension justifies a finding that there has been no breach of the obligation of restraint, despite taking into account the particular context of the dispute between the parties. This may have set a precedent for ex post facto sanctions against unilateral oil and gas drilling activities. It has been observed that unilateral hydrocarbon development activities in the disputed area may create the risk of obtaining "fait accompli" (Xu, 2018, pp. 67-79). This case appears to encourage more unilateral behavior by coastal states regarding areas with seabed resources. This may lead to claimant states in the disputed area increasing resource development and production within the disputed area, which is undoubtedly a negative signal.

It can be seen that, in international judicial practice, the attitude towards the prohibition of unilateral acts of exploitation has gradually become more conservative, with a greater tendency to protect the established state of rights of the parties and maintain the status quo. There are two main types of criteria for defining the wrongfulness of unilateral acts of exploitation. One is the criterion of permanent physical impact on the marine environment. Secondly, the criterion of attribution of the maritime area claimed by the parties to the disputed area, where the disputed area in which the unilateral development activity of a party is taking place has subsequently been adjudicated to be allocated to the parties, the Court is more likely to be inclined to find that the unilateral activity is not in breach of the obligation of restraint. However, the cases relating to the duty of self-restraint decided by these international courts and tribunals do not provide clear criteria as to the scope of the duty, and the overall lack of clarity as to the boundaries of the violation of the unilateral act of exploitation creates uncertainty in State practice.

4. Permitted Unilateral Acts in Disputed Maritime Areas: Further Definition of Exceptions

The exploitation and utilization of marine resources by coastal states do not necessarily require the establishment of maritime boundaries. The Convention aims to resolve conflicts between parties regarding maritime delimitation, promote fair and effective use of disputed area resources, and provide parties with time to re-evaluate their positions, thus establishing a basis for future delimitation negotiations. It can be concluded from the above theories and cases that there are various criteria for allowing exceptions or restrictions on unilateral acts of exploitation in disputed areas.

The permanent/temporary criterion of the nature of the act, the distinction between permanent and temporary exploitation is based on the nature of the act and its potential impact on the environment. As defined in the cases cited above, exploitation activities that cause permanent physical damage to the seabed, the subsoil, and its natural resources, such as the establishment of installations or other highly controversial developments, are likely to cause irreversible adverse effects on the marine environment, are considered “permanent” developments and should be prohibited. Unilateral acts of exploitation of a temporary nature, which do not cause irreparable or irreversible harm to the rights and marine resources of other coastal States, may be permissible, taking into account the economic development needs of the States concerned. Under this criterion, the most serious impacts are caused by unilateral acts of oil and gas drilling. Seismic surveys also pose a risk of breaching pre-delimitation obligations due to the resource information they acquire and the potential acoustic impacts. Specific activities are permitted in undermarketed maritime areas, including naval patrols, search and rescue operations, regulation and supervision of archaeological excavations of underwater cultural heritage, regulation and monitoring of marine scientific research, control of navigation, and pollution control activities (Nicholas, 2019, pp. 345-368). While these activities do not rationalize claims, they indicate the special interest that a coastal State may have in a particular undelimited area, i.e., the State’s “primary interest that may play a role in future delimitations” (Malcolm, 1989). Therefore, in the disputed area, the risk of such activities breaching pre-delimitation obligations is low and may be considered permissible.

The delimitation outcome criterion presumes good faith when the area of unilateral exploitation is on the side of the median line/equidistance line adjacent to the State’s coast. In previous jurisprudence on maritime delimitation disputes, international judicial bodies have established a three-stage approach to delimitation. Firstly, a provisional median line/equidistance line is established as the demarcation line. Secondly, the provisional boundary is adjusted if there are relevant circumstances that require such adjustment. Finally, a proportionality test is conducted between the area delimited by the demarcation line and the corresponding length of the coastline. If the legality of a State’s unilateral conduct in the disputed maritime area is to be determined by the result of the delimitation rather than by the nature of the conduct, according to the “constitutive theory of delimitation”, then unilateral development in the maritime area on the side of the median line/equidistance line adjacent to one’s coastline, regardless of the result of the delimitation, would be a form of restraint and limitation, pending the resolution of the dispute concerning the delimitation of the disputed maritime area. However, in such cases, the State

needs to exercise restraint. However, in cases of disputed maritime areas, States should exercise caution due to the high degree of uncertainty regarding the location of the boundary and the difficulty in determining the extent of the disputed areas. This is particularly relevant in the South China Sea, where unilateral exploitation is often accompanied by acts of grabbing or encroachment by neighboring States, increasing the risk of potential allocation of maritime areas to another State at a later stage.

In the Ghana/Côte d'Ivoire case, Judge Jin-Hyun Paik proposed a method of assessment that considers relevant factors within the framework of the relationship between the two states. It is not possible to determine whether a state's conduct violates the obligation "not to endanger or impede the conclusion of a final agreement" in a general and abstract manner. When assessing a state's breach of the obligation of restraint, it is necessary to consider relevant factors such as the type, nature, place, time, and manner of the act. This determination should be made within the framework of the relations between the concerned States. It is important to note that there is no simple criterion that can be applied to all situations.

5. Potential Countermeasures to Unilateral Activities

5.1 Countermeasures

Potential countermeasures that can be taken in response to unilateral development behavior by a coastal state in a disputed maritime area. Countermeasures have an exemplary effect, but they cannot be regarded as a punishment or reprisal in themselves. Instead, they serve as an inducement for the responsible State to comply with its obligations. This substantive limitation determines the essentially temporary nature of countermeasures, which are limited to the suspension of the fulfillment of certain international obligations towards the responsible State. Countermeasures must be provisional, targeted, and proportional to be justified. Countermeasures must adhere to the general norm of not violating peremptory norms or fundamental human rights, such as the obligation to prohibit the threat or use of force and the humanitarian obligation to prohibit reprisals, as outlined in the United Nations Charter. Countermeasures require that the responsible State be allowed to negotiate and that channels of communication be maintained between the States concerned. This is a general obligation required by the principle of good faith.

5.2 Maritime Administrative Enforcement

It is important to note that a unilateral act of exploitation in a disputed maritime area may acquire legitimacy and become a fact, based on the factual situation and sovereign rights. However, it is crucial to consider that the absence of protest by the other party to the disputed maritime area constitutes acquiescence to the said act. It is therefore necessary to ensure that all parties involved are aware of the situation and have the opportunity to voice their concerns. Enforcement may be a necessary response to unilateral acts by other states in disputed areas, especially when there is an urgent need to prevent the violation of sovereign rights or sovereignty. This is done to safeguard the interests of the coastal state after the activity has begun and while it is taking place (Sandrine, 2019, pp. 5-26). In this context,

parties may increase their enforcement efforts in response to previous unilateral acts of exploitation by other states, such as the expulsion confirmed by the arbitral tribunal in the Guyana/Suriname case. However, according to international law, administrative law enforcement is permitted in disputed maritime areas. It is important to ensure that law enforcement behavior is reasonable and proportionate, not only within the pre-delimitation obligations of the Convention but also subject to the conditions for resorting to force and the extent of the force to be applied, as provided for in the Convention and the Charter of the United Nations. The maritime law enforcement activities carried out by the relevant States may not be considered military action “under the threat of force”. The characterization of law enforcement activities in international judicial practice is based on an objective assessment of the nature of the activity in question. Such activities are essentially indistinguishable from, and not mutually exclusive of, law enforcement activities that may be elevated to the level of military activities for various reasons. The international legal nature of law enforcement activities depends on the circumstances of the case. Criteria such as the functional objective of the operation, the status of the affected entity, location, and jurisdiction may play a role in determining this. The use of force in the execution of enforcement actions should only be considered as a last resort.

5.3 Interim Measures

Interim measures are safeguards for States in legal proceedings to preserve their rights pending the outcome of the case (Natalie, 2005). They are used in the United Nations Charter, the Statute of the International Court of Justice, and LOSC as a protective measure to prevent the deterioration of a situation. The justification for provisional measures is based on the fundamental legal principle that the Court’s judgments should be effective. Therefore, when a case is brought before the Court, it must prevent either or both parties from disturbing the situation or creating a *fait accompli* for the adversary (Merrills, 1998). Provisional measures are issued only if certain conditions are met. The relevant court or tribunal must have *prima facie* jurisdiction. Additionally, the situation must be urgent enough to pose a risk of irreparable harm to the parties’ rights or the marine environment before the final decision. There must be a genuine link between the provisional measure and the right to be preserved. Finally, the adoption of the provisional measure to protect the right must be considered reasonable. In maritime delimitation disputes involving unilateral acts of exploitation, provisional measures are adopted based on two substantive criteria: whether there is irreparable harm to the rights of the parties or serious harm to the marine environment (Sun, 2019, pp. 193-200). However, states frequently use interim measures as a litigation strategy, which poses a risk of abuse (Yao, 2022, pp. 120-136).

5.4 Compulsory Arbitration Procedure

When a dispute arises between States parties regarding the interpretation or application of the Convention and the parties fail to agree on a solution, the compulsory settlement procedure under Part XV of the Convention applies. The tribunal in the Ghana/Côte d’Ivoire case observed that the parties did not violate the obligation to negotiate in good faith by initially closing the judicial settlement route, provided that they had made a prior exclusionary declaration based on Article 298 of the Convention.

The issue at hand is whether the compulsory dispute settlement mechanism can be applied after a party has made an exclusionary declaration. Specifically, the question is whether unilateral acts of exploitation constitute a breach of pre-delimitation obligations. The main issue concerns the extent of the exclusion being discussed, which is addressed in the interpretation of Article 298 of the Convention. There is also the possibility that a declaration made under Article 298 of the Convention may not cover the exclusion of claims related to liability for breaches of pre-demarcation obligations from judicial arbitration proceedings. The analysis of whether Article 298, paragraph 1 (a) (1), of the Convention deals with delimitation or pre-delimitation obligations must be conducted on a case-by-case basis. Articles 74 and 83 not only provide for the actual delimitation of maritime areas but also address issues related to the pre-delimitation transition period. Furthermore, considering the purpose of the Convention for the peaceful uses of the sea, excluding Articles 74/83 under Article 298, and interpreting it as a blanket exclusion of paragraph 3, would contradict that purpose. The 2016 Compulsory Conciliation between Timor-Leste and Australia (Decision on Jurisdiction) noted that Contracting States may exclude disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to the delimitation of maritime boundaries from compulsory judicial arbitration proceedings by declaration. However, it was held that such disputes fall within the scope of compulsory arbitration. Disputes are subject to compulsory judicial arbitration proceedings, including interim arrangements during the transitional period and the obligation “not to endanger or impede”. The exclusion of delimitation disputes does not cover the question of responsibility for pre-delimitation obligations and is limited to delimitation disputes. However, the optional regime of exceptions was established because some disputes are considered politically sensitive, and resolving conflicts through diplomatic channels or negotiations may be preferable (Alexander, 2017). Article 298, paragraph 1(a), in particular, reflects the political and economic significance of maritime delimitation as a process for determining the extent of the coastal State’s authority (Natalie, 2005). It could be argued that the reasoning for permitting optional exceptions does not pertain to disagreements regarding the duty of self-restraint, as the disagreement itself is not connected to the standards or approach to defining boundaries (Yumi, 2017, pp. 37-47).

6. China’s Position and Countermeasures

The South China Sea holds significant economic and strategic value and is abundant in fishery, waterway, and mineral resources, particularly oil and gas. Most of the disputed sea areas between China and neighboring countries in the South China Sea are under the actual control, management, and exploitation of the neighboring countries from the perspective of the unilaterally developed areas. However, China has not yet carried out any substantial oil and gas resource development activities in the disputed areas of the South China Sea. In 2019, China proposed the idea of a “community of maritime destiny”, promoting the sharing of marine resources and the joint management of maritime affairs by all nations. This demonstrates China’s willingness to negotiate and cooperate. However,

illegal exploitation and interference by other countries in the South China Sea have hindered joint development. To safeguard its rights and interests in the South China Sea, China may need to take certain countermeasures and strengthen unilateral development.

China has the right to lodge a formal objection, known as a protest, in response to any unlawful unilateral development activities carried out by other countries. This objection is made when a State believes that an act or claim is contrary to international law or unfounded (Hui, 2013, pp. 43-61). By protesting, China is indicating that it does not agree with the behavior in question.

After the Sino-Philippine Arbitration in the South China Sea, China is at risk of other coastal countries in the South China Sea following the Philippines' example of judicializing the issue. This could involve initiating arbitration proceedings under Annex VII to the Convention, which may result in provisional measures or compulsory arbitration proceedings against China. In response to an application for provisional measures by another State, China may counteract it following Article 294 of the Convention. It is important to note that international judicial bodies tend to distinguish between maritime delimitation and pre-delimitation obligations. Disputes related to unilateral exploitation issues may not be subject to the optional exceptions. China should continue to make legal preparations and use favorable rulings in international jurisprudence to claim its rights and interests.

If China engages in unilateral development in the South China Sea, it aims to counter the previous unlawful unilateral development of other countries, compel relevant countries to consider the proposal of joint development and advance the negotiation process of the South China Sea Provisional Measures or delimitation agreement. This is a legitimate and provisional countermeasure. China can enhance its development efforts within the scope of allowed unilateral development. Depending on the nature of the exploitation, unilateral exploitation activities that do not cause irreparable or irreversible damage to marine resources may be carried out for economic development purposes. If unilateral development activities occur on the side of the median line/equidistance line of the disputed sea area against the coast of one's own country, goodwill tends to be presumed, regardless of the outcome of the delimitation.

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