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Thank you.

IBRU

Durham University

Options to address disputes impacting upon transboundary resources

IBRU Training Workshop

Will Thomas KC

New York, October 2023

Freshfields Bruckhaus Deringer

Outline

- **Introduction / Scene Setting**
- **1. Obligation to seek to settle disputes peacefully**
- **2. Negotiation**
- **3. Third-party assistance – non-binding options**
  - Mediation
  - Conciliation
  - Inquiry
  - 'Track II' Diplomacy
- **4. Third-party assistance – binding adjudication**
  - Part 1: Inter-State disputes
    - International Court of Justice (ICJ)
    - Ad hoc arbitration
    - UNCLOS: (i) dispute resolution procedures and (ii) provisional arrangements
  - Part 2: Other disputes potentially arising in relation to transboundary resources
    - Investor-State arbitration
- **Conclusion**

Introduction / Scene Setting

Introduction / Scene Setting

One common scenario:

- Overlapping maritime claims
- Overlapping concessions (protested?)
- Straddling pressure-connected field of hydrocarbon resources
- How do you move forward?

The principal actors in that scenario:

- States, NOCs, IOCs
- States play the leading role: boundary disputes are a sovereign matter
- IOCs can play a supporting role:
  - Information (what/where are the resources?)
  - Assistance (legal/cartographic; how good is your case?)
  - Finance
- A Host State and interested IOCs should cooperate and coordinate

Introduction / Scene Setting (cont.)

Drill in any event?

- Technical risks?
- Financial risks?
- Military risks?
- Legal risks?
  - ‘rule of capture’ v. obligations to cooperate and exercise mutual restraint
  - see UNCLOS section below; see, in particular, Session 4 …

1

Obligation to seek to settle disputes peacefully

Charter of the United Nations

Art 2(3): 'All members **shall** settle their international disputes by means in such a manner that international peace and security, and justice, are not endangered.'

Art 33(1): 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, **shall**, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

2

Negotiation

Negotiation

What is it?

- Discussions between interested parties with a view to reconciling divergent opinions
- Generally State-to-State; no third-party intervention necessary
- Diplomatic channels, with delegates from relevant ministries
- Confidential
- Over 200 examples of negotiated boundary agreements

Why is it useful?

- Promotes State-to-State dialogue
- Scope for flexible and creative solutions
- Obtain information and understand position of all interested parties
- Identify differences and common interests
- No necessary impact on any subsequent litigation / arbitration
- Can continue *after* third-party assistance is sought

Common challenges?

- Depends on genuine political will
- Success can depend on or be influenced by the personality of negotiators
- 'Reasonable' v 'Exaggerated' claims
- Thorough preparation is key to effective negotiations

Negotiation (cont.)

Preparation is key

- **hydrographic and geomorphological advice** – identify location of field/basin and estimated reserves;
- **legal advice** – strength of case on rights to the resource and permissible activity;
- **understanding the commercial environment** – estimated revenue and where it is likely to accrue (upstream/downstream); and
- **understanding the political context** – existing and anticipated relationship with the other State and desirable timeframe for resolution.

Use the above to tailor strategy – what does the relevant State want, what is feasible and where are the red lines drawn?

Negotiation (cont.)

Practical considerations

Be properly prepared with all necessary commercial, legal and strategic input.	Keep a paper trail of genuine efforts to engage the other State in negotiations, of a clear invitation to the other State, and be specific about the subject-matter of the proposed negotiations.	Keep a paper trail of the meaningful and good faith conduct of the negotiations.	Be prepared to take account of other States' interests; may require careful planning for the purpose of designing an adaptable negotiation strategy.	Consider 'without prejudice' and confidentiality clauses in any negotiations.	Can be pursued in parallel with other dispute settlement options.

Negotiation (cont.)

→ **Recognise (and adapt strategy) when negotiations are blocked**

- Lack of genuine willingness to compromise
- States' reluctance to be seen to 'give away' sovereignty / sovereign rights
- Stalling tactics
- Similar issues can arise in relation to mediation / conciliation (see below)
- May result in 'limbo'…

Negotiation (cont.)

3

Third-party assistance – non-binding options

Mediation

What is it?

- Non-binding
- An impartial third-party facilitates negotiation and assists parties to settle their differences
- Cooperative process
- Typically confidential but the institutionalisation of some forms of mediation can have public aspects

Why is it useful?

- Helpful in situations where the relationship between the interested States is tense and/or where negotiations have reached a deadlock
- Concessions may sometimes be easier to make in the course of mediation than in a direct negotiation

Challenges?

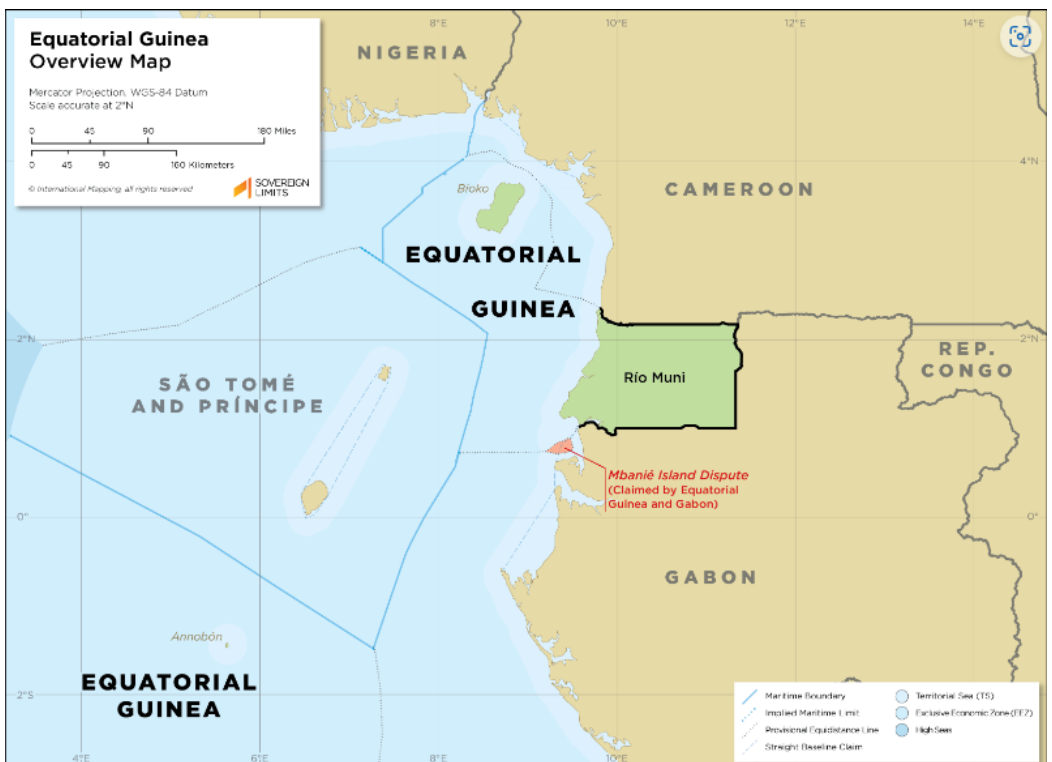
- Depends on political will and ability to agree on mediator
- In some cases, the visibility of institutionally mediated disputes encourages the adoption of attitudes that are unrealistic and difficult to abandon

Examples

- Beagle Channel, Argentina / Chile
- Corisco Bay, Gabon / Equatorial Guinea

Mediation (cont.)

Gabon v Equatorial Guinea



Conciliation

What is it?

- Non-binding
- Effectively a more formalised mediation, via a commission
- Third-party investigation into the dispute and submission of a report with suggestions for settlement
- Can be confidential or the parties can choose to make the report public
- NB: UNCLOS *compulsory conciliation*, see below

Why is it useful?

- Formal but flexible
- What it does and how it goes about its work depends on the instrument setting it up
- Can deal with issues of law and fact
- Helpful in proposing formal settlement options that may prompt further negotiations between the parties

Challenges?

- Still depends on political will and ability to agree on process
- One or both States can legitimately reject proposals

Examples

- Belize-Guatemala, 2000-02
- Ecuador-Peru, 'MOMEP', 1995-98
- Iceland-Norway, 'Conciliation Commission', 1980

Conciliation (cont.)

Inquiry

What is it?

- Establishment of independent commission specifically to investigate and ascertain facts

Why is it useful?

- Potentially useful in disputes involving differences of opinion on particular factual matters
- Can be used in conjunction with other forms of peaceful settlement – e.g., negotiations following and on the basis of facts ascertained by an inquiry

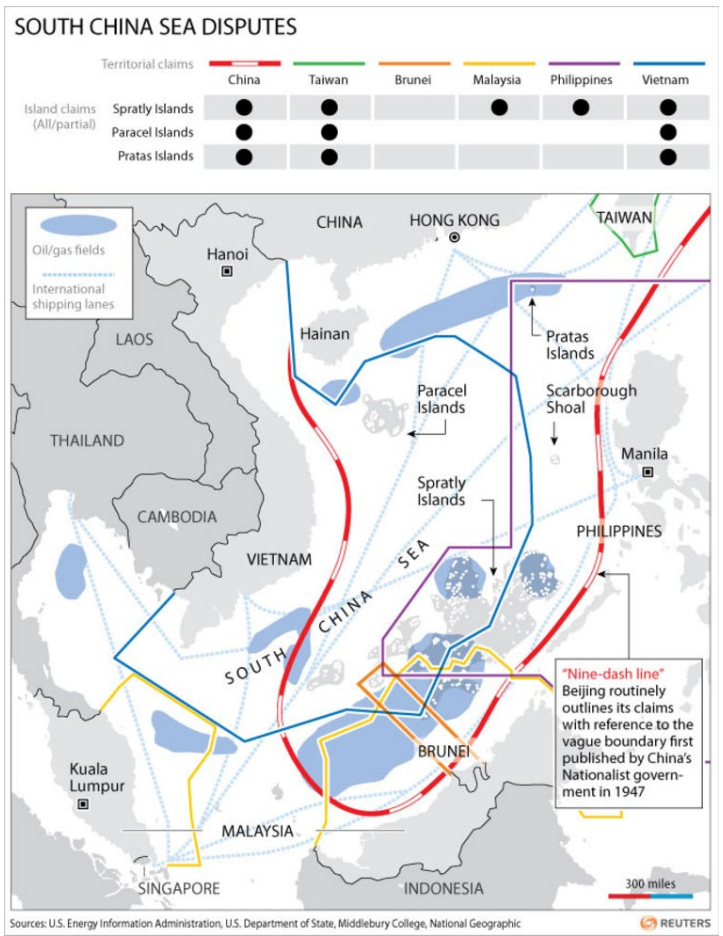
Challenges?

- Utility limited to disputes concerning genuine factual differences
- In some situations, the determination of certain facts may not necessarily aid settlement – it may (arguably) strengthen one party's negotiating position and thereby make a compromise solution less likely

‘Track II’ Diplomacy

- **‘Track I’ Diplomacy**
  - Governmental interaction, official
- **‘Track II’ Diplomacy**
  - Non-governmental, unofficial
  - Policy-based activities in the private sector
  - Eg, Middle East (Geneva Accords)
  - Eg, South China Sea (Indonesian workshops on ‘*Managing Potential Conflicts in the South China Sea*’)

‘Track II’ Diplomacy (cont.)



4

Third-party assistance – binding adjudication

Part 1: Inter-State Disputes

International Court of Justice (ICJ)

- Established under the UN Charter
- The principal judicial organ of the UN
- Seated in The Hague
- Composition of the Court:
  - 15 judges, elected for 9 year terms
  - Possibility of *ad hoc* judges

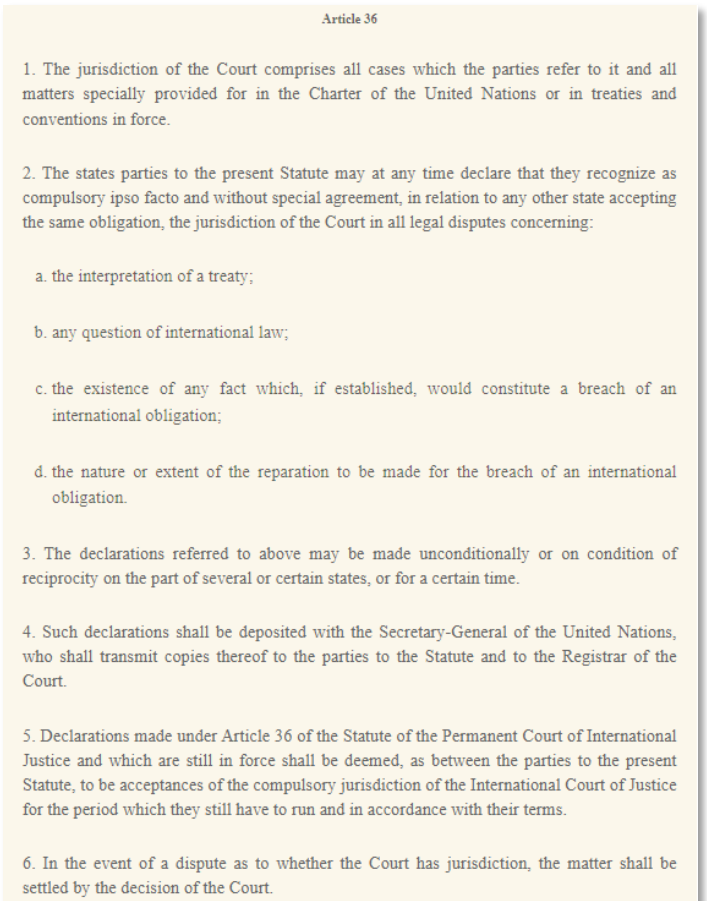
International Court of Justice (ICJ) (cont.)

Jurisdiction – Art 36, Statute of the ICJ

- Declaration recognising compulsory jurisdiction of the Court (reservation?)
- Compromissory clause in an existing treaty
- Special agreement (*compromis*)
- Forum prorogatum

Can only invoke treaties that are registered under Art 102 of the UN Charter

Possibility of intervention under Art 62



Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

International Court of Justice (ICJ) (cont.)

E.g., of declaration recognising compulsory jurisdiction of the Court with reservation as to boundary disputes.

The Government of Australia declares that it recognises as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing this declaration. This declaration is effective immediately.

This declaration does not apply to:

a. any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement;

b. any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation; and

c. any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.

International Court of Justice (ICJ) (cont.)

Gabon v Equatorial Guinea (pending)

Article 1
Submission to the Court and Subject of the Dispute

1. The Court is requested to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga.

To this end:

2. The Gabonese Republic recognizes as applicable to the dispute the special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900, and the Convention demarcating the land and maritime frontiers of Equatorial Guinea and Gabon, signed in Bata on 12 September 1974.

3. The Republic of Equatorial Guinea recognizes as applicable to the dispute the special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900.

4. Each Party reserves the right to invoke other legal titles.

International Court of Justice (ICJ) (cont.)

Procedure

- Statute of the Court / Rules of the Court
- The Registry
- Procedure: written pleadings / oral hearings; possibility of jurisdictional objections
- The judgment: final and without appeal (Art 61, Statute)
- Requests for interpretation / revision
- Enforcement under Art 94 of the UN Charter
- Confidentiality issues to consider; hearings are public
- Parties pay their own costs, no costs for the Court / registry / facilities
- How long does it take?

International Court of Justice (ICJ) (cont.)

Some examples

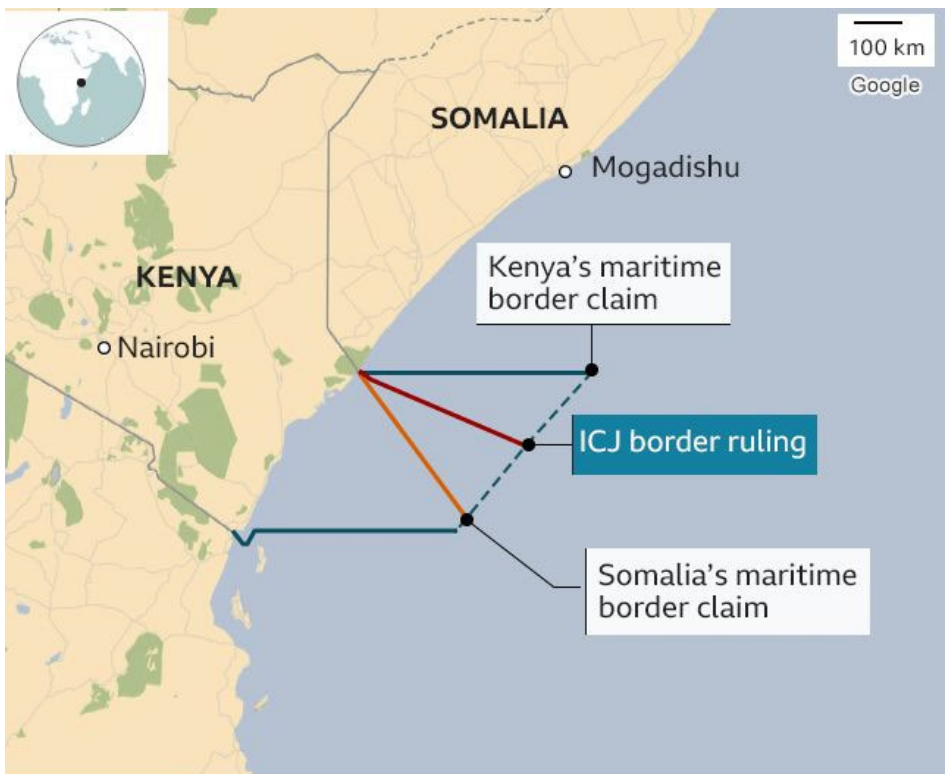
- *Minquiers and Ecrechos* (France/United Kingdom), 1953
- *North Sea Continental Shelf* (Germany/Denmark, Germany/Netherlands) 1969
- *Continental Shelf* (Tunisia/Libya), 1982
- *Gulf of Maine* (Canada/USA), 1984
- *Continental Shelf* (Libya/Malta), 1985
- *Frontier Case* (Burkina Faso/Mali), 1986
- *Jan Mayen* (Denmark v Norway), 1993
- *Qatar v Bahrain*, 2001
- *Cameroon v Nigeria*, 2002
- *Indonesia v Malaysia*, 2002
- *Nicaragua v Honduras*, 2007
- *Malaysia v Singapore*, 2008
- *Romania v Ukraine*, 2009
- *Nicaragua v Colombia*, 2012
- *Frontier Dispute* (Burkina Faso/Niger), 2013
- *Peru v Chile*, 2014
- *Costa Riva v Nicaragua*, 2018

Pending cases

- *Guatemala's Territorial, Insular and Maritime Claim* (Guatemala/Belize)
- *Belize v Honduras*
- *Land and Maritime Delimitation and Sovereignty over Islands* (Gabon/Equatorial Guinea)

International Court of Justice (ICJ) (cont.)

Somalia v Kenya



Arbitration

- **Adjudicated settlement by a specially constituted tribunal**
- An *ad hoc* process
- The need for an arbitration agreement:
  - Consent of the parties
  - Scope of the dispute
  - Appointment of arbitrators / chair (possible need for an appointing authority)
  - Appointment of a secretary / registrar
  - Place / language / procedural rules / applicable law

Arbitration (cont.)

Possible advantages (as compared to the ICJ)

- ✓ Expeditious proceedings
- ✓ Privacy and political considerations
- ✓ Ability to choose the arbitrators
- ✓ Bespoke rules of procedure
- ✓ Inability of third States to intervene

Arbitration (cont.)

Possible disadvantages (as compared to the ICJ)

- X Need to negotiate detailed arbitration agreement
- X Practical issues: no sitting tribunal, no set rules, no facilities
- X Costs? Potentially faster, but arbitrators / registry / facilities all paid for by the parties
- X Enforcement? No equivalent for arbitration of Art 94 of the UN Charter

Arbitration (cont.)

Some example cases

- *UK v France*, 1977
- *Guinea v Guinea Bissau*, 1985
- *Egypt v Israel*, 1988
- *Canada v France*, 1992
- *Eritrea/Yemen*, 1999
- *Abyei Arbitration (Sudan)*, 2009
- *Slovenia v Croatia*, 2017

Arbitration (cont.)

UNCLOS procedures

United Nations Convention on the Law of the Sea

- Part XV: Settlement of Disputes
- Art 279: State parties "**shall"** settle disputes in accordance with Art 2, paragraph 3 and Art 33, paragraph 1 of UN Charter
- Art 280: States are free to agree means themselves
- Art 284: voluntary conciliation mechanism
- Art 287: binding dispute resolution options
- Art 296: final judgment is binding
- Art 298: 'opt-out' possible (see below …)

Increasing dispute resolution under UNCLOS

- Art 287 – choice of four options:
  - International Court of Justice;
  - International Tribunal for the Law of the Sea;
  - Annex VII arbitration (general); and
  - Annex VIII arbitration (specific: fisheries, marine protection, marine scientific research, and navigation including pollution);
- States may make declaration stating preference
- Automatic reference to Annex VII if no preference specified by either party, or if parties cannot agree

UNCLOS procedures (cont.)

Annex VII arbitration

- Essentially *ad hoc* arbitration prescribed by UNCLOS
- 5-member Tribunal
- Tribunal determines its own procedure
- Award is final and without appeal
- Potential limits to jurisdiction: disputes concerning territorial sovereignty
- Note the possibility of making a unilateral application
- Example of cases: *Barbados/Trinidad & Tobago, Guyana/Suriname, Bangladesh/India, Philippines/China*

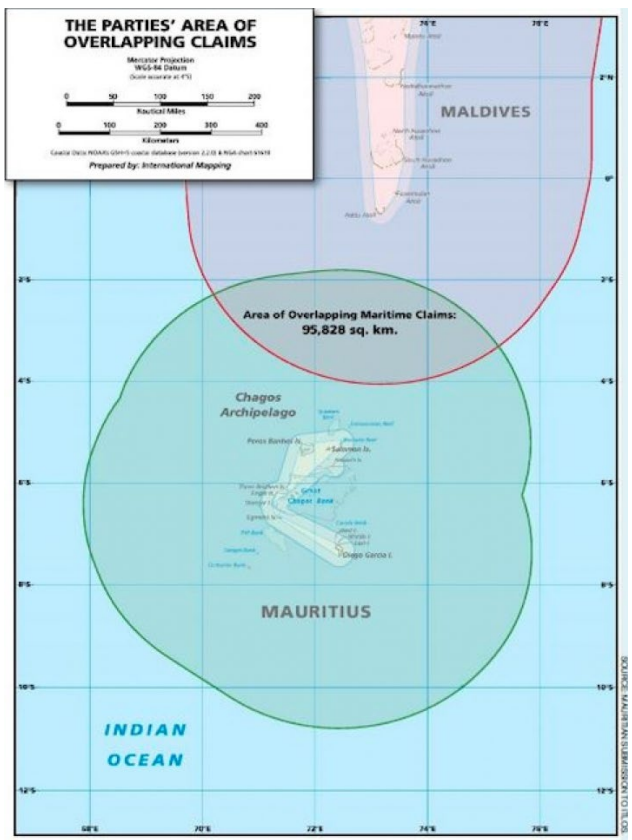
UNCLOS procedures (cont.)

UNCLOS procedures (cont.)

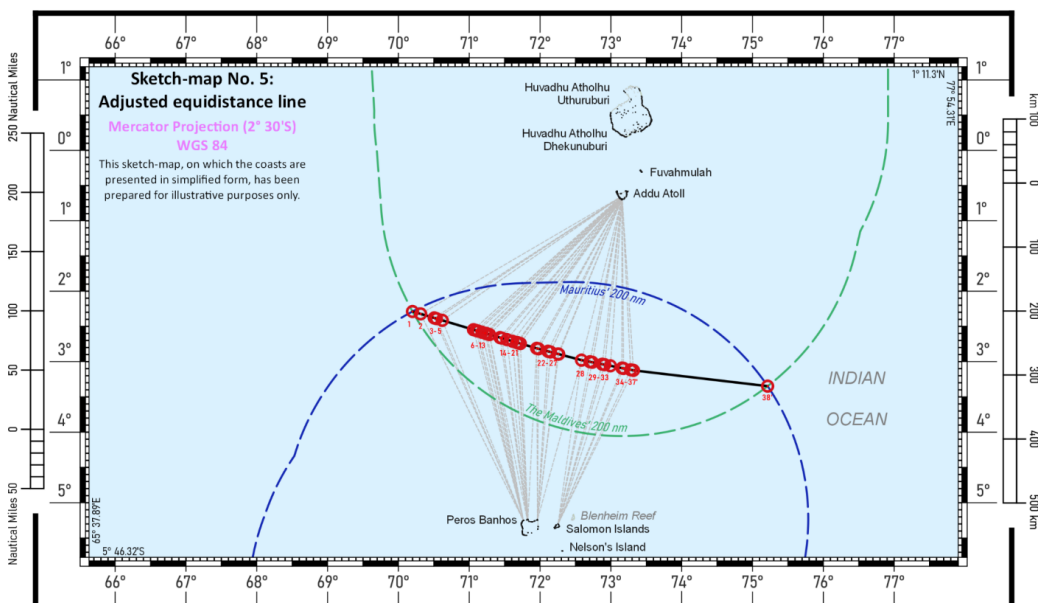
International Tribunal for the Law of the Sea

- Specifically to adjudicate disputes arising under UNCLOS
- Established in 1996, seated in Hamburg
- Statute at Annex VI of UNCLOS
- Composition of the Tribunal, special Chambers
- Applicable law is UNCLOS and rules of international law
- Procedure governed by ITLOS' own Rules
- UNCLOS State parties only pay their own costs

UNCLOS procedures (cont.)



Mauritius/Maldives



UNCLOS procedures (cont.)

NB - <u>Compulsory Conciliation</u> under UNCLOS

- Art 298: 'opt out' possible (see above)
- BUT …
- Art 298(1): States **can** exclude maritime boundary disputes from the jurisdiction of the compulsory dispute mechanisms under UNCLOS; **but** if they do, and no negotiated agreement on a boundary is reached within a reasonable time, then any disputing State can refer the matter to **compulsory conciliation** under Annex V, Section 2
- Annex V: Commission will hear the States and issue a report (within 12 months) proposing options for settlement
- Art 298(1): the parties "**shall"** then negotiate on the basis of the Commission's report; if no agreement, States "**shall, by mutual consent"** submit the question to one of the binding dispute resolution mechanisms under UNCLOS (ie, that were previously unavailable because of a State's 'opt out')
- See *Timor Leste / Australia*

UNCLOS procedures (cont.)

COUR PERMANENTE D'ARBITRAGE PERMANENT COURT OF ARBITRATION

PRESS RELEASE

CONCILIATION BETWEEN
THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE AND THE COMMONWEALTH OF AUSTRALIA

NEW YORK, 6 MARCH 2018

Timor-Leste and Australia sign new Maritime Boundaries Treaty

The Democratic Republic of Timor-Leste ("**Timor-Leste**") and the Commonwealth of Australia ("**Australia**") have today signed their new Maritime Boundaries Treaty. The signing ceremony, which took place at 5:00pm today at United Nations Headquarters in New York, constitutes the culmination of the international conciliation proceedings between Timor-Leste and Australia being conducted by a Conciliation Commission pursuant to the UN Convention on the Law of the Sea and under the auspices of the Permanent Court of Arbitration (the "**PCA**"). The signing of the new Maritime Boundaries Treaty was hosted by Secretary-General of the United Nations, H.E. Antonio Guterres, who witnessed the signature of the treaty along with the Chairman of the Conciliation Commission, H.E. Ambassador Peter Taksøe-Jensen, and the members of the Conciliation Commission, Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, and Judge Rüdiger Wolfrum.

The new Maritime Boundaries Treaty delimits the maritime boundary between Timor-Leste and Australia in the Timor Sea. The agreement on the boundaries is comprehensive and final. It encompasses the delimitation of both the 'continental shelf' (which entails rights to exploit seabed resources, such as petroleum) and the 'exclusive economic zone' (which entails rights to exploit resources in the water column, such as fisheries).

The Treaty also addresses the legal status of the Greater Sunrise gas field, the establishment of a Special Regime for Greater Sunrise, and a pathway to the development of the resource. Upstream revenue from Greater Sunrise will be shared 70/30 in Timor-Leste's favour if the field is developed by a pipeline to Timor-Leste, or 80/20 in Timor-Leste's favour if the field is developed by a pipeline to Australia.

UNCLOS procedures (cont.)

Provisional arrangements under UNCLOS

- Art 74(1) (EEZ) and 83(1) (Continental shelf):
  - A delimitation "**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**".

- Art 74(3) (EEZ) and 83(3) (Continental shelf):
  - "**Pending agreement as provided for in paragraph 1**, the States concerned, in a spirit of understanding and cooperation, **shall make every effort to enter into provisional arrangements** of a practical nature **and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement**. Such arrangements shall be without prejudice to the final delimitation".

UNCLOS procedures (cont.)

Provisional Arrangements under UNCLOS

- **Some questions arising as regards Arts 74 (EEZ) and 83 (Continental shelf):**
  - What is the extent of the *positive* and *negative* obligations arising thereunder?
  - To what extent do those obligations negate the traditional 'rule of capture'?
  - To what extent are States obliged to enter into provisional arrangements?
  - What are the most common such provisional arrangements? Joint Development Agreements?
  - Are JDAs win-win tools that offer a fast-track alternative to delimitation? How complex, time-consuming and difficult to implement? Balance pros and cons against dispute resolution options?
  - What about where resources straddle *existing* rather than *disputed* boundaries? Unitizations?
  - **See Session 4 for some suggested answers ….**

4

Third-party assistance – binding adjudication

Part 2: Investor-State disputes

Investor-State arbitration

Key features of an investment treaty:

- qualifying 'investor';
- qualifying 'investment';
- 'in the territory of' the host State;
- common substantive protections:
  - expropriation;
  - fair and equitable treatment;
  - full protection and security;
  - non-discrimination; and
  - standing consent to arbitration

Potential disputes re boundaries / resources:

1) A concession-granting State loses effective control over an area in which it had granted a concession to a contractor, and the State now in effective control takes actions against companies already operating in that area

2) A court or tribunal delimits a maritime boundary, and an area in respect of which a concession was previously granted by one State falls within an area now belonging to another State, but the States do not make provision for the continued protection of existing (acquired) rights of companies holding concessions in that area

Potential contractual claims also (under PSAs)?

Investor-State arbitration (cont.)

Source: Platts, ChornomorNaftogaz

Conclusion

Conclusion

- Various options exist to resolve boundary disputes impacting upon transboundary resources
- Ensure possibility of negotiation is fully explored
- If negotiations fail, third-party assistance is available in a number of forms: both non-binding and binding
- Identifying the most appropriate option will require evaluation of political, commercial and legal factors
- Whichever dispute settlement mechanism is selected, the process will be multi-disciplinary; a team effort, requiring extensive preparation / coordination / cooperation
- In tandem, consider provisional, cooperative arrangements in order to ensure optimum exploitation of resources and compliance with international law obligations – see Session 4