

## INTERIM MEASURES PENDING MARITIME DELIMITATION AGREEMENTS

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### I. INTRODUCTION

Since President Truman claimed zones of extended coastal jurisdiction for the United States in September 1945,<sup>1</sup> the delimitation of zones of national jurisdiction between states with opposite or adjacent coasts has become a major legal and political issue in international relations. The development of the concept of the continental shelf during the 1950s and 1960s, as well as the claim to extended fisheries zones or exclusive economic zones by nearly all coastal states under the sway of the Third United Nations Conference on the Law of the Sea since the mid-1970s, gave rise to delimitation problems all over the world. Similar problems may arise if more states extend their territorial seas to 12 nautical miles, which they may do under the new United Nations Convention on the Law of the Sea (LOS Convention) of 1982.<sup>2</sup> By now, a considerable number of delimitation agreements have been concluded on the continental shelf and/or the territorial sea,<sup>3</sup> and even agreements on the delimitation of fisheries zones have been reported.<sup>4</sup>

Disputes about delimitation are the price coastal states have to pay for the extension of their zones of national jurisdiction. Such disputes have resulted in several important international pronouncements on the merits: the 1969 *North Sea Continental Shelf* decisions of the International Court of Justice,<sup>5</sup> its Judgment

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<sup>1</sup> Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 3 C.F.R. 67 (1943-48), 13 DEP'T ST. BULL. 485 (1945). A similar declaration was made on the same date with respect to coastal fisheries in certain areas of the high seas, but it was never enforced and almost immediately became a dead letter.

<sup>2</sup> United Nations Convention on the Law of the Sea, *done* at Montego Bay, Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* 21 ILM 1261 (1982).

<sup>3</sup> *See, e.g.*, the list of 75 agreements on maritime boundaries in Jagota, *Maritime Boundary*, 171 RECUEIL DES COURS 81, 202 (1981 II). Most agreements are published with maps and analyses in U.S. DEP'T OF STATE, OFFICE OF THE GEOGRAPHER, INTERNATIONAL BOUNDARY STUDY, SERIES A, LIMITS IN THE SEAS.

<sup>4</sup> *See* the Venezuela and Trinidad/Tobago fishing agreement of Dec. 12, 1977, analyzed by Nweihed, *EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements between Venezuela and Her Neighbors*, 8 OCEAN DEV. & INT'L L. 1, 14 *et seq.* (1980).

<sup>5</sup> *North Sea Continental Shelf Cases* (W. Ger./Den.; W. Ger./Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20).

of 1982 in the *Case Concerning the Continental Shelf* between Tunisia and Libya,<sup>6</sup> and the decisions of 1977 and 1978 in the *Anglo-French* arbitration on the continental shelf in the English Channel,<sup>7</sup> as well as the report and recommendations submitted to the Governments of Iceland and Norway by the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen in 1981.<sup>8</sup> Other cases are still pending, namely, the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*<sup>9</sup> between Canada and the United States (since 1981), and the *Case Concerning the Continental Shelf* between Libya and Malta (since 1982).<sup>10</sup> Still other disputes have never been judged on their merits or may never be submitted to independent third-party settlement, such as those on the Aegean Sea<sup>11</sup> between Turkey and Greece, the Barents Sea<sup>12</sup> between Norway and the Soviet Union, and the Baltic Sea<sup>13</sup> between Poland and Denmark, the Soviet Union and Sweden, and Denmark and Sweden, to mention but a few well-known examples.<sup>14</sup> Considering that large marine areas with growing offshore industries remain undelimited, e.g., in the South China Sea, the eastern Pacific, and the Caribbean, delimitation problems will probably keep state representatives, scholars of international law and geographers busy for years to come.

Meanwhile, the time spans needed for delimitation seem to grow with the number of complicated cases. For example, the process lasted from 1964/1965 to 1971 in the case of the continental shelf between the Federal Republic of

<sup>6</sup> *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18 (Judgment of Feb. 24).

<sup>7</sup> *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decisions of 30 June 1977 and 14 March 1978, 18 R. Int'l Arb. Awards 3, 18 ILM 397 (1979).

<sup>8</sup> 20 ILM 797 (1981).

<sup>9</sup> *See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, Constitution of Chamber, 1982 ICJ REP. 3 (Order of Jan. 20); and *id.* at 15 (Order of Feb. 1).

<sup>10</sup> After Malta's request to intervene in the dispute between Tunisia and Libya was refused (*Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application of Malta for Permission to Intervene, 1981 ICJ REP. 3 (Judgment of April 14)), its dispute with Libya was separately submitted to the ICJ (*Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1983 ICJ REP. 3 (Order of April 26)).

<sup>11</sup> Greece unsuccessfully requested interim measures of protection and the Court held that it lacked jurisdiction to entertain the Greek application. *See Aegean Sea Continental Shelf (Greece v. Turk.)*, Interim Protection, 1976 ICJ REP. 3 (Order of Sept. 11); and 1978 ICJ REP. 3 (Judgment of Dec. 19).

<sup>12</sup> *See Traavik & Østreng, Security and Ocean Law: Norway and the Soviet Union in the Barents Sea*, 4 OCEAN DEV. & INT'L L. 343 (1977); Fleischer, *The Northern Waters and the New Maritime Zones*, 22 GER. Y.B. INT'L L. 100 (1979); Østreng, *The Continental Shelf-Issues in the "Eastern" Arctic Ocean*, in LAW OF THE SEA: NEGLECTED ISSUES 165 (J. K. Gamble, Jr., ed. 1979).

<sup>13</sup> *See von Münch, Die gegenwärtige Situation der Ostsee und die Zusammenarbeit zwischen den Anliegerstaaten*, 103 ARCHIV ÖFFENTLICHEN RECHTS 522, 556 *et seq.* (1978); Boczek, *The Baltic Sea: A Study in Marine Regionalism*, 23 GER. Y.B. INT'L L. 196, 227 *et seq.* (1980).

<sup>14</sup> There are seven specific areas of dispute covered in a recent special bibliography on delimitation. *See T. MCDORMAN, K. BEAUCHAMP & D. JOHNSTON, MARITIME BOUNDARY DELIMITATION* 113 *et seq.* (1983).

Germany and Denmark and the Netherlands.<sup>15</sup> It took 8 years from the moment the overlapping claims were made in the *Tunisia/Libya* case until the International Court of Justice rendered its decision,<sup>16</sup> and approximately 3 years from the signing of the Arbitration Agreement until the tribunal rendered its second award in the *Anglo-French* delimitation.<sup>17</sup>

Where there are intricate geographical circumstances, the time needed for delimitation generally tends to be longer. The dispute over the Aegean Sea has been going on since 1976.<sup>18</sup> Other complicating factors include the assertion of historic rights over certain parts of the undelimited area (i.e., rights that do not exist ipso facto and ab initio as a matter of law but are created by occupation and usage<sup>19</sup>), and islands, particularly when it is unclear whether they should be considered as habitable territory or merely as rocks on which a claim to coastal state jurisdiction cannot be based.<sup>20</sup> The situation is made even more complex by territorial disputes over islands, as in the case of the Paracel Islands<sup>21</sup> in the South China Sea and those in the Beagle Channel<sup>22</sup> near the southern tip of South America. Although such territorial disputes are not part of the

<sup>15</sup> The Federal Republic concluded treaties on the lateral delimitation of the continental shelf in the vicinity of the coast with the Netherlands on Dec. 1, 1964, 550 UNTS 123, and with Denmark on June 9, 1965, 570 UNTS 98. After the ICJ rendered its Judgment of Feb. 20, 1969, *supra* note 5, the final delimitation agreements were concluded on Jan. 28, 1971, 10 ILM 600 (1971).

<sup>16</sup> See 1982 ICJ REP. at 37, para. 21.

<sup>17</sup> The Arbitration Agreement was signed at Paris on July 10, 1975, and the decision was rendered on Mar. 14, 1978. See 18 ILM at 400 and 462.

<sup>18</sup> See 1978 ICJ REP. at 8, para. 16.

<sup>19</sup> See the statement of the Court in the case concerning Tunisia and Libya, 1982 ICJ REP. at 73, para. 100.

<sup>20</sup> E.g., Rockall. See Symmons, *Legal Aspects of the Anglo-Irish Dispute over Rockall*, 26 N. IR. LEGAL Q. 65 (1975); C. SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 162 *et seq.* & 184 *et seq.* (1979); Brown, *Rockall and the Limits of National Jurisdiction of the UK*, 2 MARINE POL'Y 181, 275 (1978). With regard to the Eddystone Rock, see the observation of the tribunal in the *Anglo-French* case (1st decision), 18 ILM at 430 *et seq.*, paras. 121-144.

<sup>21</sup> For the dispute concerning the archipelagoes of the Paracel Islands held by China and Vietnam and the Spratly Islands held by Vietnam, the Philippines and Taiwan in the South China Sea, see Tao Cheng, *The Dispute over the South China Sea Islands*, 10 TEX. INT'L L.J. 265 (1975); Chiu & Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L. 1 (1975); Valencia, *The South China Sea: Prospects for Marine Regionalism*, 2 MARINE POL'Y 87 (1978); Park, *The South China Sea Dispute: Who Owns the Islands and the Natural Resources?*, 5 OCEAN DEV. & INT'L L. 27 (1978); Park, *China and Maritime Jurisdiction: Some Boundary Issues*, 22 GER. Y.B. INT'L L. 119 (1979); see generally J. PRESCOTT, *MARITIME JURISDICTION IN SOUTHEAST ASIA: A COMMENTARY AND MAP* (1981).

There is a similar dispute about the Senkaku Islands (Tiao-yu-tai) in the East China Sea between Japan and China. See Park, *Oil under Troubled Waters: The Northeast Asia Seabed Controversy*, 14 HARV. INT'L L.J. 212 (1973); Ragland, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664 (1973); Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221 (1974); Li, *China and Off-Shore Oil: The Tiao-Yu-Tai Dispute*, 10 STAN. J. INT'L STUD. 143 (1975).

<sup>22</sup> See the Beagle Channel Arbitration: Report and Decision of the Court of 18 February 1977, 17 ILM 634 (1978); the Declaration of Her Majesty Queen Elizabeth II on the Decision of 18 April 1977, *id.* at 632; the Agreement of Argentina and Chile to accept Papal Mediation, *done* at Montevideo on Jan. 8, 1979, 18 *id.* at 1 (1979).

“process of delimitation” in the proper sense—the International Court of Justice defined it in 1969 as “essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected”<sup>23</sup>—they nonetheless prolong the period before delimitation can be achieved because their resolution is preliminary to that process.

The increase in complex, protracted delimitation proceedings has been accompanied by accelerated exploration and exploitation of the resources of the continental shelf. These factors, and the potential for conflict that they portend, heighten the desirability of interim measures pending final delimitation.

The LOS Convention acknowledges the intrinsic relationship between delimitation and interim measures by dealing with them in the same provision. Article 83 reads:

*Delimitation of the continental shelf between States with opposite or adjacent coasts*

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, 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.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Identical rules on the delimitation of the exclusive economic zone, which also apply to fisheries zones, are contained in Article 74 of the Convention. The continental shelf, however, is a “natural prolongation of the land territory into the sea,”<sup>24</sup> whereas the latter zones cannot be established without an express declaration of the coastal state.<sup>25</sup>

Paragraph 1 of the quoted provision states that delimitation is to be effected by agreement. Paragraph 4 makes clear that, as a rule, the states concerned are to choose the methods of drawing the boundary line. Only if there is no agreement in force between them is one referred by paragraph 1 to the principles

<sup>23</sup> North Sea Continental Shelf Cases, 1969 ICJ REP. at 22, para. 20.

<sup>24</sup> As constantly held by the Court. *See id.* at 30, para. 40; 1978 *id.* at 36, para. 86; 1982 *id.* at 43, para. 36; *see also* the tribunal in the Anglo-French arbitration, 18 ILM at 443, para. 191. This phrase became part of the definition of the continental shelf. *See* Art. 76(1) of the LOS Convention.

<sup>25</sup> Part V of the Convention does not contain any provision on the exclusive economic zone parallel to Article 77, paragraphs 2 and 3 on the rights of the coastal state over the continental shelf.

and rules on delimitation of general international law. This paragraph, however, does not indicate any specific criterion that could give guidance to the interested states in their effort to achieve an equitable solution. Thus, the provision on the delimitation criteria (paragraph 1), which is a constituent element of Articles 74/83 of the LOS Convention, adds nothing to the body of general customary international law.<sup>26</sup>

The same conclusion cannot be reached about all the elements of these articles. While the rule on the settlement of delimitation disputes (paragraph 2), like any other precept on the settlement of disputes, is of a conventional nature, the concept of interim measures pending delimitation of the continental shelf or the exclusive economic zone is a new one in international law. This is hardly surprising because these zones of coastal state jurisdiction, as well as the delimitation problems they give rise to, are themselves of comparatively recent origin. Consequently, the concept of interim measures as set forth in paragraph 3 of the two articles on delimitation will bind only contracting and acceding states to the LOS Convention once it enters into force.

"Interim measures" generally means measures undertaken in the meantime and until something is done, but it has a specific meaning in paragraph 3 of Articles 74/83 of the LOS Convention. Under these provisions, interim measures include, on the one hand, "provisional arrangements" and, on the other hand, "effort[s]. . . not to jeopardize or hamper the reaching of the final agreement" on delimitation. This paper will deal with both variants. In doing so, it must adopt a rather basic approach, as state practice and international adjudication say little about interim measures pending delimitation. Representing only a minor problem at the Third Law of the Sea Conference, as compared with the crucial issues regarding delimitation of the criteria to be applied and the settlement of disputes, this topic did not attract much interest from the participants and international lawyers.<sup>27</sup> Here, I will first restate briefly the history of the drafting of paragraph 3 of Articles 74/83, which sheds some light on certain features of these provisions. Thereafter, I will analyze the different variants of interim measures pending delimitation under the LOS Convention. Finally, the conventional concept of interim measures pending delimitation will be looked at in the broader context of general international law.

## II. THE DEVELOPMENT OF PARAGRAPH 3 OF ARTICLES 74/83 AT THE CONFERENCE

It is not an overstatement to say that at a very early stage of the Third United Nations Conference on the Law of the Sea, states became aware of the problem of interim measures pending the delimitation of maritime zones, although it was considered neither a core issue of the conference nor even the principal

<sup>26</sup> See the statement of the Court in this regard in the case between Tunisia and Libya, 1982 ICJ REP. at 49, para. 50.

<sup>27</sup> See Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AJIL 1, 22 *et seq.* (1979); Adede, *Toward the Formulation of the Rule of Delimitation of the Sea Boundaries between States with Adjacent or Opposite Coasts*, 19 VA. J. INT'L L. 207, 222 *et seq.*, 244 *et seq.* (1979).

problem with regard to delimitation. The first compilation of alternative proposals by the Second Committee<sup>28</sup> during the second session in 1974 did not contain any reference to interim measures. But in the same year, the Netherlands made the first proposal on "interim solutions to be applied pending the final determination of the delimitation lines." It read: "Pending such agreement, neither of the States is entitled to establish its marine boundaries beyond the line, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each State is measured."<sup>29</sup>

As this proposal was not likely to meet with the agreement of those states which did not consider use of the equidistance or median line a principle but merely a method of delimitation, an Irish proposal of the same year avoided any reference to these lines:

3. Pending an agreement for which provision is made in the preceding paragraphs, no State is entitled to carry on exploration or exploitation activities in any areas which are claimed *bona fide* by any other State except with the express consent of that State, provided such a claim is not inconsistent with the principles laid down in this article.<sup>30</sup>

When in 1975, during the third session of the conference, interim measures were mentioned for the first time in a working text of the Convention, the draft—like the Dutch and Irish proposals—was couched in terms of a preventive rule. Thus, Article 70, paragraph 3 of the Informal Single Negotiating Text, Part II (ISNT, Part II) read: "Pending agreement, no State is entitled to extend its continental shelf beyond the median line or the equidistance line."<sup>31</sup> Article 61, paragraph 3 of the ISNT, Part II provided the same for the exclusive economic zone,<sup>32</sup> but no reference was made to this subject in the text relating to the territorial sea, though that text, following the 1958 Convention on the Territorial Sea and the Contiguous Zone, contains a parallel general provision on delimitation, which also has an interim effect.

A fundamentally different approach on interim measures was presented a year later in the Revised Single Negotiating Text, Part II (RSNT, Part II),<sup>33</sup> which was carried over to the Informal Composite Negotiating Text (ICNT)<sup>34</sup>

<sup>28</sup> Statement of activities of the Conference during its first and second sessions (17 October 1974), App. I, Working paper of the Second Committee: Main Trends, UN Doc. A/CONF.62/L.8/Rev.1 (1974), in 3 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS [hereinafter cited as UNCLOS III OR] 93, 107 *et seq.*

<sup>29</sup> Netherlands: Draft article on delimitation between States with opposite or adjacent coasts, UN Doc. A/CONF.62/C.2/L.14 (1974).

<sup>30</sup> Ireland: Draft article on delimitation of areas of continental shelf between neighbouring States, UN Doc. A/CONF.62/C.2/L.43 (1974).

<sup>31</sup> Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Pt. II (1975), 4 UNCLOS III OR 137, 163.

<sup>32</sup> *Id.* at 162.

<sup>33</sup> Revised Single Negotiating Text, Part Two, UN Doc. A/CONF.62/WP.8/Rev.1/Pt. II, Arts. 62, para. 3 and 71, para. 3 (1976).

<sup>34</sup> UN Doc. A/CONF.62/WP.10 (1977), 8 UNCLOS III OR.

of 1977 and the first revision of that text (ICNT/Rev.1)<sup>35</sup> of 1979. Paragraph 3 of Articles 74/83 of the ICNT provided: "Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1."<sup>36</sup>

Both the notion of "provisional arrangements" and the reference to settlement were introduced in this text, but the latter was later dropped. The reference to paragraph 1 makes it clear that the interim measures are closely linked to the criteria of delimitation, as was already apparent in the quoted articles of the preceding ISNT, Part II. Thus, as soon became obvious, there were two different approaches towards interim measures at the conference. Those delegations which advocated the median or equidistance line as a general principle of delimitation supported a provision on interim measures along the same lines as in the ISNT. On the other hand, those delegations which favored delimitation in accordance with equitable principles stuck to the formulation of the ICNT.

Although the concept of "provisional arrangements" in Articles 74/83 of the ICNT remained vague because the required measures were not defined, the difference between the two approaches was by no means one of legal rhetoric only but one of substance. The provisions on interim measures in the ICNT, unlike those in the ISNT, were not primarily concerned with preventing possible damage by restraining the activities of neighboring coastal states in the undelimited zones. Instead, they were designed to promote interim regimes and practical measures that could pave the way for provisional utilization of such areas pending final delimitation.

The two approaches became the focal points of suggestions on interim measures when, at the beginning of its seventh session in the spring of 1978, the conference set up Negotiating Group 7 on "Delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes thereon."<sup>37</sup> Membership in the group was open to all countries with a special interest in the subject.<sup>38</sup> In April 1978, a group of 20 states that advocated the median or equidistance line submitted an informal suggestion on Articles 74 and 83 of the ICNT.<sup>39</sup> This suggestion, which was upheld until the ninth session in the spring of 1980, read: "3. Pending agreement or settlement in conformity with paragraphs 1 and 2, the parties in the dispute shall refrain from exercising jurisdiction beyond the median or equidistance line unless they agree on alter-

<sup>35</sup> UN Doc. A/CONF.62/WP.10/Rev.1, Arts. 74, para. 3 and 83, para. 3 (1979), *reprinted in* 18 ILM 686 (1979).

<sup>36</sup> See note 34 *supra*.

<sup>37</sup> Organization of work: Decisions taken by the Conference at its 90th meeting on the report of the General Committee, UN Doc. A/CONF.62/62 (1978), 10 UNCLOS III OR 6, 8 (item 7).

<sup>38</sup> According to the report of the Chairman of Negotiating Group 7 (hereinafter referred to as NG 7), some one hundred delegations participated in the negotiations of the group. See Report by the Chairman of Negotiating Group 7 on the Work of the Group, Conf. Doc. NG7/21 (May 17, 1978). All materials of the group are informal and lack any documentary character.

<sup>39</sup> Informal suggestion relating to paragraphs 1, 2 and 3 of articles 74 and 84, Conf. Doc. NG7/2 (April 20, 1978). It was sponsored by the Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Denmark, the Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, the United Arab Emirates, the United Kingdom, and Yugoslavia.

native interim measures of mutual restraint."<sup>40</sup> At the same time, 30 states that favored delimitation in accordance with equitable principles maintained the formulation of the ICNT in their informal suggestions of 1978 and 1980.<sup>41</sup>

Nevertheless, from the very beginning of the discussions in Negotiating Group 7, attempts were made to bridge the gap between the preventive and incentive approaches to interim measures. Thus, an early informal suggestion made by Morocco in 1978, which dealt with all maritime zones including the territorial sea, provided: "Pending the conclusion of an agreement or settlement, the States concerned shall abstain from any measure which could prejudice a final solution or in any way, aggravate their conflict, and shall endeavour to reach mutually acceptable, provisional arrangements, regarding the activities in the 'bona fide' disputed areas."<sup>42</sup>

At the resumed seventh session in the autumn of 1978, Negotiating Group 7 turned once again to the matter of interim measures. Its Chairman, Judge E. J. Manner of Finland, pointed out that a number of delegations believed that the Moroccan proposal contained elements of compromise.<sup>43</sup> A suggestion to provide for a moratorium on economic activities within the area under dispute<sup>44</sup> was not accepted by the group.

In the spring of 1979, after 27 meetings, Negotiating Group 7 was still unable to achieve consensus on the three interrelated crucial problems of delimitation, i.e., the criteria to be applied, interim measures and settlement of disputes. Chairman Manner then observed that the Plenary of the conference would hardly be more likely to reach a consensus than the group itself.<sup>45</sup> In fact, although originally there had apparently been general agreement that the Convention should contain a specific provision on interim measures,<sup>46</sup> the Chairman now reported that there was no longer a consensus on this important question.<sup>47</sup> Most delegations, however, apparently still endorsed including such a provision in the Convention.

<sup>40</sup> Conf. Docs. NG7/2/Rev.1 (March 25, 1980); NG7/2/Rev.2 (March 28, 1980).

<sup>41</sup> Informal suggestion by Algeria, Argentina, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libyan Arab Jamahiriya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syrian Arab Republic, Somalia, Suriname, Turkey, Venezuela and Vietnam, Conf. Doc. NG7/10, Arts. 74 and 84 (May 1, 1978). It was maintained until 1980; see Conf. Doc. NG7/10/Rev.2 (March 28, 1980).

<sup>42</sup> Informal suggestions by Morocco, Conf. Doc. NG7/3 (April 21, 1978).

<sup>43</sup> Statement made by the Chairman of Negotiating Group 7 on 12 September 1978, Conf. Doc. NG7/23 (Sept. 12, 1978).

<sup>44</sup> Informal suggestion by Papua New Guinea, Conf. Doc. NG7/15, Arts. 74 and 83 (May 9, 1978). Paragraph 3 should read: "3. Pending agreement or settlement, the States concerned shall, either (a) make provisional arrangements, taking into account the provisions of paragraph 1, or (b) establish a moratorium against economic activities within the area under dispute." Some delegations supported the idea of a moratorium, whereas others found it unacceptable, considering the very concept ambiguous. See Statement made by the Chairman, *supra* note 43.

<sup>45</sup> Statement by the Chairman made at the 28th meeting of NG 7, prepared for the last series of negotiations of the group, Conf. Doc. NG7/26 (March 26, 1979).

<sup>46</sup> Conf. Doc. NG7/21, *supra* note 38.

<sup>47</sup> Statement by the Chairman, *supra* note 45. Moreover, there was an informal working paper by Israel, suggesting the omission of Article 74, paragraphs 2 and 3, which, however, was not necessarily related to Article 83. Conf. Doc. NG7/28 (March 28, 1979).



Consequently, the search for a compromise continued. In April 1979, India, Iraq and Morocco launched an informal proposal that omitted the mandatory character of the preceding suggestion by Morocco and any reference to the disputed area and emphasized the provisional and transitory nature of the measures. It read:

Pending agreement or settlement, the States concerned shall, in a spirit of co-operation, freely enter into provisional arrangements. Accordingly, they shall refrain from activities or measures which may aggravate the situation or jeopardize the interests of either State, during the transitory period.

Such arrangements, whether of mutual restraint or mutual accommodation, shall be without prejudice to the final solution on delimitation.<sup>48</sup>

Finally, after consultations in a private group convened by the Chairman and consisting of India, Iraq, Morocco and the delegations of the Soviet Union and the Ukrainian Soviet Socialist Republic, a suggested compromise formula for paragraph 3 of Articles 74 and 83 was found in April 1979.<sup>49</sup> After some minor changes, it was inserted into the second revision of the ICNT in 1980,<sup>50</sup> and it remained intact in the Draft Convention<sup>51</sup> and the final Convention as well.

Because of its deliberately informal nature, most of the material presented could hardly be considered as proper preparatory work for the purpose of interpreting paragraph 3 of Articles 74/83 of the LOS Convention. Nonetheless, it does permit certain general observations to be made. To begin with, the inclusion of the provisions on interim measures in the final text reveals a widespread conviction among the delegations at the conference that such measures are generally needed where delimitation of the exclusive economic zone or the continental shelf between states with opposite or adjacent zones is pending. The provisions themselves represent a compromise that combines two basically different views on interim measures: they involve attempts either to promote certain measures or to restrict others. As interim measures depend upon the delimitation criteria applied in an area, Articles 74 and 83 in themselves represent a "package,"<sup>52</sup> which became a part of the overall package of the Convention.

<sup>48</sup> India, Iraq, and Morocco: Informal Proposal, Articles 74(3) and 83(3), Conf. Doc. NG7/32 (April 5, 1979).

<sup>49</sup> Suggested Compromise Formula for Articles 74(3) and 83(3), prepared by a private group convened by the Chairman of NG 7:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort with a view to entering into provisional arrangements. Accordingly, during this transitory period, they shall refrain from activities or measures which may aggravate the situation and thus hamper in any way the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Conf. Doc. NG7/38 (April 17, 1979). See also the Report of the Chairman on the Work of Negotiating Group 7, Conf. Doc. NG7/39 (April 20, 1979). A similar informal proposal by Mexico and Peru was withdrawn. Conf. Doc. NG7/36/Rev.1 (April 18, 1979) and Corr.1 (April 19, 1979).

<sup>50</sup> UN Doc. A/CONF.62/WP.10/Rev.2, Arts. 74, para. 3 and 83, para. 3 (1980).

<sup>51</sup> Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981).

<sup>52</sup> See Statement by the Chairman, *supra* note 45; Oxman, *supra* note 27, at 23; Adede, *supra* note 27, at 223 *et seq.*

Finally, the history of their drafting process confirms that paragraph 3 of the two articles is in no way a codification of customary international law but represents an example of its progressive development.

### III. PROVISIONAL ARRANGEMENTS

#### *The Obligation to Negotiate in Good Faith*

Under the first alternative of Articles 74 and 83, paragraph 3, the states concerned shall make every effort to enter into provisional arrangements of a practical nature. There can be no doubt that this precept applies to all cases where a final agreement on the delimitation of the exclusive economic zone or the continental shelf is pending between states with opposite or adjacent coasts, including those where the delimitation depends upon the prior settlement of a territorial dispute concerning islands or similar issues. As the language of paragraph 3 allows no direct explanation as to the legal nature of the requirement to enter into provisional arrangements, the circumstances under which they are to be applied, and their subject, this provision poses more questions than it is designed to answer. Therefore, it has to be interpreted in its context in good faith, and in the light of its object and purpose, while taking into account any relevant rules of general international law.

As the provisional arrangements can be entered into even before the coastal states begin to negotiate the final delimitation agreement, the principal object and purpose of paragraph 3 is to further the provisional utilization of the area to be delimited. The development of paragraph 3, as shown above, confirms this intent. Of course, the states may use provisional arrangements to restrict certain activities in the area concerned so as to remove obstacles to their negotiations on the delimitation. Yet provisional arrangements are not necessarily related to these negotiations, whereas they are generally related to the exploration and exploitation of the resources of the area.

Crucial to our understanding of paragraph 3 is the meaning of the phrase that states "shall make every effort" to enter into provisional arrangements. The language used indicates that this requirement is not merely a nonbinding recommendation or encouragement, but a mandatory rule whose breach would represent a violation of international law. The states concerned are obliged not to undertake specific actions but to endeavor to reach an agreement on interim measures. In lieu of a hard-and-fast rule prescribing certain interim measures, paragraph 3 contains an obligation to negotiate about such measures. Whether or not they are necessary depends upon the circumstances of any given case. Therefore, this obligation could not be couched in language analogous to that of paragraph 1: for example, interim measures are to be effected by agreement of the states concerned.<sup>53</sup> By using an area over which other states also claim sovereign rights and jurisdiction, a state is likely to touch upon the rights of

<sup>53</sup> Chairman Manner of NG 7 reported at the conference that "[t]here did not seem to be consensus to the effect that States should be *obliged* to make provisional arrangements. On the other hand, no opposition appeared to be expressed as to the *encouragement* of States to enter interim measures, as appropriate." See Conf. Doc. NG7/23, *supra* note 43 (emphasis in original).

any of the others. As one cannot foresee which measures will be needed to protect the rights of the states concerned, the duty to negotiate is an appropriate means provided by international law to avoid conflict in any such situation.

Under paragraph 3, the efforts shall be conducted "in a spirit of understanding and co-operation," which may reflect the traditional legal concept of "good faith"—if that language were considered to have any legal connotation at all.

This obligation to seek agreement in good faith, which often is paraphrased as an obligation to cooperate (e.g., in the case of enclosed or semi-enclosed seas under Article 123 of the LOS Convention), is of growing importance in international law. Originally invoked exclusively by consent of the states concerned, it gradually gained recognition in cases under customary international law in which the specific rights of neighboring states or states in a region were at stake. The delimitation of zones of national jurisdiction is an important example.<sup>54</sup> In fact, Turkey maintained in the *Aegean Sea* case that Greece had refused not only to participate in meaningful negotiations, but even to attempt to agree on a definition of the area in question.<sup>55</sup> Other examples are provided by the law regarding international rivers and drainage basins,<sup>56</sup> common deposits of liquid natural resources extending across national frontiers,<sup>57</sup> and environmental protection.<sup>58</sup> The International Court of Justice<sup>59</sup> considered the obligation to negotiate in good faith "a principle which underlies all international relations." The Court went on to say that this obligation "is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes."

The obligation to seek agreement in good faith is defined in such well-established precedents of international judicature as the *Tacna Arica* arbitration,<sup>60</sup> the case of the *Railway Traffic between Lithuania and Poland*,<sup>61</sup> the *Lac Lanoux*

<sup>54</sup> Restating "the *opinio juris* in the matter of delimitation," the Court observed in the *North Sea Continental Shelf Cases* "that delimitation must be the object of agreement between the States concerned." 1969 ICJ REP. at 46, para. 85.

The Court would therefore observe at the outset that an attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law, . . . which provide that maritime boundaries should be determined by agreement between the Parties.

Case Concerning the Continental Shelf (Tunisia/Libya), 1982 ICJ REP. at 66 *et seq.*, para. 87. Even the unilateral establishment of an outer limit "has always an international aspect." See the Fisheries Case (UK v. Nor.), 1951 ICJ REP. 116, 132 (Judgment of Dec. 18).

<sup>55</sup> Observations of the Government of Turkey on the Request by the Government of Greece for Provisional Measures of Protection, ICJ Pleadings (Aegean Sea Continental Shelf) 69, 70, para. 10 (Observations submitted in 1976).

<sup>56</sup> See Schwebel, Second report on the law of the non-navigational uses of international watercourses, UN Doc. A/CN.4/332 and Add.1 (1980), [1980] 2 Y.B. INT'L L. COMM'N, pt. 1, at 159, 170 *et seq.*, UN Doc. A/CN.4/SER.A/1980/Add.1.

<sup>57</sup> See Onorato, *Apportionment of an International Common Petroleum Deposit*, 17 INT'L & COMP. L.Q. 85, 93 (1968); Lagoni, *Oil and Gas Deposits across National Frontiers*, 73 AJIL 215, 233 *et seq.* (1979).

<sup>58</sup> See, e.g., GA Res. 3129 (XXVIII) (1973).

<sup>59</sup> North Sea Continental Shelf Cases, 1969 ICJ REP. at 47, para. 86.

<sup>60</sup> 19 AJIL 393, 398 (1925).

<sup>61</sup> 1931 PCIJ, ser. A/B, No. 42, at 108, 116.

arbitration<sup>62</sup> and the *North Sea Continental Shelf Cases*.<sup>63</sup> The states concerned are obliged "to enter into negotiations with a view to arriving at an agreement" to establish provisional arrangements of a practical nature and, as the International Court of Justice specified, "not merely to go through a formal process of negotiation."<sup>64</sup> The negotiations are to be "meaningful, which will not be the case when either [state] insists upon its own position without contemplating any modification of it."<sup>65</sup> However, the obligation to negotiate does not imply an obligation to reach agreement, as the Court stated.<sup>66</sup>

Rules that always imply an obligation to compromise seem to encourage extreme claims. Though unilateral by nature, claims to maritime zones are not without relevance to general international law, which has attached several strings to the capacity of states to exert such claims. As a whole, delimitation according to equitable principles is based on the concept of good faith, under which extreme claims may not be recognized. During a delimitation dispute, a state may refuse another state's claim, arguing that it constitutes an abuse of rights (either under Article 300 of the LOS Convention or under general international law), if that claim has no valid basis in the present corpus of international law, or if it lacks a reasonable element of proportionality. Therefore, extreme claims appear to be more a theoretical problem than a practical threat to delimitation according to equitable principles.

#### *The Area of Application*

Before I turn to the nature of the provisional arrangements, there are still other questions of interpretation to be answered. One is the area to which the arrangements apply. Although some suggestions and proposals at the Law of the Sea Conference contained references to specific geographical lines or areas,<sup>67</sup> all such references were omitted from the final text. Nevertheless, the obligation to negotiate in order to establish provisional arrangements clearly has a geographical connotation. In accordance with the above-mentioned object and purpose of paragraph 3, the obligation applies only to those areas about which the governments hold opposing views. These views must be expressed formally, for example by declarations, or may be implied, for example through protests filed against the acts of other states or foreign nationals, by acts of the national legislator, or by the granting of licenses and concessions. In doing so, the parties must have acted in good faith, believing that their action was justified by existing international law, as Judge Jessup noted in the *North Sea Continental Shelf Cases*.<sup>68</sup> Accordingly, it was suggested at the Law of the Sea Conference that any claim

<sup>62</sup> 12 R. Int'l Arb. Awards 285 (1956).

<sup>63</sup> 1969 ICJ REP. at 46, para. 86; see also the Fisheries Jurisdiction Case (UK v. Ice.), Merits, 1974 ICJ REP. 3, 32, para. 75; and the parallel case (W. Ger. v. Ice.), Merits, 1974 ICJ REP. 175, 201, para. 67.

<sup>64</sup> *North Sea Continental Shelf Cases*, 1969 ICJ REP. at 47, para. 85(a). See also the corresponding statement of the tribunal in the Lac Lanoux arbitration, *supra* note 61.

<sup>65</sup> *North Sea Continental Shelf Cases*, 1969 ICJ REP. at 47, para. 85(a).

<sup>66</sup> *Id.* at 48, para. 87.

<sup>67</sup> See text accompanying notes 29 and 31 *supra*.

<sup>68</sup> 1969 ICJ REP. at 79 (Sep. Op. Jessup, J.).

must be made *bona fide*,<sup>69</sup> a requirement, however, that could only be relevant if a claim were on its face not justified by existing international law.

A slightly idealized situation was referred to in the *North Sea Continental Shelf Cases*, when the Court observed, "Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim. . . ."<sup>70</sup> In fact, in the *Case Concerning the Continental Shelf between Tunisia and Libya*, the concessions granted by the two states apparently overlapped in only a small area, whereas their claims to the continental shelf overlapped in large parts of the seabed of the Pelagian Sea.<sup>71</sup> In the *Aegean Sea* case, Turkey asserted claims to a well-defined area that Greece considered part of its own continental shelf.<sup>72</sup>

The situation is often more complex: for example, if an area being delimited by two states is also claimed by a third one, as in the *North Sea cases*;<sup>73</sup> or if the seaward limits of the claims remain undefined because of the rights of third states, as in the *Tunisia/Libya* case;<sup>74</sup> or if the principles to be applied have not been determined, so that the claims cannot be defined in advance, as in the *Anglo-French* arbitration.<sup>75</sup> In case of doubt, the obligation to negotiate applies to the broader dimensions of an area, as between Tunisia and Libya where the "area of concern"<sup>76</sup> included all parts of the seabed claimed by the parties and not only those smaller parts where the concessions actually overlapped. Finally, if the extent of the area to which the provisional arrangements should apply is in dispute, then this question must be included as a separate topic in the negotiations on those measures.

#### *Application Ratione Temporis*

The obligation to negotiate in good faith on provisional arrangements exists "pending agreement." As it is not linked to the negotiations on the final delimitation agreement, the obligation can arise before the states concerned initiate such negotiations, and it does not cease if they are terminated without reaching an agreement. Normally, the obligation is formed when the existence of overlapping claims with regard to an area becomes apparent. But it may arise in exceptional situations if no definite claim can be asserted because the principles of delimitation are at issue, or if the delimitation is contingent on the resolution of a dispute over sovereignty of an island. As its purpose is to protect the mutual rights of the states concerned, the obligation to negotiate can generally be

<sup>69</sup> See the proposal made by Ireland, text at note 30 *supra*; the informal suggestion by Morocco, text at note 42 *supra*.

<sup>70</sup> 1969 ICJ REP. at 22, para. 20.

<sup>71</sup> 1982 ICJ REP. at 42, para. 34; *id.* at 35, para. 21; see also map 2 at p. 81 of the Judgment.

<sup>72</sup> 1976 ICJ REP. at 6, para. 15 *et seq.* See also the Application Instituting Proceedings Submitted by the Government of Greece, with Ann. I and attached map, ICJ Pleadings (*Aegean Sea Continental Shelf*) 3, 21 (Application submitted in 1974).

<sup>73</sup> 1969 ICJ REP. at 14, para. 5 and 16, map 3.

<sup>74</sup> 1982 ICJ REP. at 42, para. 35 and 81, map 2.

<sup>75</sup> See the observation of the tribunal that the Channel Islands are "on the wrong side" of the mid-Channel median line. 18 ILM at 434 *et seq.*, paras. 145-201.

<sup>76</sup> As referred to by Libya, 1982 ICJ REP. at 42, para. 35.

assumed to arise whenever one of those states considers it necessary and proper to enter into negotiations on provisional arrangements. If that stipulation is made in good faith, the other state or states cannot refuse it. The obligation ceases when the final delimitation agreement is reached.

*The Concept of Provisional Arrangements*

Articles 74/83 of the LOS Convention are not very enlightening when it comes to defining the concept of provisional arrangements. Nonetheless, the articles do contain a few explicit remarks about these arrangements that enable one to make certain observations about their nature.

First, the "arrangements" entered into under Articles 74/83 are agreements concluded between two or more of the states concerned. States with adjacent or opposite coasts are not necessarily the only states concerned because third states with long-standing fishery rights to the area may also be affected by its delimitation. Such agreements will normally be informal, for example, by being embodied in two related *notes verbales*. Although the Vienna Convention on the Law of Treaties applies only to agreements in written form,<sup>77</sup> the informal nature of such arrangements would affect neither their legal force nor the applicability to them of all rules of customary international law.<sup>78</sup> Being conventional in nature, such arrangements could legally bind only those states that concluded them, and as *res inter alios acta*, they would neither entitle nor oblige third states, even if the latter also claimed rights to the area concerned. Furthermore, their conventional nature limits the applicability of the provisional arrangements to those uses of the sea to which they specifically refer: a provisionally established common fisheries zone would have no relevance to the nonliving resources of the area in question.

Second, the provisional arrangements shall be "of a practical nature," which means that they are to provide practical solutions to actual problems regarding the use of an area and are not to touch upon either the delimitation issue itself or the territorial questions underlying this issue.

Third, because they are characterized as "provisional," the arrangements are interim measures; they are preliminary or even preparatory to the final agreed status of the area and the utilization of its resources. The parties, of course, are free to change any provisional arrangement into a permanent one by agreement, for example, by maintaining a joint development zone after the final delimitation of that area. But even without an agreement, interim measures may easily become permanent ones, if the parties cannot reach a final delimitation agreement and there is no binding dispute settlement procedure in force between them.<sup>79</sup> In such a situation, the question whether to terminate the provisional arrangements may become important. If the arrangements do not provide for termination, denunciation or withdrawal, one can assume that a right of de-

<sup>77</sup> Art. 2(1)(a), Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969).

<sup>78</sup> *Id.*, Art. 3.

<sup>79</sup> As already noted by Oxman, *supra* note 27, at 23.

nunciation or withdrawal is implied in their "provisional" nature.<sup>80</sup> An analogous right to termination of the provisional application of an agreement is permitted under Article 25, paragraph 2 of the Vienna Convention on the Law of Treaties.<sup>81</sup> In addition, Article 18 of the Vienna Convention provides that the obligation of a nonparty signatory not to defeat the object and purpose of a treaty ceases when it has made its intention clear not to become a party to that treaty.<sup>82</sup>

Fourth, as stated in the second sentence of paragraph 3 of Articles 74/83, "such arrangements shall be without prejudice to the final delimitation."<sup>83</sup> Consequently, the delimitation does not have to take into account either the preceding provisional arrangements or any of the activities of the parties undertaken under the arrangements. These activities cannot create acquired rights with respect to the area or its resources. Thus, if it is not otherwise provided by the express consent of the parties, one cannot assume that they accept or acquiesce in the arrangements as being final; and they are not estopped from taking any position in the negotiations on the final agreement that cannot be squared with the provisional arrangement.

The making of the above observations brings legal analysis of the concept of provisional arrangements pending delimitation to an end. The content of such arrangements is to be determined by the parties concerned and depends upon the circumstances of each individual case. Many factors may be relevant here, such as the kind of natural resources in question, the size of the area, the number of states asserting claims to it, the complexity of the legal and political issues involved and the time estimated for the process of delimitation. One could distinguish between those arrangements which limit the jurisdiction of the parties and those which are intended to further the utilization of the natural

<sup>80</sup> See Art. 56(1)(b) of the Vienna Convention, *supra* note 77, which provides that there is a right of denunciation or withdrawal from a treaty containing *no* provision regarding termination, denunciation or withdrawal, if "(b) a right of denunciation or withdrawal may be implied by the nature of the treaty."

<sup>81</sup> The provision reads:

Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

<sup>82</sup> Article 18 reads:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

<sup>83</sup> According to the Statement by the Chairman of NG 7, "there seemed to be general agreement to the effect that any provisional arrangement should be without prejudice to the final delimitation." See Conf. Doc. NG7/23, *supra* note 43.

resources involved. But it makes little sense to create a typology of provisional measures on the basis of this difference because the legal technique used depends upon the purpose intended. For example, the parties may agree to regulate fishing in an area of overlapping claims but not to authorize the exploration and exploitation of the nonliving resources in the area.

#### *A Review of Possible Arrangements*

The following observations will draw attention to some examples of state practice which in one respect or another could possibly serve as models for future provisional arrangements.

The states concerned could agree on a moratorium with regard to all uses of the area where their claims overlap, but such a sweeping solution is hardly a realistic appraisal of what states would tend to do. If a moratorium is considered necessary at all, the parties will normally relate it to certain resources only, or certain methods of exploitation, or to specific acts such as the establishment of installations.<sup>84</sup> Though not required by law, such functional limitations are typical of provisional arrangements of a practical nature. There may be good reason for a provisional moratorium on the exploitation of nonrenewable resources, such as oil and gas in a continental shelf area claimed by two or more states, but not for one on fishing and harvesting the living resources in the corresponding parts of the sea. With regard to living resources, there is already a widespread practice of establishing "white" or "gray" zones<sup>85</sup> in areas where claims to fisheries zones or exclusive economic zones overlap. These zones are designed to regulate fishing within the area of overlapping claims on a provisional basis and to exclude the fishing fleets of third states from the area. As a valid claim to a fisheries zone or an exclusive economic zone still presupposes an express declaration by the coastal state, contradictory declarations could lead to the misconception that the area is not validly claimed at all. Here the "gray zone" becomes an interim measure to clear the legal situation.

A case in point is the provisional gray zones agreement of January 11, 1978, between the Soviet Union and Norway, on fishing in an "adjacent area of the Barents Sea."<sup>86</sup> Originally limited to a period of nearly 5 months, it has subsequently been annually prolonged.<sup>87</sup> The gray zone does not cover the whole area of overlapping claims and a small part of it even overlaps a portion of the Soviet fishing zone that is not in dispute at all. A similar zone is established in the Baltic Sea where the fisheries zones of Denmark and Poland overlap, and there are two more zones of overlapping claims within that comparatively small sea.

Provisional arrangements on the exploration and/or exploitation of the natural resources of the continental shelf face much greater problems than those

<sup>84</sup> The delegation of Norway tentatively addressed this point at the negotiations of NG 7. See its informal paper on paragraph 3 of Articles 74 and 83 of the ICNT, Conf. Doc. NG7/16 (May 9, 1978).

<sup>85</sup> As referred to by Chairman Manner of NG 7 as possible examples of state practice concerning provisional measures, Conf. Doc. NG7/23, *supra* note 43.

<sup>86</sup> See Fleischer, *supra* note 12, at 112; see also Østreng and Traavik & Østreng, *supra* note 12.

<sup>87</sup> Fleischer, *supra* note 12, at 112 n.38.



on fishing. Oil and natural gas are nonrenewable resources over which coastal states claim sovereign rights and which normally represent an important source of revenue. Making use of these resources presupposes large financial investments, usually takes considerable time and requires clear legal circumstances as well as a stable political climate.

As a first step, the states concerned can attempt to cope with these problems by limiting their provisional arrangements to exploration. If exploration is not undertaken by an organ of the parties, they may agree upon joint licensing of a consortium, "which, under appropriate safeguards concerning future exploitation, might undertake the requisite wildcat operations," as Judge Jessup noted in the *North Sea Continental Shelf Cases*.<sup>88</sup> However, a consortium is hardly likely to explore an area without having at least a fair chance of getting a concession to exploit it afterwards if oil and gas are found. Therefore, a provisional arrangement of this kind must be undertaken with a view to subsequent arrangements of a permanent nature.

Nonetheless, knowing whether or not there are exploitable resources within an area of overlapping claims will certainly help to clear the road to a final settlement of the delimitation issue. As the International Court of Justice held in the *North Sea cases*, such areas "are to be divided between [the states concerned] in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user [*sic*], or exploitation for the zones of overlap or any part of them."<sup>89</sup>

It will probably be easier to reach an agreement to divide an area of overlapping claims if it is known that there are no resources within it, but it need not be difficult to reach an agreement even if the exploration turns out to be successful. International agreements have been concluded on the joint or unitized operation of oil and gas deposits that can serve as models for future arrangements. The Supplementary Agreement of 1962 to the Ems-Dollart Treaty of 1960, entered into by the Netherlands and the Federal Republic of Germany,<sup>90</sup> is in fact a preliminary agreement pending the settlement of a long-standing territorial dispute over the estuary of the Ems River. The Agreement established a preliminary boundary line and provided for various measures to encourage joint operation of the parties' respective concession areas. Another well-known joint development regime independent of the final delimitation was undertaken by Japan and South Korea under the Agreement concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries of 1974.<sup>91</sup> As such agreements are concluded before the final boundary line is drawn, they are "preliminary" but by no means "provisional"; the very nature of their subject matter requires that they be designed to remain in force for

<sup>88</sup> See 1969 ICJ REP. at 83.

<sup>89</sup> See *id.* at 53, para. 101(C)(2).

<sup>90</sup> 509 UNTS 140. For a discussion of the Agreement, see Lagoni, *supra* note 57, at 223 *et seq.*

<sup>91</sup> LIMITS IN THE SEAS, *supra* note 3, No. 75 (1977). See Dong Hi Kim, *Accord entre la Corée du Sud et le Japon sur le développement commun de la partie sud du plateau continental adjacent aux deux pays*, 2 KOREAN J. COMP. L. 103 (1974); 1 S. ODA, THE LAW OF THE SEA IN OUR TIME: NEW DEVELOPMENTS, 1966-1975, at 249 *et seq.* (1977); Park, 22 GER. Y.B. INT'L L., *supra* note 21, at 134 *et seq.*

very long periods.<sup>92</sup> They continue in force even if the final delimitation is reached before their date of termination.

Other agreements on unitization and the joint development of oil and gas deposits could equally serve as models for provisional arrangements. It is not necessary, however, to go into the details of these agreements<sup>93</sup> or into the specific problems of unitization<sup>94</sup> here, for they have been sufficiently analyzed elsewhere in the legal literature.

Where it is hardly feasible to divide an area of overlapping claims because the final delimitation depends upon the preliminary question of sovereignty over an island or group of islands, the establishment of joint development zones also appears to be an appropriate measure unless the parties prefer to abstain totally from exploration or exploitation pending settlement of the territorial question.

#### IV. THE OBLIGATION OF MUTUAL RESTRAINT

##### *The Legal Nature of this Obligation*

Under paragraph 3 of Articles 74/83 of the LOS Convention, the states concerned shall also, in good faith, make every effort not to jeopardize or hamper the reaching of the final delimitation agreement. Couched in the same mandatory terms as the obligation to negotiate, this is a prohibitive precept that limits the jurisdiction of the coastal states. However, it does not contain express rules against arbitrary exploitation of the natural resources or other unilateral measures within the disputed area, as was suggested at the Law of the Sea Conference.<sup>95</sup> Nor does it merely restate the general obligation to negotiate in good faith. Instead, it creates a specific duty to exercise mutual restraint in a difficult situation for the states concerned. Any use of the area

<sup>92</sup> The agreement between Japan and South Korea remains in force for 50 years before it can be terminated after 3 years' written notice (Art. 31), whereas the Supplementary Agreement is not limited in its time of application at all.

<sup>93</sup> See generally Onorato, *supra* note 57; *id.*, 26 INT'L & COMP. L.Q. 324 (1977); Barberis, *Los Recursos minerales compartidos entre Estados y el derecho internacional*, 8 DERECHO DE LA INTEGRACIÓN 45 (1975); Lagoni, *supra* note 57. With regard to single agreements, see Utton, *Institutional Arrangements for Developing North Sea Oil and Gas*, 9 VA. J. INT'L L. 66 (1968); Young, *Equitable Solutions for Off-shore Boundaries: The 1968 Arab-Iran Agreement*, 64 AJIL 152 (1970); Horigan, *Unitization of Petroleum Reservoirs Extending Across Sub-Sea Boundary Lines of Bordering States in the North Sea*, 17 INT'L & COMP. L.Q. 67 (1968); *id.*, 7 NAT. RESOURCES LAW. 67 (1974); Woodliffe, *International Unitization of an Offshore Gas Field*, 26 INT'L & COMP. L.Q. 338 (1977); Manin, *Le Traité de Frigg*, 1978 ANNUAIRE FRANÇAIS DROIT INT'L 792; Gault, *The Frigg Gas Field, Exploitation of an International Crossboundary Petroleum Field*, 3 MARINE POL'Y 302 (1979). Note also the papers on (Topic F) International Unitization: Current Developments, in 1 INTERNATIONAL BAR ASSOCIATION [IBA], ENERGY LAW SEMINAR PROCEEDINGS (Cambridge, Sept. 29–Oct. 4, 1979); Miller, *The Statfort and Murchison Oil Fields*, Paper 3; Outhit, *The Frigg Gas Field Unit*, Paper 1.

<sup>94</sup> See *supra* note 93, especially the papers of the IBA ENERGY LAW SEMINAR; Outhit, *Unitization. As between Companies of Fields between States*, 2 IBA, PETROLEUM LAW SEMINAR PROCEEDINGS (Cambridge, Jan. 8–13, 1978), Topic K, Paper 26.

<sup>95</sup> See, e.g., the proposal by Ireland, *supra* note 30.

of overlapping claims pending its final delimitation will naturally affect the rights of states that assert claims to that area.

International law knows of analogous obligations in similar situations. Under Article 18 of the Vienna Convention on the Law of Treaties, a state is obliged after signing a treaty to refrain from acts that would defeat its object and purpose. Although in its draft<sup>96</sup> the International Law Commission had proposed that this obligation be applied to the negotiating process as well, the majority of states considered signing to be an essential requirement. Interestingly, Sir Humphrey Waldock, as an expert consultant to the Vienna Conference on the Law of Treaties, gave the example of a state that had entered into negotiations to delimit territorial waters because mineral reserves were found in the area and had then exhausted those reserves during the negotiations.<sup>97</sup> He considered such conduct as falling within the scope of the later Article 18 of the Vienna Convention.

A similar obligation is universally accepted for proceedings pending before an international court or tribunal. The Permanent Court of International Justice stated in the *Electricity Company of Sofia and Bulgaria* case: “[T]he parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute.”<sup>98</sup> Identical language is used, for example, in Article 33, paragraph 3 of the General Act for the Pacific Settlement of International Disputes of 1928.<sup>99</sup> By the same token, international courts and tribunals possess independent power to indicate interim measures when they are necessary to preserve the respective rights of the parties to a dispute, e.g., under Article 41 of the ICJ Statute and Article 290 of the LOS Convention. The common purpose of these provisions is the protection of the rights and interests of states when they are especially susceptible to violation.

#### *The Transitional Character of the Obligation*

The obligation not to jeopardize or hamper the reaching of the final agreement is transitional in its nature, as it ceases with the conclusion of the delimitation agreement. However, paragraph 3 of Articles 74/83 does not give a direct answer to the questions when the “transitional period” of the obligation begins and whether the obligation can be suspended before the final agreement is reached. As the negotiating process normally consists of different stages divided by lengthy intervals, it could make a considerable difference in time if the obligation arises simultaneously with the overlapping claims themselves or only when negotiations on the delimitation are begun.

In a dispute pending between Sweden and Denmark on the delimitation of

<sup>96</sup> Article 15 of the draft reads: “A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when: (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress.” Draft articles on the law of treaties and Commentary, [1966] 2 Y.B. INT’L L. COMM’N 202, UN Doc. A/CN.4/SER.A/1966/Add.1.

<sup>97</sup> UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS OF THE FIRST SESSION, UN Doc. A/CONF.39/11, at 104, para. 26 (1968).

<sup>98</sup> 1939 PCIJ, ser. A/B, No. 79, at 199.

<sup>99</sup> 93 LNTS 342.

the adjacent continental shelf in the Kattegatt, the duration of the obligation recently gained practical relevance. As they could not agree on whether certain Danish islands were to be considered as base points for the delimitation, the parties had discontinued their negotiations 5 years ago. Although Sweden recently made an attempt to resume the negotiations and expressed the view that no exploration should be undertaken in the area under dispute, the Danish Government gave a Danish company permission to start exploratory drilling on August 1, 1983.<sup>100</sup> The Danish company proceeded despite the Swedish protest, only to find that there are no commercially exploitable resources in the disputed area. This discovery relaxed the political situation, but the delimitation issue is still pending between the two countries.

One could give three different answers to the questions raised above. First, in order to confine the obligation to a situation of relatively close contact between the parties, it could be linked to the negotiations on the final agreement. This solution would limit the jurisdiction of the states concerned as little as possible, because the obligation not to impede the reaching of the final agreement would only arise at the moment the negotiations commence, and it would be suspended when they are discontinued, except in the event of dispute settlement.

Second, the obligation not to impede the reaching of the final agreement could be assumed to arise at the moment the parties begin to negotiate on provisional arrangements, which could take place a long time before the negotiations on the final delimitation agreement. In this case, it would be up to each of the states concerned to determine the beginning of the "transitional period" within which the obligation would apply. Should one of them undertake operations within the area of overlapping claims, the other could suggest the initiation of negotiations on provisional measures at that time.

A third view would link the obligation to the emergence of overlapping claims, arguing that according to the wording of paragraph 3, the obligation exists "pending delimitation" and is functionally related to the "reaching" of the final agreement, as against its "negotiation."

Considering the object and purpose of the obligation, one has to endorse the opinion that it must arise as soon as the claims overlap. Otherwise, one of the states concerned could prejudice the negotiations before they actually started. Being independent of the negotiations, the obligation would also arise if one of the states concerned refused to negotiate on the delimitation, as did Greece in the *Aegean Sea* case<sup>101</sup> because it believed that the whole area was part of its continental shelf. Similarly, the obligation would not cease if the negotiations between the parties reached a deadlock,<sup>102</sup> or if one of them issued notification of its opinion that a dispute had arisen.<sup>103</sup> Nor would it come to an end if the negotiations were discontinued, as in the above-mentioned case between Denmark and Sweden concerning the Kattegatt.

<sup>100</sup> See *Frankfurter Allgemeine Zeitung*, July 21, 1983, at 5; *Der Grenzstreit um Erdöl im Kattegatt verschärft sich*, *id.*, Aug. 4, 1983, at 5.

<sup>101</sup> See *supra* note 72.

<sup>102</sup> See the statement of the Court in the *Interhandel Case* (Switz. v. U.S.), 1959 ICJ REP. 6, 21 (Judgment of March 21).

<sup>103</sup> See Art. 3, Optional Protocol of Signature applying to any one or more of the 1958 Geneva Law of the Sea Conventions.

*The Obligation Interpreted*

Although paragraph 3 of Articles 74 and 83 of the LOS Convention stipulates that the states concerned must not jeopardize or hamper the reaching of the final delimitation agreement, it does not spell out which acts or omissions of these states would come under this prohibition. In general, they are unilateral acts related to the area of overlapping claims, even though paragraph 3 makes no specific geographical references. In addition, one can assume from its language that not every exercise of a right, freedom or jurisdiction within that area falls under the sway of the precept. Rights and freedoms of the sea not reserved to coastal states, for example shipping, remain intact within the area in dispute. However, military navigation directly related to the subject of the dispute<sup>104</sup> is likely to jeopardize or hamper the reaching of the final agreement.

With regard to the sovereign rights and exclusive jurisdiction of the coastal state, as provided by Articles 56 and 77 of the LOS Convention, one can follow two different lines of argumentation. The first is that the exercise of any such right or jurisdiction within the area in dispute could possibly violate the sovereign rights of another coastal state. Consequently, pending delimitation the states concerned must not unilaterally exercise their sovereign rights and exclusive jurisdiction within that area, though they are free to agree on provisional measures concerning the use of the area.

The other strand of argumentation can draw on the language of paragraph 3. It adopts the principle that the states concerned are free to exercise their rights and jurisdiction in an area of overlapping claims so long as they pay due regard to the rights of the other coastal states. According to this more pragmatic view, the attainment of the final agreement would not necessarily be impeded if, for example, one of the coastal states engaged in marine scientific research within the disputed area. In addition, one can assume that traditional fishing can generally continue within that area, even when the delimitation of extended fisheries zones is at stake and the states concerned have not established a gray zone. Here one can draw a parallel to the *Fisheries Jurisdiction* cases where the International Court of Justice, in its Interim Protection Orders of August 17, 1972,<sup>105</sup> granted the United Kingdom and the Federal Republic of Germany an annual catch within the Icelandic fisheries zone as an interim measure that was based on the average annual catch of the claimants for the period 1960–1969.

In taking this latter view, one nevertheless has to realize that the hard cases stem from the use of nonliving resources within an area claimed by two or more states. Here again, the interim measures of protection ordered by the International Court of Justice may offer some assistance in finding convincing answers to our question. Certainly, any activity that an international court or tribunal would find sufficient to indicate an interim measure must be considered

<sup>104</sup> According to the Application of Greece, in 1974 the Turkish hydrographic vessel *Candarli* was accompanied by 32 warships of the Turkish Navy while doing research in the area in dispute. See *supra* note 72, at 7, para. 24. After Greece requested that Turkey refrain from taking further military measures, Turkey stated in 1976 that its research vessel *MTA Sismik*, which was operating in the area, was not accompanied by warships. See *Aegean Sea Continental Shelf, Interim Protection*, 1976 ICJ REP. at 5, para. 2 and 7, para. 16.

<sup>105</sup> 1972 ICJ REP. 12, 17, para. 25 *et seq.* and 34 *et seq.*, para. 26 *et seq.*

as hindering a final agreement under Articles 74/83, paragraph 3 of the LOS Convention. Under Article 41 of its Statute, the International Court upon request would resort to an interim measure when "the circumstances of the case disclose the risk of an irreparable prejudice to rights [of either party] in issue in the proceedings."<sup>106</sup> A similar power is given to the competent court or tribunal under Article 290 of the LOS Convention. With regard to exploration of the area in dispute between Greece and Turkey, the Court stated:

[T]he continued seismic exploration activities undertaken by Turkey are all of the transitory character just described, and do not involve the establishment of installations on or above the sea-bed of the continental shelf; and . . . no suggestion has been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute.<sup>107</sup>

The Court noted that "seismic exploration of the natural resources of the continental shelf without the coastal State might, no doubt, raise a question of the latter's exclusive right of exploration."<sup>108</sup> Yet it did not order the interim measure requested because it considered the alleged breach as "one that might be capable of reparation by appropriate means."<sup>109</sup>

One can thus infer that any activity which represents an irreparable prejudice to the final delimitation agreement, namely, the "establishment of installations on or above the sea-bed" or the "actual appropriation or other use of the natural resources," would doubtless be prohibited under paragraph 3 of Articles 74/83, since these activities could be terminated by an injunction if the dispute were submitted to a court or international tribunal. This opinion is confirmed by the fact that both Tunisia and Libya halted their operations in the area of overlapping claims while their case was before the Court.

As the activities in question clearly include exploratory drilling, one cannot simply conclude that exploration is permissible and exploitation prohibited in the disputed area. Instead, the Court's Order offers a distinction between exploratory activities of a transitory character, such as seismic investigation, and those which are permanent and employ stationary means. While the latter are generally prohibited under paragraph 3 of Articles 74/83, the former can be considered as jeopardizing or hampering the reaching of the final agreement only if exceptional circumstances lead to the conclusion that they would aggravate the dispute.

## V. CONCLUSION AND OUTLOOK

Interim measures pending delimitation under Articles 74/83 of the LOS Convention are in essence incentive and preventive obligations of a conventional nature. Upon the request of either one, the states concerned must enter into negotiations with a view to concluding provisional arrangements concerning the use of zones in which their claims to sovereign rights and exclusive jurisdiction

<sup>106</sup> 1976 ICJ REP. at 11, para. 32; *see also* 1972 ICJ REP. at 16, para. 21.

<sup>107</sup> 1976 ICJ REP. at 10, para. 30.

<sup>108</sup> *Id.*, para. 31.

<sup>109</sup> *Id.* at 11, para. 33.

overlap. However, they are not obliged to conclude such arrangements. If agreed, the arrangements are informal and preliminary. Normally, they are related to certain uses of the area of overlapping claims. In practice, a two-step approach seems particularly suited to coping with the problem of nonliving resources, beginning with provisional arrangements on their exploitation, and continuing, if circumstances so require, with the establishment of a joint development area.

Furthermore, the states concerned must not jeopardize or hamper the reaching of the final delimitation agreement by unilateral actions within the area in dispute. This transitional obligation of mutual restraint begins when the overlapping claims emerge, but it does not impose a moratorium on the use of the natural resources. Rather, one can argue that utilization of the living resources may continue, whereas any exploitation of nonrenewable resources, as well as any kind of exploration requiring drilling or the establishment of installations or structures within the area, is prohibited.

As the prohibition of unilateral actions is intrinsically connected with the duty to negotiate in good faith with regard to provisional arrangements, paragraph 3 of the two articles constitutes another precept reflecting a general tendency to further cooperation in the international relations of states. Its constituent elements fit neatly both into the usual patterns of an obligation to negotiate, which is increasingly prescribed under international law when neighboring states face a common problem, and into the general obligation of mutual restraint in order to protect the rights of any state that might be affected by the dispute.

Because its source is purely conventional, paragraph 3 will bind only those states which have ratified or acceded to the Law of the Sea Convention once it has entered into force. The Convention does not prescribe a parallel obligation for the delimitation of the territorial sea between states with opposite or adjacent coasts,<sup>110</sup> since Article 15 lacks a similar provision. Circumstances, however, may require that such an obligation be assumed by analogy.

It would be still more important if the paragraph 3 obligations could be said to form a part of general customary international law, binding all states with respect to every kind of maritime delimitation independently of the LOS Convention. As the preceding analysis of its content and scope has revealed, paragraph 3 is potentially "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law,"<sup>111</sup> as the International Court of Justice described the development of customary norms. Turning to state practice for further evidence of custom, one finds that the existing practice has necessarily been elaborated by those states whose interests are specially affected. But as yet it appears neither uniform nor sufficiently extensive for the obligations to be considered evidence of customary international law. Nonetheless, even cautious observers could agree that paragraph 3 of Articles 74/83 sets forth an *emerging* customary rule. The more so, when one recalls that

<sup>110</sup> A suggestion by Morocco for a corresponding paragraph on the delimitation of the territorial sea was not approved. See Conf. Doc. NG7/3, *supra* note 42.

<sup>111</sup> 1969 ICJ REP. at 42, para. 72.

it represents progressive development within a context of principles and rules on delimitation that in themselves do not add anything to the existing body of customary international law.

Finally, given the many disputes about delimitation, attention should be drawn to the procedures on dispute settlement in part XV of the LOS Convention as they pertain to interim measures pending delimitation. Although disputes concerning the interpretation or application of paragraph 3 of Articles 74/83 are subject to mandatory dispute settlement, the parties may opt to exclude them under Article 298(1)(a)(i). Since they may be expected to do so, the prospects for the submission of disputes over interim measures pending delimitation to international courts or tribunals are dim.