

Meaningful Responses to Unilateralism in Undelimited Maritime Areas

Sandrine De Herdt

Structured Abstract

Article Type: Research Paper¹

Purpose—A number of undelimited maritime areas continues to burden relations between coastal States with opposite or adjacent coasts. Notwithstanding the obligations of States Parties to UNCLOS to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of a final agreement, various examples of States acting without sufficient restraint are observed in undelimited areas. The purpose of this article is to provide an overview of courses of action available to States facing unilateral activities conducted in a maritime area claimed by another State.

Design/Methodology/Approach—This article first provides a brief analysis of the content of Articles 74(3) and 83(3) UNCLOS. It then examines the following courses of action: protesting, adjudication, provisional measures, maritime law enforcement, and countermeasures.

Findings—This paper shows that unilateral acts could be countered by recourse to diplomatic actions, or Part XV UNCLOS. It further finds that the obligation not to jeopardize or hamper the reaching of a final agreement cuts back the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. It is especially true for maritime law enforcement activities and the implementation of lawful countermeasures.

Practical Implications—This article studies the permissible and meaningful

Athens Public International Law Center, Faculty of Law, National & Kapodistrian University of Athens. Athens, Greece; email: sandrinedeherdt@hotmail.com; phone: +32(0)484619722



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responses under international law to put a halt to unilateral acts conducted in undelimited areas. The question is important especially since only half of the potential maritime boundaries have been delimited around the world. It has furthermore a significant practical dimension, considering the fact that there are many examples of States acting without notable restraint in disputed areas. The findings may also have important implications for non-State users of the area in question.

Originality, Value—This article presents an analysis of the courses of action available to States facing unilateral activities conducted in disputed maritime areas from the protest through diplomatic channels to the implementation of lawful countermeasures.

Keywords: countermeasures, maritime law enforcement,
Part XV UNCLOS, protesting, provisional arrangements,
undelimited maritime areas

I. Introduction

A number of undelimited maritime areas continues to burden relations between coastal States with opposite or adjacent coasts. Notwithstanding the obligations of States Parties to UNCLOS² under Articles 74(3) and 83(3) to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of a final agreement, various examples of States acting without sufficient restraint are observed in undelimited areas.³

On February 16, 2019, Kenya summoned its ambassador to Somalia and asked his Somalia counterpart to leave. The summons was a consequence “of a most regretful and egregious decision by the government of Somalia to auction off oil and gas blocks in Kenya’s maritime territorial area that borders Somalia,” the Foreign Ministry said.⁴ The *Somalia v. Kenya* dispute is currently pending before the International Court of Justice (“ICJ” or “Court”). Somalia accused Kenya of acting unilaterally to exploit both the living and non-living resources on Somalia’s side of an equidistance line.⁵ It further accused Kenya of having encouraged fisheries within the disputed area.⁶ On June 17, 2019, Japan has protested what is says was an “unauthorized Chinese maritime survey within its economic waters near disputed East China Sea islands.” The Ministry said it was “extremely regrettable” that the Chinese survey ship was seen conducting research in the area without obtaining Japan’s permission. It is recalled that the two countries concluded a framework for mutual prior notification of marine scientific research in 2001.⁷ On February 7, 2019, Japan has lodged another protest with China over its continued “deployment of a drilling ship at a gas field” in a contested area of the East China Sea. “It’s extremely regrettable that China has continued its unilateral development activity,”⁸ Chief Cabinet Secretary said. According to China, it was operating in areas “indisputably” under its jurisdiction.⁹ On December 22, 2018, a Venezuelan navy vessel intercepted a ship exploring for oil on behalf of Exxon Mobil in Guyanese waters. Guyana’s Foreign Ministry said: “Guyana rejects this illegal, aggressive and hostile act,” adding that the move “violates

the sovereignty and territorial integrity of our country.”¹⁰ According to Venezuela, the incident occurred in an area under “undoubtedly Venezuelan sovereignty.”¹¹

Considering these examples, the question boils down to how a State may respond to the other State’s unilateral conduct undertaken in an undelimited area. The purpose of this article is to study the permissible and meaningful responses under international law to put a halt to unilateral acts conducted in disputed areas. This paper first provides a brief analysis of the content of the two-pronged obligations contained in Articles 74(3) and 83(3) UNCLOS. It then examines the following courses of action: protesting, adjudication, provisional measures, maritime law enforcement, and countermeasures.

II. The Obligations to Make Every Effort to Enter into Provisional Arrangements of a Practical Nature and not to Jeopardize or Hamper the Reaching of a Final Agreement

Pending the reaching of a final delimitation agreement of the EEZ and continental shelf, respectively, Articles 74(3) and 83(3) UNCLOS impose on the coastal States concerned two interlinked obligations of conduct.¹² These States concerned are under a positive obligation to make every effort to enter into provisional arrangements of a practical nature, and a negative obligation to make every effort not to jeopardize or hamper the reaching of a final agreement. The two obligations simultaneously attempt to promote but also limit activities in disputed areas during the transitional period.¹³ As the Arbitral Tribunal in *Guyana/Suriname* held, they constitute “an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime areas, as long as such activities do not affect the reaching of a final agreement.”¹⁴ Besides, States are bound by the two obligations during the entire transitional period, i.e., the “period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved.”¹⁵ The two obligations arise when States made it clear that there are overlapping entitlements through a diplomatic protest, legislative act, concrete proposal of a boundary, invitation of negotiation, or *notes verbales* to the Commission on the Limits of the Continental Shelf.

The first obligation aims to invite States to conclude provisional arrangements dealing with the management of resources, or other aspects related to the maritime area subjected to overlapping claims. It was interpreted as an obligation to meaningfully negotiate in good faith.¹⁶ It requires the States concerned to “enter into negotiations with a view to arriving at an agreement and not merely go through a formal process of negotiation.”¹⁷ It does not amount to an obligation to reach effectively such agreements.¹⁸ Furthermore, a State facing unilateral activities should request negotiations (and not merely request the offending State to refrain from continuing its activities) to be able to claim a breach of such obligation.¹⁹ Neither merely a non-

binding recommendation nor encouragement, the obligation to negotiate is a mandatory rule and its breach would represent a violation of international law.²⁰

The second obligation aims to prevent only activities that will jeopardize or hamper the reaching of a final agreement. This obligation to exercise restraint is thus not intended to preclude *all* activities in undelimited areas.²¹ Where provisional arrangements have been reached, these agreements regulate the conduct of the parties in the undelimited area. However, in the situation where no such arrangements have been reached or where they cover only a limited category of activities, the States' obligations concerning an undelimited area are described by the words "not to jeopardize or hamper the reaching of the final agreement."²² The permissible activities should thus be assessed on a case-by-case basis. In the *Guyana/Suriname* award, the Arbitral Tribunal pronounced itself on the substantive legal difference between oil exploration activities and exploratory drilling. It considered that unilateral activities that might lead to a permanent physical change to the marine environment would generally be regarded as activities jeopardizing or hampering the reaching of a final agreement. Hence, unilateral seismic testing seems to amount to unilateral activities permissible in disputed areas, while exploratory drilling does not.²³ But the *Ghana/Côte d'Ivoire* case seemingly suggests otherwise. The Special Chamber of the International Tribunal for the Law of the Sea ("Tribunal" or "ITLOS") found that it may be permissible for a State to undertake unilateral drilling activities in a disputed area.²⁴ The distinction between seismic exploration and drilling activities is therefore debatable.

III. Protesting

First of all, faced with an activity unilaterally undertaken that jeopardizes or hampers the reaching of a final agreement, a State can protest against it. A protest is a formal objection by "a State, against a conduct or a claim purported to be contrary to or unfounded in international law."²⁵ This protest may preserve the rights of the State since the obligations provided for in Articles 74(3) and 83(3) UNCLOS arise when the States make clear that there are overlapping claims. In doing so, the State also makes known that it does not acquiesce.²⁶ An example may be found in *Ghana/Côte d'Ivoire* where Ghana argued that a tacit agreement has emerged between the parties on a common maritime boundary as a result of their mutual acceptance of such a boundary over many decades. It relied, *inter alia*, on the fact that Côte d'Ivoire never once protested or objected to any of Ghana's extensive activities on its side of the agreed line.²⁷ On another note, protest invokes state responsibility of another State²⁸ as well as implies the existence of dispute.²⁹

The diplomatic protest could be notably coupled with complaints to the UN Security Council and/or the UN General Assembly. By way of example, in 1976, the unilateral exploration carried out by Turkey without Greece's consent in areas of the continental shelf in the Aegean Sea claimed by the latter triggered a simultaneous and parallel Greek action to the ICJ and to the UN Security Council. On August 25,

1976, the Security Council adopted Resolution 395 by which, *inter alia*, it urged “the Governments of Greece and Turkey to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated,” and called upon the parties “to resume direct negotiations over their differences and appealed to them to do everything within their power to ensure that these negotiations will result in mutually acceptable solutions.”³⁰ It also recalled the need for them “to respect each other’s international rights and obligations and to avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution.”³¹ Accordingly, the ICJ found it was not necessary “to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute.”³²

Depending upon the particular circumstances of a case, a mere protest may not suffice and further responses may be required.

IV. Compulsory Dispute Resolution Under UNCLOS

Facing unilateral acts conducted by another State in an undelimited area, a claimant State could resort to the compulsory procedures provided for in Part XV UNCLOS for the peaceful resolution of disputes.

4.1 Requirements Under Article 283 UNCLOS

Recourse to Part XV brings into play the requirements of Article 283 UNCLOS. It requires parties in dispute to “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”³³ It also requires a further exchange of views upon the failure of a dispute settlement procedure.³⁴ The purpose of this article is “to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings.”³⁵ The parties must exchange views on the means to settle the dispute, but they are not under an obligation to engage in substantive negotiations.³⁶ A State is furthermore “not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement had been exhausted.”³⁷

Interpreting the articulation between Articles 283 and 74 and 83 UNCLOS, the Arbitral Tribunal in *Arbitration between Barbados and the Republic of Trinidad and Tobago* reached the conclusion that such requirements overlap with the obligation to agree upon delimitation. Since the Parties have already spent a “reasonable period of time” seeking to negotiate a solution to their delimitation problems, it considered that to require a further separate exchange of views on its settlement by negotiation or other peaceful means or procedure for settlement was “unrealistic.”³⁸ Similarly, the Arbitral Tribunal in *Chagos Marine Protected Area Arbitration* emphasized: “an overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out. [...] In practice, substantive negotiations con-

cerning the parties' dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute.³⁹ Therefore, by seeking to negotiate a solution to delimitation problems during a "reasonable period of time" under Articles 74 and 83 UNCLOS, States seem to have already exhausted the requirements of Article 283. States having exhausted the requirements under Article 283 have not, however, exhausted the obligation to enter into provisional arrangements.

4.2 Declaration Under Article 298 UNCLOS

Upon the failure of the Parties to settle their dispute by recourse to Section 1, i.e., to settle it by negotiations, Part XV, Section 2, UNCLOS gives a Party to a dispute concerning the interpretation or application of UNCLOS a unilateral right to submit it to compulsory settlement by a court or tribunal.⁴⁰ However, when signing, ratifying or acceding to UNCLOS or at any time thereafter, Article 298 UNCLOS explicitly permits States Parties to exclude certain categories of disputes from compulsory procedures. As envisaged in Article 298(1)(a)(i) UNCLOS, a State could make a declaration so as to opt out of the compulsory settlement of "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles." Such a dispute may still be subject to the compulsory conciliation procedures in Annex V UNCLOS if it meets certain conditions.⁴¹ The question arises of whether the two obligations enshrined in the common paragraph 3 of Articles 74 and 83 UNCLOS were intended to be covered by Article 298(1)(a)(i) UNCLOS. According to some, the exceptions must be strictly construed. Furthermore, the explicit reference to the disputes "relating to *sea boundary delimitations*" indicates that disputes arising out of an alleged breach of the two obligations does not fall within the scope of declarations under Article 298(1)(a)(i) UNCLOS.⁴² Others, instead, argued that such a declaration also excludes the disputes concerning these two obligations.⁴³ It is open to discussion since the question has not yet been tested by any court or tribunal.⁴⁴

Considering the interpretation whereby the two obligations might be captured by such a declaration raises some interesting questions. The *Ghana/Côte d'Ivoire* case may serve as a good example for further discussions. Ghana closed off the possibility of a judicial solution by filing a declaration under Article 298 UNCLOS, "so shielding its activities from the scrutiny of a judicial body and preventing any possibility of the dispute's being settled by a third party."⁴⁵ Following the discovery of a significant oil deposit in the TEN zone,⁴⁶ it lodged a declaration on December 15, 2009, in accordance with Article 298(1)(a) UNCLOS excluding disputes concerning sea boundary delimitations from compulsory dispute settlement as provided for in section 2 of Part XV UNCLOS.⁴⁷ At that time, it seemed that Ghana used the opportunity to exponentially step up its drilling activities, increase the number of oil contracts and grant permission for seismic surveys to be conducted in the disputed area in spite of Côte d'Ivoire's repeated objections.⁴⁸ Ghana kept its declaration in force until after having instituted proceedings and it eventually withdrew it on September 22, 2014.⁴⁹ The Special Chamber decided that the fact that Ghana initially closed off the possibil-

ity of a judicial solution by filing the declaration under Article 298 was not contrary to the obligation to negotiate in good faith since the UNCLOS explicitly permits it.⁵⁰

Against this background, a first question arises: can a State lodge a declaration after a dispute has arisen concerning the interpretation or application of Articles 74(3) and 83(3) between the parties to prevent proceedings being instituted against it in respect of this dispute? The limitation of the declaration under Article 298 UNCLOS can have “an impact upon an existing dispute which has yet to reach the stage of proceedings before a Section 2 court of tribunal.”⁵¹ A declaration under Article 298 may indeed be withdrawn or amended *at any time* by a State party.⁵² A new declaration or a withdrawal of a declaration does not, however, affect a proceeding that is underway.⁵³

The ICJ jurisprudence might be of interest for this issue.⁵⁴ In the *Right of Passage Over Indian Territory* case, the Court found that a declaration of acceptance to its compulsory jurisdiction applies to disputes brought before it after the date of notification and that no retroactive effect can properly be imputed to notifications made.⁵⁵ In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the Court considered the question of the precise period of notice appropriate to terminate a declaration. It should be observed that in the *Right of Passage over Indian Territory* case, it did make a pronouncement on the opposite situation, where Portugal had made a declaration regarding the Optional Clause only a few days before it filed an application against India based on this declaration.⁵⁶ In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, while the United States was bound by self-imposed clause of six months’ notice, the ICJ held that:

the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a *reasonable time* for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.⁵⁷

On the question of what reasonable period of notice would legally be required, the Court observed that three days would not amount to a reasonable time.⁵⁸ In the *Fisheries Jurisdiction (Spain v. Canada)*, the Court upheld the declaration of reservation made 10 months prior to an application to it by Spain to the jurisdiction of the Court in relation to disputes concerning conservation measures applicable to vessels fishing in the NAFO Regulatory area.⁵⁹ By comparison, a State making a declaration under Article 298(i)(a) UNCLOS may be subject to the tests of good faith and reasonable period of notice.⁶⁰ The precise period of notice must necessarily be fixed *in concreto* according to the circumstances of the case,⁶¹ especially taking into account the timing and subject of the reservation.⁶²

A second question arises of whether any dispute connected with the undelimited area should be excluded automatically. It should be noted at the outset that the invocation of a declaration under Article 298 does not as such oust the tribunal’s jurisdiction. A Party to a dispute cannot determine unilaterally whether the exclusion applies in a given case.⁶³ Besides, the *South China Sea Arbitration* shed useful light

on the interpretation of declaration under Article 298. The Philippines had challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. The Arbitral Tribunal in its *Award on Jurisdiction and Admissibility* found that this was not a dispute over maritime boundaries since the Philippines had not requested the Tribunal to delimit any overlapping entitlements between the two States.⁶⁴

Notwithstanding a declaration under Article 298, a dispute connected with Articles 74(3) and 83(3) UNCLOS might be brought before a court or a tribunal. Other obligations under UNCLOS (which does not call upon the breach of the obligation to enter into provisional arrangement and/or not to jeopardize or hamper the reaching of the final agreement)⁶⁵ may indeed provide potential legal bases for proceedings under Part XV: the “due regard” obligations (Articles 56[2] and 58[3] UNCLOS), exclusive rights of exploration and exploitation of the natural resources of the continental shelf (Articles 56[1] and 77[1] UNCLOS),⁶⁶ laws and regulations regarding drilling on the continental shelf (Article 81 UNCLOS), operation of law enforcement vessels (e.g., Articles 73, 224–227, 232 UNCLOS),⁶⁷ cooperation of States bordering enclosed or semi-enclosed seas (Article 123 UNCLOS),⁶⁸ obligation to protect and preserve the marine environment (Part XII UNCLOS), exclusive right to conduct maritime scientific research (Article 246[5] UNCLOS), obligation to settle disputes by peaceful means (Article 279 UNCLOS), and good faith and abuses of rights (Article 300 UNCLOS).⁶⁹ Finally, it should be added that making a declaration under Article 298 does not mean that a State does not have to comply with the obligation to settle disputes by peaceful means, expeditious exchange of views regarding the settlement of the dispute, invitation to conciliation as well as the general principle of good faith and abuse of rights.⁷⁰

V. Request for the Prescription of Provisional Measures

Another option for a claimant State to address unilateral conduct committed in an undelimited area potentially in violation of Articles 74(3) and 83(3) is to request provisional measures as provided for in Article 290 UNCLOS.⁷¹ Such measures aim at preserving the *status quo* of the litigation in question pending the proceedings and/or avoiding an aggravation of the dispute between the parties.⁷²

5.1 Conditions

Article 290 UNCLOS serves two situations. (1) Its paragraph 1 deals with the situation where “the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the disputes or to prevent serious harm to the marine environment, pending the final decision.” (2) Its paragraph 5 gives compulsory residual jurisdiction to prescribe provisional measures to any court or tribunal agreed to between the

parties or, failing such agreement within two weeks from the date of the request for provisional measures, to ITLOS pending the establishment of an arbitral tribunal pursuant to Part XV UNCLOS.

Neither the existence of a claim to an area of EEZ or continental shelf *per se*,⁷³ nor the existence of a maritime boundary dispute *per se*, are sufficient bases for the prescription of provisional measures under Article 290 UNCLOS. Indeed, certain conditions are required to be fulfilled for the prescription of such measures. Pursuant to it, the prerequisite is that *prima facie* the court or tribunal would have jurisdiction to hear the case. It is the case where “there is nothing which manifestly and in terms excludes the Tribunal’s jurisdiction.”⁷⁴ As discussed above, there is an uncertainty as to the effect of a declaration under Article 298(1)(i)(a) on disputes arising under Articles 74(3) and 83(3) UNCLOS. Besides the *prima facie* jurisdiction, there are additional requirements to be satisfied if provisional measures are to be prescribed: the risk of irreparable prejudice⁷⁵; urgency, “that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to the rights at issue before the final decision is delivered”⁷⁶; the existence of a link between the rights claimed and the provisional measures requested⁷⁷; and the plausibility test, or the need to show that the rights claimed on the merits and sought to be protected are at least plausible.⁷⁸ A court or tribunal is free to indicate provisional measures different from those requested.⁷⁹ Compliance with them must be prompt.⁸⁰

It is worth mentioning that, instead of acts Suriname characterized as maritime enforcement, the Arbitral Tribunal in *Guyana/Suriname* specified that peaceful means of addressing Guyana’s alleged breach of international law with respect to exploratory drilling were available to Suriname under UNCLOS. Indeed, it could have invoked compulsory dispute resolution provided for in Section 2 of Part XV UNCLOS, which provides among other things the request to prescribe provisional measures.⁸¹ While assessing whether the conduct of the State concerned breached Articles 74(3) and 83(3), the fact that the request to such measures was not considered as an option to cease the alleged lawful conduct and to safeguard its rights might be taken into account by a court or tribunal.

5.2 *Provisional Measures with Respect to the Obligation Not to Jeopardize or Hamper the Reaching of a Final Agreement*

The request for provisional measures with respect to the obligation not to jeopardize or hamper the final agreement may be strategically useful to preserve the *status quo* that might otherwise be upset by the unilateral action undertaken by a State in an undelimited area pending a judicial decision. These measures intend to guarantee that the negotiations as such remain meaningful.

The recourse to such measures might be justified to preserve the sovereign rights of State in the case of drilling exploration. In the *Aegean Sea Continental Shelf* order, the ICJ held that the establishment of installations on or above the seabed of the continental shelf as well as the actual appropriation or other use of the natural

resources of the areas of the continental shelf disputed may provide grounds for the request of provisional measures. It also considered that exploration activities involving a risk of permanent (not “of a transitory character”) physical damage to the seabed or subsoil or to their natural resources of the continental shelf may merit provisional measures.⁸² In the *Ghana/Côte d’Ivoire* order, Côte d’Ivoire requested the Special Chamber to order suspension of all seismic exploration activities, drilling activities and the establishment of installations on the seabed of the continental shelf which caused physical harm to it⁸³—summarized as “all ongoing oil exploration and exploitation operations.” Taking into account the significant and permanent modification of the physical characteristics of the area in dispute, the considerable financial risk for Ghana (and its concessionaires) and serious danger to the marine environment that suspension of ongoing activities might entail,⁸⁴ the Chamber ultimately ordered Ghana to refrain from undertaking new drilling in the disputed area—but did not order cessation of those activities already underway. In light of this, it is safe to assume that States becoming aware of the arrival of an oil rig and drilling ship in an undelimited area should request provisional measures to prevent drilling activities from being undertaken.

The above observation leads to consideration as to whether such measures may prevent seismic activities generally perceived as less invasive than drilling operations. In the *Aegean Sea Continental Shelf* order, the ICJ held that seismic exploration, being of transitory character, does not by itself suffice to justify the indication of interim measures of protection.⁸⁵ In line with this is the *Ghana/Côte d’Ivoire* order where the Chamber did not order suspension of all seismic surveys, despite the request by Côte d’Ivoire. That said, it is worth highlighting that the ICJ, in the *Aegean Sea Continental Shelf* order, said: “[n]o complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources.”⁸⁶ Interestingly enough, a recent article brings to light the potential adverse effects of seismic surveys on the marine environment in or near the area in question due to the high volume of acoustic energy commonly released during seismic operations.⁸⁷ Yiallourides concluded: “the potential adverse effects of seismic noise on the marine environment, if adequately presented by the complaining party before the Tribunal, may well justify the prescription of provisional measures of protection under Article 290 UNCLOS and may, therefore, provide an adequate remedy for the complaining party.”⁸⁸

Among the rights connected to the exploration and exploitation of the natural resources of the continental shelf, some may create a risk of irreversible prejudice as the acquisition and use of information concerning the resources of the undelimited area. Seismic exploration studies and analysis may provide an advantage to the State possessing it during delimitation negotiations. The State can effectively assess the potential value of the oil and gas resources through the information obtained, including as the outer configuration of the reservoir, its internal structure and its size, as well as the accessibility and quality of its resources.⁸⁹ According to the Côte d’Ivoire request, “the sovereign rights of the coastal State relating to the exploration of the continental shelf and the exploitation of the natural resources thereof include not

only the right of that State to regulate access to them but also its right to possess and control all information relating to them.”⁹⁰ The Special Chamber ruled that these rights fall within the ambit of a State’s exclusive rights.⁹¹ It ordered Ghana “to take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d’Ivoire.”⁹² One should note that, in the *Aegean Sea Continental Shelf* order, the ICJ found that to acquire information concerning the natural resources of areas of the continental shelf is one that might be capable of reparation by appropriate means and thus did not create a risk of irreparable prejudice to rights in issue.⁹³

Provisional measures may be justified in the context of the prevention of serious harm to the marine environment. In the *Ghana/Côte d’Ivoire* order, the Special Chamber noted that Côte d’Ivoire’s allegations of risk of serious harm to the marine environment due to the activities conducted by Ghana in the disputed area were insufficiently documented.⁹⁴ However, in its views, such risk was of great concern.⁹⁵ It held that the complete suspension of ongoing activities conducted by Ghana could pose “a serious danger to the marine environment resulting, in particular, from the deterioration of equipment.”⁹⁶ Therefore, the Chamber imposed on both States the general obligation of cooperation in relation to the protection and preservation of the marine environment in UNCLOS and general international law. It also invited them “to act with prudence and caution to prevent serious harm to the marine environment.”⁹⁷ It subsequently ordered Ghana to carry out strict and continuous monitoring of its activities in the disputed area with a view to ensuring the prevention of serious harm to the marine environment.⁹⁸ The added value of these measures could be to “underline a sense of urgency arising out of the duty to cooperate enshrined in part XII of the Convention and general international law.”⁹⁹

Provisional measures may also prove to be useful to prevent a State from increasing fishing activities in undelimited areas to the point where such stocks are in danger of becoming over-fished.¹⁰⁰

Finally, the prevention of an armed incident in undelimited areas may likely be the subject of provisional measures.¹⁰¹ In the aftermath of Suriname’s threat to use force by mooring a warship against the rig, Guyana planned to seek such measures from the ITLOS pending the constitution of the Arbitral Tribunal. However, it did not submit its request. In its Statement of Claim, Guyana requested, *inter alia*, that Suriname shall, pending the decision of the Tribunal:

(1) refrain from any threat or use of armed force in the maritime zone under dispute or any other measures that would aggravate, prolong, or render more difficult the solution of the dispute submitted to the Annex VII Tribunal;

(2) refrain from any conduct in the nature of reprisals against Guyana or its nationals, including in particular its fisher-folk, in retaliation for Guyana’s recourse to the compulsory procedures under the 1982 Convention.¹⁰²

5.3 Provisional Measures with Respect to the Obligation to Enter into Provisional Arrangements

The request for provisional measures with respect to the obligation to enter into provisional arrangements seems to have less practical utility. The issue arises of whether a court or tribunal may order a provisional agreement that the parties themselves were unable to agree on in order to protect the substantive rights of the parties pending the proceedings. As Klein rightly pointed out, it is doubtful that a court or tribunal should be able to go so far as imposing such arrangement since there is no obligation to come to provisional arrangements (but a mere obligation to make every effort to enter into negotiations).¹⁰³ Instead, it might be ordered to cooperate until the final decision on the maritime delimitation—that is the obligation yet contained in Articles 74(3) and 83(3) UNCLOS. Such measures, however, may likely create a more suitable climate for negotiations of provisional agreements while underlining a sense of urgency.

VI. Maritime Law Enforcement

Another option for a claimant State to address unilateral conduct undertaken in an undelimited area is the coastal State's enforcement of sovereign rights with regard to living or non-living resources. One may wonder whether such an enforcement measure undertaken against the other party to the dispute (or against its vessels) would conform to the Articles 74(3) and 83(3) UNCLOS. Indeed, any such law enforcement activity against vessels of the other State might be considered inconsistent with the obligation not to jeopardize or hamper. While it is true that this response to unilateral conduct may exacerbate the dispute between the States, such an action in an undelimited area should not automatically be ruled out in every case.¹⁰⁴ What is more, such a response might be considered as a meaningful response to a unilateral act undertaken in undelimited area, especially in the need for urgency to prevent infringement of a State's rights, that is, "to preserve the interests of the coastal State *after* activities have started and while they take place."¹⁰⁵ Considered as a last resort option, a State may, therefore, incur international responsibility for the breach of Articles 74(3) and 83(3) UNCLOS while having recourse to law enforcement and not having tried in good faith to address the situation earlier by other means.¹⁰⁶

Besides, to enforce its laws and regulations in an undelimited area, a State has to strictly observe the requisites set down both by national legislation and by international law.¹⁰⁷ Maritime law enforcement involves two levels of legal prescriptions: (1) it has to be permitted by international law which defines the conditions to resort to force and the limits on the degree of force to apply; and (2) it has to be prescribed by national legislation which indicates when, if necessary, law enforcement power is to be exercised and with what degree of force.¹⁰⁸

A question to be addressed is the dividing line between the use of force in the exercise of law enforcement activities and the (threat of) use of force under Article

2(4) of the UN Charter. In *Guyana/Suriname*, following failed diplomatic efforts with Guyana to cease all oil exploration activities in the undelimited area, two patrol boats from the Surinamese navy approached the CGX's oil rig and drill ship and ordered the ship and its service vessels to leave the area within twelve hours¹⁰⁹: if they would not do so, "the consequences would be theirs."¹¹⁰ The Arbitral Tribunal admitted that "there was no unanimity as to what these 'consequences' might have been."¹¹¹ Based primarily on the testimony of witnesses involved in the incident, it held that the order to leave the area constituted an explicit threat that force might be used if the vessels did not comply.¹¹² The Tribunal rejected Suriname's argument that the measures undertaken were reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf.¹¹³ It considered that Suriname's action "seemed more akin to a threat of military action rather than a mere law enforcement activity."¹¹⁴ As a result, it concluded that Suriname's threat of force amounted to both a threat of the use of force in contravention of the UNCLOS, the UN Charter, and general international law,¹¹⁵ and a violation of the obligation not to jeopardize or hamper the reaching of a final delimitation agreement.¹¹⁶

Practically, the fact remains that to delineate the legal line separating maritime law enforcement from the use of force seems to be a far from clear-cut exercise. One view is that merely the nature of the activities may qualify the legal framework of the reaction. It has been argued: "if the use of force or threat of the use of force [...] aims at protecting sovereignty or sovereign rights, such as the right to explore the natural resources of the continental shelf, especially in disputed maritime areas, then article 2(4) and article 51 of the UN Charter comes into play."¹¹⁷ On the other hand, it has been said that the determination of the international legal nature of the forcible action depends upon the circumstances surrounding the case. Criteria such as the functional objective of the forcible action, the status of the entity subjected and location and jurisdictional aspects, can serve in this regard.¹¹⁸ Another possible methodology to draw the distinction might be to compare the offending State's legislation with the regulations of other States and analyze the terms of the international legal basis which permitted the enforcement action, as the Court did in the *Fisheries Jurisdiction* case.¹¹⁹ To determine exactly when the situation becomes serious enough to trigger the application of Article 2(4) UN Charter, the criterion of gravity can be interpreted considering the place where the litigious action took place and the seriousness of the action must be appreciated, depending upon the context in which it occurred.¹²⁰ In any event, in the exercise of enforcement action, the use of force is permitted as a no-alternative option only.¹²¹

VII. Implementation of Lawful Countermeasures

Provided that countermeasures are in conformity with the rules on State responsibility,¹²² a State can take countermeasures in response to an alleged breach of Articles 74(3) and 83(3) UNCLOS with the aim of inducing compliance by another State.

7.1 Lawfulness of Countermeasures in Undelimited Area

The purpose of countermeasures is to induce another State to comply with its obligations,¹²³ and not to have a punitive aim. Countermeasures are thus intended to be instrumental, i.e., “they are taken with a view to procuring cessation of and reparation for the internationally wrongful act.”¹²⁴ Note that a State may also resort to retorsion, i.e., unfriendly conduct not taken as a response to an internationally wrongful act.¹²⁵

In order to be justifiable, a countermeasure must meet certain conditions: it must be taken in response to a previous wrongful act of another State; be directed to that State¹²⁶; be temporary in character¹²⁷; be as far as possible reversible in its effect¹²⁸; be a necessary and proportionate response¹²⁹; it must not involve any departure from the peremptory norms, or obligation to refrain from the threat or use of force as embodied in the UN Charter.¹³⁰

Considering the obligation to meaningfully negotiate “in a spirit of understanding and cooperation” in particular, some concerns may arise as to whether a State can have recourse to countermeasures in the negotiation phase. On the question of whether the negotiations and such measures could go hand in hand, the *Air Service Agreement* award might be of interest. The Arbitral Tribunal held as follows:

85. It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith. [...]

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.¹³¹

Accordingly, when there are accompanied by an offer to negotiate in particular, countermeasures are available during the negotiations phase. Before taking it, a claimant State is required to call upon another State to fulfill its obligations as well as to notify it of any decision to take countermeasures and offer to negotiate with that State.¹³² The State has dispensed with the notification requirement in a situation of urgency to preserve its rights, nonetheless.¹³³ The prohibition of countermeasures while negotiations are being carried out in good faith was furthermore deleted from the final version of the Draft Articles on State Responsibility.¹³⁴ That said, in a provisional arrangement, States may explicitly exclude countermeasures with respect to the performance of the obligations under Articles 74(3) and 83(3) UNCLOS by a provision precluding the suspension of performance of an obligation under any circumstances.¹³⁵

A State may resort to countermeasures against another State that is acting wrongfully. This State acts at its peril since it bases its actions solely on its unilateral assessment of whether wrongful conduct committed by another State actually occurred.¹³⁶ When taking countermeasures, the assessment of the existence of such a wrongful act presupposes an objective standard.¹³⁷ However, as best captured by Judge Paik, the “key criterion is whether the actions in question would have the effect of endangering the process of reaching a final agreement or impeding the progress of negotiations to that end. In other words, it is a result-oriented notion.”¹³⁸ He further noted: “[i]n assessing whether the conduct of States would have the effect of jeopardizing or hampering the reaching of the final agreement, several factors may be considered. In particular, the type, nature, location, and time of acts as well as the manner in which they are carried out may be relevant.”¹³⁹ A State taking countermeasures may act wrongfully if it is determined that a prior wrongful act did not exist. On another note, while countermeasures can be used for conduct taken in breach of a provisional agreement, it may not be resorted to for failure to reach such an arrangement since the obligation to negotiate does not imply the actual reaching of it.

7.2 *Permissible Countermeasures*

The question of proportionality is central to the consideration of what kind of countermeasures are available to a State.¹⁴⁰ Proportionality seeks to commensurate the character and effects of a countermeasure with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.¹⁴¹ Additionally, an important consideration intended to restrain the conduct is that a State should choose, as much as possible, countermeasures capable of being reversed. An act is considered reversible if it can later be undone, i.e., if it can permit the resumption of performance of the obligations suspended as a result of countermeasures.¹⁴²

“By its very nature, drilling is irreversible because once the rock has been crushed it cannot be reconstituted.”¹⁴³ It is therefore debatable that a State may conduct drilling operations as a countermeasure. It has been argued elsewhere, however, that “in terms of oil and gas exploitation countermeasures would only be available if the dispute involved an area with very limited resources,” i.e., Australian oil companies in the Western Sahara.¹⁴⁴ Doubt can equally be shed on whether a State can carry out seismic activities as a proportionate response to a prior wrongful act. Even though one may argue that a State can conduct drilling activities or undertake seismic exploration as countermeasures, doing so will certainly aggravate the dispute. In this regard, it is relevant to note that countermeasures operate “more as a shield than a sword” to protect the State against an otherwise well-founded accusation of wrongful conduct.¹⁴⁵ But such measures could not strike down the obligations under Articles 74(3) and 83(3)¹⁴⁶—although compliance with them is temporarily suspended, such obligations remain in force.

On the other hand, a State could take acts consisting in abstentions. For instance,

it may withdraw from negotiation (even in a field other than maritime delimitation), or suspend a treaty obligation, such as an arrangement permitting nationals and fishing vessels of the other Party to harvest in its EEZ.

7.3 The Relation Between Countermeasures and Dispute Settlement Mechanisms

The question arises as to whether the recourse to countermeasures is conditional upon prior exhaustion of international dispute settlement procedures. Part of the response might be found in the *Guyana/Suriname* award. As mentioned earlier the Arbitral Tribunal found that peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under UNCLOS.¹⁴⁷ As a result, a judicial body faced with the alleged violation of Articles 74(3) and 83(3) UNCLOS may take into consideration the non-recourse to Part XV. The ILC nonetheless concluded that the recourse to countermeasures was not conditioned on the recourse to dispute settlement procedures.¹⁴⁸ This is not to say, however, that countermeasures must not be viewed as *ultima ratio*. They are justified as the only means at the disposal of a State to respond to the peril at a particular time. The limited object and exceptional character of countermeasures as a response to internationally wrongful conduct are acknowledged.¹⁴⁹

Furthermore, the fact that the dispute is pending before a court or tribunal precludes the imposition of countermeasures.¹⁵⁰ It does not apply if the State refuses to cooperate in the procedure, for instance, by non-appearance, through non-compliance with a provisional measure order, or through refusal to accept the final decision of the court or tribunal.¹⁵¹

VIII. Conclusion

In undelimited maritime areas, pending agreement on maritime boundary delimitation, the UNCLOS enjoins States Parties to make every effort to enter into provisional arrangements of a practical nature, and not to jeopardize or hamper the reaching of a final agreement. Facing unilateral acts conducted in such an area, a coastal State has several options available to which it might respond meaningfully. The State can protest against the conduct, enter into discussions regarding provisional arrangements to establish the modalities of the unilateral action, or complain about the action to the UN General Assembly and/or Security Council. A State may equally counter such unilateral action by the recourse to compulsory dispute resolution under Part XV, Section 2, UNCLOS. If the option is not available due to a declaration made under Article 298, other legal bases subject to the compulsory dispute settlement mechanism that do not call upon the breach of Articles 74(3) and 83(3) UNCLOS might be used. Moreover, if the course of action so requires, a State has the option to respond meaningfully through the request of provisional measures. The request for such measures with respect to the obligation to enter into a provi-

sional arrangement seems, however, to have less practical utility. Finally, it is reasonable to infer that the obligation not to jeopardize or hamper the reaching of a final agreement limits somewhat the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. This is especially true regarding maritime law enforcement activities and the implementation of lawful countermeasures. These two responses may increase the likelihood of jeopardizing or hampering negotiations on a boundary, and have the potential to exacerbate matters still further.

Notes

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2. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397 (“UNCLOS”).

3. See generally: *Report on the Obligations of States Under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas* (London: British Institute of International and Comparative Law, 2016) (“BIICL Report”), pp. 40–112, paras. 134–397.

4. “Kenya Recalls Its Ambassador to Somalia as Territorial Row Escalates,” *Reuters*, 17 February 2019, available at <https://af.reuters.com/article/topNews/idAFKCN1Q60BY-OZATP?feedType=RSS&feedName=topNews>. Accessed 10 May 2019.

5. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Application Instituting Proceedings*, p. 8, para. 25.

6. *Ibid.*, Memorial of Somalia, p. 144, para. 8.34.

7. See “Japan protests Chinese activity near disputed islands,” *Washington Post*, available at https://www.washingtonpost.com/world/asia_pacific/japan-protests-chinese-activity-near-disputed-islands/2019/06/17/9calla14-90ea-11e9-956a-88c291ab5c38_story.html?utm_term=.e87c1400fc11.

8. “Japan Protests as China Continues Gas Activity in Contested Waters,” *South China Morning Post*, 7 February 2019, available at <https://www.scmp.com/news/china/diplomacy/article/2185272/japan-protests-china-continues-gas-activity-contested-waters>. See “Tokyo Protests Beijing’s New Activities in East China Sea Gas Field,” *The Japan Times*, 3 December 2018, available at <https://www.japantimes.co.jp/news/2018/12/03/national/politics-diplomacy/tokyo-protests-beijings-new-activities-east-china-sea-gas-field/#.XP6AHdMzaL9>.

9. See “Beijing Defends East China Sea Activities After Japan Protests,” *South China Morning Post*, 2 August 2017, available at <https://www.scmp.com/news/china/diplomacy-defence/article/2105153/beijing-defends-east-china-sea-activities-after-japan>; see also “Foreign Ministry Spokesperson Geng Shuang’s Regular Press Conference on December 3, 2018,” available at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1618558.shtml, accessed 10 May 2019.

10. “Venezuela Navy Confronts Exxon Oil Ship in Guyana Border Dispute,” *Reuters*, 23 December 2018, available at <https://www.reuters.com/article/us-guyana-venezuela-oil/venezuela-navy-confronts-exxon-oil-ship-in-guyana-border-dispute-idUSKCN10M0BK>. Accessed 10 May 2019.

11. *Ibid.*

12. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D’Ivoire in the Atlantic Ocean (Ghana/Côte D’Ivoire)*, *Judgment of 23 September 2017*, Case No. 23, pp. 170–172, paras. 627, 629 (“*Ghana/Côte D’Ivoire Judgement*”).

13. Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, *RIAA*, vol. XXX, 1, p. 130, para. 459 (“*Guyana/Suriname*”); Myron H. Nordquist, N.R. Grandy, S.N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* vol. 2 (Leiden: Martinus Nijhoff, 1993), pp. 815, 984.

14. *Guyana/Suriname, op. cit.*, p. 130, para. 460.
15. *Ibid.*, p. 172, para. 630.
16. *Ibid.*, para. 461.
17. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47, para. 85 (“North Sea Continental Shelf”).
18. *Ibid.*, p. 48, para. 87.
19. *Ghana/Côte D’Ivoire Judgement, op. cit.*, pp. 166, 171, paras. 605, 628.
20. Rainer Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” *American Journal of International Law* 78(2) (1984), p. 354, <https://doi.org/10.2307/2202280>.
21. See *Ibid.*, pp. 349–354.
22. *Ghana/Côte D’Ivoire Judgement, op. cit.*, p. 172, para. 630.
23. *Guyana/Suriname, op. cit.*, pp. 132–133, 137, paras. 467, 470, 479–481.
24. *Ghana/Côte D’Ivoire Judgement, op. cit.*, pp. 166–173, paras. 606–634.
25. Christophe Eick, “Protest,” *Max Planck Encyclopedia of Public International Law* (2006) available at <https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1460?rsk=cpe7AO&result=1&prd=OPIL>, <https://doi.org/10.2307/2202280>. Accessed 10 May 2019.
26. *Ibid.*
27. *Ghana/Côte D’Ivoire Judgement, op. cit.*, pp. 42–43, paras. 130–136.
28. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter “ARSIWA”) in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp No. 10, UN Doc. A/56/10 (2001), art. 43.
29. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgement, I.C.J. Reports 2016*, 833, p. 849, para. 38.
30. SC Res 395 (25 August 1976), Complaint by Greece against Turkey, p. 16.
31. *Ibid.*
32. *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 13, para. 42 (“Aegean Sea Continental Shelf Order”).
33. *Ibid.*, art. 283(1).
34. *Ibid.*, art. 283(2).
35. *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, p. 149, para. 382 (“Chagos Marine Protected Area Arbitration”) available at <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>. Accessed 10 May 2019.
36. *Ibid.*, p. 147, para. 378.
37. See *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 107, para. 60.
38. *Arbitration Between Barbados and the Republic of Trinidad-and-Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them*, Decision of 11 April 2006, RIAA, vol. XXVII, pp. 206–207, paras. 201–205.
39. *Chagos Marine Protected Area Arbitration, op. cit.*, p. 146, para. 381.
40. UNCLOS, art. 286.
41. See *In the Matter of a Conciliation Before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Decision on Australia’s Objections to Competence*, PCA Case no. 2016–10, 19 September 2016, pp. 16–22, paras. 65–82.
42. See Robert Beckman and Christine Sim, “Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues,” in Myron H. Nordquist, John Norton Moore and Ronán Long (eds.), *Legal Order in the World’s Oceans. UN Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 2017), p. 248; Youri van Logchem, “The Scope for Unilateralism in Disputed Maritime Areas,” in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds.), *The Limits of Maritime Jurisdiction* (Leiden/Boston: Martinus Nijhoff, 2014), p. 195.
43. See Natalie Klein, “Provisional Measures and Provisional Arrangements,” in Alex G. Oude Elferink, Tore Henriksen and Signe V Busch (eds.), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge: Cambridge University Press, 2018) pp.

124–125; Robert Beckman, “International Law, UNCLOS and the South China Sea,” in Robert Beckman et al., *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Cheltenham: Edward Elgar Publishing, 2013), p. 84; Vasco Becker-Weinberg, *Joint Development of Hydrocarbon Deposits in the Law of the Sea* (Berlin-Heidelberg: Springer, 2014), p. 103, <https://doi.org/10.2307/2202280>; Enrico Milano and Irini Papanicolopulu, “State Responsibility in Disputed Areas on Land and At Sea,” *Zeitung Für Ausländisches öffentliches Recht Und Völkerrecht* 71(3) (2011), p. 621; Irini Papanicolopulu, “Enforcement Action in Contested Waters: The Legal Regime,” in 6th IHO-IAG ABLOS Conference: “Contentious Issues in UNCLOS—Surely Not?” (International Hydrographic Bureau, Monaco, 2010), p. 7 available at https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf, accessed 15 February 2019; Gillian Triggs and Dean Bialek, “Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea,” *The International Journal of Marine and Coastal Law* 17(3) (2002), p. 426, <https://doi.org/10.2307/2202280>; Lagoni, *op. cit.*, p. 368. Accessed 10 May 2019.

44. See, however, *In the Matter of a Conciliation Before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, *op. cit.*

45. *Ghana/Côte D’Ivoire* Judgment, *op. cit.*, Counter Memorial of Côte d’Ivoire, p. 239; *Ibid.*, Rejoinder of Côte d’Ivoire, pp. 57, 120, 124, 126, 164, 172.

46. *Ibid.*, Counter Memorial of Côte d’Ivoire, p. 122; *Ibid.*, Rejoinder of Côte d’Ivoire, pp. 123–127.

47. “Ghana: Declaration Relating to Article 298,” available at <https://treaties.un.org/doc/Publication/CN/2009/CN.890.2009-Eng.pdf>. Accessed 10 May 2019.

48. *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte D’Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, Request of Côte d’Ivoire, p. 8, para. 10 (“Ghana/Côte D’Ivoire Order”); *Ghana/Côte D’Ivoire* Judgment, *op. cit.*, Rejoinder of Côte d’Ivoire, pp. 123–127.

49. Ghana: Withdrawal of declaration relating to Article 298 available at <https://treaties.un.org/doc/Publication/CN/2014/CN.568.2014-Eng.pdf>. Accessed 10 May 2019.

50. *Ghana/Côte D’Ivoire* Judgment, *op. cit.*, p. 166, para. 604.

51. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 2d ed. (Oxford: Hart Publishing, 2016), p. 493.

52. UNCLOS, art. 298(2).

53. *Ibid.*, art. 298(5).

54. While the declaration under article 36(2) ICJ Statute is a declaration of inclusion, the declaration under article 298 UNCLOS is one of exclusion.

55. *Case Concerning Right of Passage Over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957, I.C.J. Reports 1957*, p. 142.

56. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 467 (Separate opinion of Judge Mosler).

57. *Ibid.*, p. 420, para. 63 (emphasis added). on an inherent right to terminate without a period of notice, see: *Ibid.*, pp. 471–513 (Separate opinion of Judge Oda); *Ibid.*, p. 553 (Separate opinion of Judge Sir Robert Jennings); *Ibid.*, pp. 618–621 (Dissenting opinion of Judge Schwebel). See also Andrew Serdy, “Article 298. Optional Exception to Applicability of Section 2,” in Alexander Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (München/Oxford/Baden-Baden: Beck/Hart/Nomos, 2017), p. 1932.

58. *Nicaragua v. United States of America, op. cit.*, p. 420, para. 63.

59. Triggs and Bialek, *op. cit.*, p. 427.

60. *Ibid.*

61. *Nicaragua v. United States of America, op. cit.*, p. 467 (Separate opinion of Judge Mosler).

62. Triggs and Bialek, *op. cit.*, p. 427.

63. See *The “Arctic Sunrise” Case (Kingdom of the Netherlands V. Russian Federation), Provisional Measures, Order of 22 November 2013*, 230, p. 259, para. 8 (Joint separate opinion of Judges Wolfrum and Kelly).

64. *In the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex*

VII to the 1982 United Nations Convention on the Law of the Sea Between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility, PCA Case no. 2013-19, 29 October 2015, p. 61, para. 157.

65. *Ibid.*, pp. 140-147, paras. 397-412.

66. See, however, BIICL Report, *op. cit.*, p. 20, para. 69.

67. See, however, UNCLOS, art. 297 and 298(1)(b).

68. It is uncertain that Article 123 can support a self-standing claim. See, however, Christopher Linebaugh, "Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea," *Columbia Journal of Transnational Law* 52(2) (2014), pp. 542-568.

69. It is uncertain that Article 300 can support a self-standing claim. See, for instance, Killian O'Brien, "Article 300. Good Faith and Abuse of Rights," in Alexander Proelss, *op. cit.*, pp. 1939-1940.

70. See UNCLOS, art. 279, 283, 284, 300.

71. See also Statute of the International Court of Justice, art. 41.

72. See Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2017), pp. 174-223; Rüdiger Wolfrum, "Interim (Provisional) Measures of Protection," in *Max Planck Encyclopedia of Public International Law* (2006) available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e32?prd=EPIL>, accessed 15 February 2019, <https://doi.org/10.1093/law:epil/9780199231690/e32>. Accessed 10 May 2019.

73. See *Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures, Order of 8 October 2003*, ITLOS Reports 2003, p. 22, para. 71 (hereinafter *Malaysia v. Singapore*).

74. *Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, the MOX Plant Case (Ireland v. United Kingdom)*, *Order N°3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures*, 24 June 2003, p. 5, para. 14.

75. See, for instance, *Ghana/Côte D'Ivoire Order, op. cit.*, p. 155, para. 41.

76. *Ibid.*, p. 156, para. 42.

77. *Ibid.*, p. 159, para. 63.

78. *Ibid.*, p. 158, para. 58.

79. *Ibid.*, p. 164, para. 97.

80. UNCLOS, art. 290(6).

81. *Guyana/Suriname, op. cit.*, pp. 137-138, paras. 482-484 (the Tribunal stated that "[t]he obligation to have recourse to these options is binding on both Guyana and Suriname.>").

82. *Aegean Sea Continental Shelf Order, op. cit.*, p. 10, para. 30.

83. *Ghana/Côte D'Ivoire Order, op. cit.*, Request of Côte d'Ivoire, pp. 12-15, paras. 21-23.

84. *Ibid.*, pp. 163-164, paras. 89, 99.

85. *Aegean Sea Continental Shelf Order, op. cit.*, p. 11, para. 32.

86. *Ibid.*, p. 10, para. 30.

87. Constantinos Yiallourides, "Protecting and Preserving the Marine Environment in Disputed Areas: Seismic Noise and Provisional Measures of Protection," *Journal of Energy & Natural Resources Law* 36(2) (2018), pp. 144-150, <https://doi.org/10.1080/02646811.2017.1403741>.

88. *Ibid.*, p. 160.

89. *Ghana/Côte D'Ivoire Order, op. cit.*, Request of Côte d'Ivoire, pp. 17, 18, paras. 30, 33. See Stephen Fietta, "Guyana/Suriname," *American Journal of International Law* 102(1) (2008), p. 127, <https://doi.org/10.1017/S0002930000039877>.

90. *Ghana/Côte D'Ivoire Order, op. cit.*, Request of Côte d'Ivoire, p. 17, para. 30.

91. *Ibid.*, p. 164, paras. 94-95.

92. *Ibid.*, p. 166, para. 108(1)(b).

93. *Aegean Sea Continental Shelf Order, op. cit.*, p. 11, para. 33. See *Ibid.*, p. 28 (Separate opinion of Judge Elias).

94. *Ghana/Côte D'Ivoire Order, op. cit.*, p. 159, para. 67.

95. *Ibid.*, p. 160, para. 68.

96. *Ibid.*, p. 164, para. 99.
97. *Ibid.*, pp. 160–161, paras. 72–73.
98. *Ibid.*, p. 166, para. 108(1)(c).
99. *Malaysia v. Singapore, op. cit.*, pp. 46–47 (Separate opinion of Judge Chandrasekhara Rao).
100. See *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, *Interim Protection, Order of 17 August 1972*, *I.C.J. Reports 1972*, p. 17; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures, Order of 27 August 1999*, *ITLOS Reports 1999*, pp. 297–301, para. 90.
101. See, e.g., *Land and Maritime Boundary Between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996*, p. 24, para. 49(1).
102. *Guyana/Suriname, op. cit.*, Pleadings—Guyana-Statement of Claim. Notification under Article 287 and Annex VII, Article 1 of UNCLOS and the Statement of Claim and Grounds on which it is based, 24 February 2004, pp. 15–16, para. 35.
103. Natalie Klein, “Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes,” *The International Journal of Marine and Coastal Law* 21(4) (2006), p. 452, <https://doi.org/10.1163/157180806779441129>.
104. An objective “reasonable State” standard could be applied. See BIICL Report, *op. cit.*, p. 28, para. 95.
105. Irini Papanicolopulu, “Enforcement Action in Contested Waters: The Legal Regime,” paper presented at the 6th IHO-IAG ABLOS Conference *Contentious Issues in UNCLOS-Surely Not?* (Monaco, 25–27 October 2010), p. 4.
106. *Ibid.*
107. Papanicolopulu, *op. cit.*, p. 5.
108. Patricia J. Kwast, “Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the *Guyana/Suriname Award*,” *Journal of Conflict & Security Law* 13(1) (2008), p. 54, <https://doi.org/10.1093/jcsl/krn021>.
109. *Guyana/Suriname, op. cit.*, p. 36, paras. 150–151.
110. *Ibid.*, p. 122, para. 436.
111. *Ibid.*, p. 123, para. 439.
112. *Ibid.*
113. *Ibid.*, p. 124, para. 441.
114. *Ibid.*
115. *Ibid.*
116. *Ibid.*, p. 138, para. 484.
117. Efthymios D. Papastavridis, “The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s),” *Journal of Territorial and Maritime Studies* 2(1) (2015), pp. 131–133, 136.
118. Kwast, *op. cit.*, pp. 72–89.
119. David Anderson, “Some Aspects of the Use of Force in Maritime Law Enforcement,” in Nerina Boschiero et al. (eds.), *International Courts and the Development of International Law. Essays in Honour of Tullio Treves* (The Hague: Asser Press, 2013), p. 241. See *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgement, I.C.J. Reports 1998* 432, pp. 458–466, paras. 64–84.
120. Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010), p. 73.
121. *Saint Vincent and the Grenadines v. Guinea, op. cit.*, pp. 61–62, paras. 155–156; *Guyana/Suriname, op. cit.*, p. 126, para. 445 (there are the three conditions for the use of force in the exercise of law enforcement activities: it must be avoided as far as possible, and it must not go beyond what is both reasonable and necessary in the circumstances).
122. Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp No. 10, UN Doc. A/56/10 (2001).
123. See ARSIWA, *op. cit.*, art. 49.
124. *Ibid.*
125. Drafts articles on Responsibility of States for Internationally Wrongful Acts, with com-

mentaries 2001, Reports of the International Law Commission on the work of its fifty-third session, vol. II, Part II *Yearbook of International Law Commission* (2001), p. 128 (“Reports ILC”).

126. ARSIWA, *op. cit.*, art. 49(1)(2).

127. *Ibid.*, art. 52(3)(a)(b) and 53.

128. *Ibid.*, art. 49(2)(3) and 53.

129. *Ibid.*, art. 51.

130. *Ibid.*, art. 50(1)(a)(d); *Guyana/Suriname, op. cit.*, at p. 126, para. 446 (the Tribunal held that “[i]t is well established principle of international law that countermeasures may not involve the use of force.”).

131. *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, Decision of 9 December 1978, RIAA, vol. XVIII, pp. 444–445.

132. ARSIWA, *op. cit.*, art. 52(1)(a)(b).

133. *Ibid.*, art. 52(2).

134. See Draft Articles on State Responsibility with commentaries thereto adopted by the International Law Commission on first reading (1997) 310–315, art. 48 available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf. Accessed 10 May 2019.

135. See ARSIWA, *op. cit.*, art. 55; Reports ILC, *op. cit.*, p. 129.

136. Reports ILC, *op. cit.*, p. 130.

137. *Ibid.*

138. *Ghana/Côte D’Ivoire Judgement, op. cit.*, p. 3, para. 6 (Separate opinion of Judge Paik).

139. *Ibid.*, p. 4, para. 10.

140. See Reports ILC, *op. cit.*, p. 134.

141. ARSIWA, *op. cit.*, art. 51; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 85 (“*Hungary/Slovakia*”).

142. Reports ILC, *op. cit.*, at p. 129, 131. See also ARSIWA, *op. cit.*, art. 49(2)(3) and 53; *Hungary/Slovakia, op. cit.*, pp. 56–57, para. 87.

143. *Ghana/Côte D’Ivoire Order, op. cit.*, Oral Proceedings, Mr Pitron, ITLOS/PV.15/C23/1/Corr.1, 29 March 2015 a.m., p. 25.

144. BIICL Report, *op. cit.*, p. 172 (according to one unnamed participant referring to the practice of certain Australian oil companies in the Western Sahara).

145. Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, State Responsibility, A/CN.4/498 and Add. 1–4, p. 59, para. 226.

146. *Ibid.*

147. *Guyana/Suriname, op. cit.*, pp. 137–138, paras. 482–484.

148. On the de-linking of countermeasures and dispute settlement, see, e.g., Report of the ILC on the work of its fifty-first session *Yearbook of the International Law Commission* (1999) 2(2), p. 88, paras. 450–452; Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, State Responsibility, 2000, A/CN.4/507 and Add. 1–4, pp. 77–78, paras. 286–287; Fourth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, State Responsibility *Yearbook of the International Law Commission* (1992) 2(1), pp. 25–39, paras. 24–51.

149. Reports ILC, *op. cit.*, at p. 130. See R. Rayfuse, “Countermeasures and High Seas Fisheries Enforcement,” *Netherlands International Law Review* (2004) 51(1), p. 76, <https://doi.org/10.1017/S0165070X04000415>.

150. ARSIWA, *op. cit.*, art. 52(3)(b).

151. *Ibid.*, art. 52(4); Reports ILC, *op. cit.*, at p. 137.

Biographical Statement

Sandrine De Herdt is a Junior Researcher at the Public International Law Center—Faculty of Law, National & Kapodistrian University of Athens, Greece. She holds a Master of Laws in Public International Law (with Distinction) degree from Catholic University of Louvain, Belgium.