

Rights and Obligations in Areas of Overlapping Maritime Claims

David Anderson

Former Judge

International Tribunal for the Law of the
Sea

Types of Overlapping Maritime Claims

- Within the 12 M limit, in both internal waters and the territorial sea
- Beyond the 12 M limit, in claims to both EEZs and continental shelves
- Where two States claim sovereignty over the same piece of territory (usually an island or rock)

Overlapping Claims to Territorial Sea

- Article 15 UNCLOS provides that, in situations where there are overlapping claims, “neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line...”
- In an overlapping claims situation, each State is thus limited to establish a territorial sea up to the provisional equidistance line.

Historic Title Exception

- Article 15 does not apply “where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way that is at variance therewith”
- Historic titles would be taken into account in delimitation
- However, the provision in article 15 does not apply beyond the territorial sea

Overlapping Claims to the EEZ / Continental Shelf

Articles 74(3) and 83(3) of UNCLOS:

3. 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 the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation

When do Obligations under Articles 74(3) & 84(3) Arise?

1. Two States have made it clear that there is an overlap
2. There is fishing activity or exploratory fishing in the area of overlaps
3. One State announces its intention to issue licences/concessions for oil and gas in the area of overlapping claims.
4. One State announces its intention to promote or authorise marine scientific research in the area of overlapping claims.
5. Negotiations for a boundary have been proposed or have been commenced but adjourned without agreement
6. There is some other activity in the area of overlaps, which is susceptible to regulation by a coastal State.
7. Overlapping claims over the continental shelf beyond 200 M

Rock/Island Situation

- Does the obligation to enter into provisional arrangements apply in the situation where two States dispute the status of a feature?
- What is the weight to be accorded to such feature under article 74/83 in establishing the maritime boundary?

Obligation under Paragraph 3

1. To seek provisional arrangements
2. To avoid unilateralism

All without prejudice to the final delimitation

Provisional Arrangements

- Formal agreement on a joint area for the purposes of fishing
- Formal agreement explicitly entered into as a part of an undelimited area of overlapping claims
- Informal agreement on a moratorium on drilling activity
- Informal arrangements on fishery patrols
- Agreement on prior notification of seismic work
- Agreement to share information from resource activity

Unilateral Actions

Jeopardising/Hampering Final Agreement

- Authorising the emplacement of an installation in the disputed area
- Threatening a non-national installation (including its crew) with armed force
- Drilling in the disputed area and *a fortiori* taking non-living resources.
- Increasing fishing activities in disputed waters to the point where the stocks are in danger of becoming over-fished
- Arresting the other State's fishing vessels for fishing in the disputed area

Unilateral Actions that are Allowed

- Seismic work, so long as no damage is done to the resources of the seabed or to fish stocks
- Establishing fishery conservation measures on the basis of scientific advice
- Marine scientific research into matters not related to the exploitation of resources

Overlapping Claims based on Disputed Islands

- Article 74(3) & 83(3) applies to the entire boundary dispute “pending agreement” on the boundary
- However, paragraph (3) is confined to the question of the boundary: it does not apply to the sovereignty issue
- UN Charter principles and general international law apply to sovereignty disputes–
 1. Friendly Relations Declaration 1970:

“States parties to an international dispute...shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security...”
 2. Manila Declaration 1982:

“...shall refrain from any action...which may...make more difficult or impede the peaceful settlement of the dispute...”

2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea

“4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.”

“5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and security including, among others, refraining from inhabiting islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.”

Conclusions

- The general duty under customary international law not to extend or aggravate a dispute applies to sovereignty and jurisdictional disputes.
- Article 15 contains a rule restraining claims to the TS
- Paragraph 3 of articles 74/83 represents a specific elaboration of the general principle. Paragraph 3 adds a good faith duty to seek provisional arrangements, without prejudice.
- A sovereignty dispute is not directly subject to 74/83 but it may be an element in a boundary dispute. Sovereignty should be determined first, then the boundary.
- To what extent is the duty to avoid aggravating or extending sovereignty disputes under general international law the same as the duty under article 74/83 para (3) to avoid jeopardising or hampering the reaching of a boundary agreement?

THANK YOU

David Anderson
Former Judge
International Tribunal for the Law of the
Sea