

Obligation of Self Restraint:
Not to Hamper or Jeopardize the Reaching
of the Final Agreement

Dr. V.D. SHARMA
Director & Head
Legal & Treaties Division
Ministry of External Affairs
Government of India

UNCLOS 1982

Constitution of Oceans

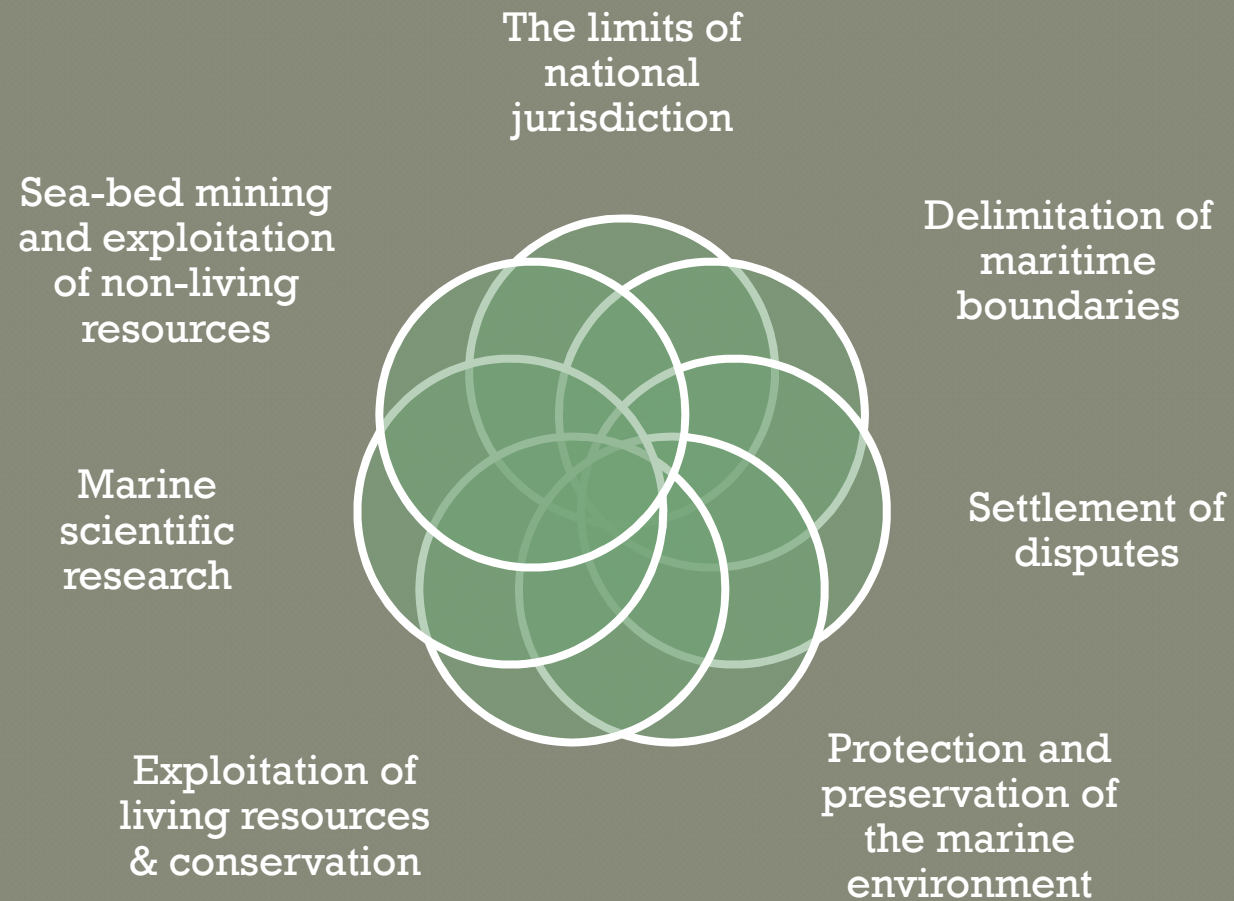
Comprehensive framework
for the regulation of ocean
space

Promote maintenance of
international peace and
security

167 State Parties

Established new
international bodies

UNCLOS: Framework for Regulation



Delimitation of Maritime Boundaries

Article 15

- **Territorial Sea**

Article 74

- **Exclusive Economic Zone**

Article 83

- **Continental Shelf**

UNCLOS: Article 74 & 83

The delimitation
of the exclusive
economic
zone/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

Provisional Arrangements : Articles 74 (3) & 83 (3)

PENDING REACHING OF FINAL AGREEMENT ON DELIMITATION OF MARITIME BOUNDARIES :

The States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature.

During this transitional period, not to jeopardize or hamper the reaching of the final agreement.

Obligations under Articles 74 (3) & 84 (3)

To enter into provisional arrangements: aims to promote adoption of certain interim measures

- Provisional boundaries (Tunisia/Algeria: Provisional Boundary for six years)
- Joint Development
- Arrangement/agreement on a joint area for the purposes of fishing
- Informal arrangements on fishery patrols
- Arrangement/agreement explicitly entered into as a part of an undelimited area of overlapping claims
- Agreement/arrangement on a moratorium on drilling activity
- Agreement on prior notification of seismic work
- Agreement to share information from resource activity

Seeks to limit the activities of States concerned in the disputed areas: No unilateral measures

Provisional Arrangements of a Practical Nature

- It is an important tool in achieving the objectives of the Convention: the equitable and efficient utilization of the resources of the seas and oceans
- Language of Articles 74 (3) & 84 (3) in which obligation is framed imposes on the parties a duty to negotiate in good faith
- Drafter's intent: Require of the parties a conciliatory approach to negotiations

Examples of Joint Development

- Senegal/Bissau Guinea Joint Development Zone on the Atlantic Coast: Mineral/living resources sharing
- Colombia/Jamaica JDZ: Partial delimitation and established a JDZ in the western Caribbean sea
- Nigeria/Sao Tome and Principe JDZ on the Atlantic shores of Africa: Potential exploitation of both hydrocarbons and fishery resources
- Barbados and Guyana Co-operation Zone: deals with the EEZ and living resources, besides mineral resources
- Thailand and Bangladesh had a joint venture program for fisheries development in the Bay of Bengal

Views of Courts/Tribunals

- Joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and Tribunals, for instance in:
- ICJ in *North Sea Continental Shelf cases (1969)*: stated that agreements for joint exploitation were particularly appropriate where areas of overlapping claims result from the method of delimitation chosen and there is a question of preserving the unity of deposits
- *Eritrea/Yemen Arbitration (1999)*: Although no mineral resources had yet been discovered in the disputed waters, Arbitral Tribunal held that parties should give every consideration to the shared or joint or unitised exploitation of any such resources

Unilateral actions which may jeopardise/hamper reaching final agreement

Emplacement of an installation in the disputed area

Threatening 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 measures which may not jeopardize or hamper reaching final agreement

Seismic work, so long as no damage is done to the resources of the seabed or to fish stocks

Establishing fishery conservation measures supported by and on the basis of scientific advice

Marine scientific research into matters not related to the exploitation of resources

Case Law: Guyana vs. Suriname (2007)

The arbitral proceedings were initiated by Guyana pursuant to Articles 286 & 287 and Annex VII of the UNCLOS

The Arbitral Tribunal held that both Guyana and Suriname violated their obligations under the UNCLOS to make every effort to enter into provisional arrangements of a practical nature and not to hamper or jeopardize the reaching of a final agreement

Tribunal's Observations/Views

First obligation: Provisional arrangements of a practical nature

- Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilisation of the resources of the seas and oceans
- Obligation on the Parties a duty to negotiate in good faith
- Drafters' intent to require of the parties a conciliatory approach to negotiation
- Recognised as important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to "make every effort" to reach such arrangements.

Tribunal's Observations/Views

Second obligation: To make every effort not to jeopardise or hamper the reaching of the final agreement

- Important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully.
- However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area.
- In the context of activities surrounding hydrocarbon exploration and exploitation, two classes of activities in disputed waters are therefore permissible.
- The first comprises activities undertaken by the parties pursuant to provisional arrangements of a practical nature. The second class is composed of acts which, although unilateral, would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary.
- Unilateral acts which do not cause a physical change to the marine environment would generally fall in to the second class.

Tribunal's Observations/Views

Acts that do cause physical change could only be undertaken pursuant to an agreement between the parties, as they may have the effect of hampering or jeopardising the reaching of a final agreement on delimitation.

A distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

The Tribunal finds that Surname's threat of force in a disputed area, while also threatening international peace and security, jeopardised the reaching of a final delimitation agreement.

Conclusions

There is a clear obligation to negotiate in good faith on provisional arrangements

To make every effort not to jeopardise or hamper the reaching of the final agreement

Use of force is clearly not an option, hence undesirable and unacceptable.

Parties are not to take unilateral action that may cause physical change to marine environment/risk of physical damage to the seabed or subsoil thereof.