DISPUTE RESOLUTION MECHANISMS

Rodman R. Bundy

Abstract
When negotiations fail to resolve a maritime boundary dispute, States usually begin to contemplate their options for third party settlement.

The initial question States must ask themselves is whether a basis of jurisdiction exists for bringing the dispute either unilaterally or jointly before an adjudicatory or arbitration body. The choices generally boil down to submission of the dispute to the International Court of Justice, ad hoc arbitration, arbitration under Annex VII of the Law of the Sea Convention, or the International Tribunal for the Law of the Sea.

The jurisdiction of the ICJ, the Law of the Sea Tribunal and arbitration tribunals is conditional on the consent of the parties. That consent can be manifested in different ways.

This paper reviews the basic alternatives available to States for third party settlement, and examines how a State should approach the jurisdictional issues that arise. Cases that involve issues of disputed sovereignty (such as over islands) as well as maritime delimitation can give rise to their own set of jurisdictional, procedural and substantive issues. Timing, costs, the constitution of the Court or tribunal, and political factors can also influence a State in considering its dispute resolution options.

Introduction

It is an honor for me to share the floor in this panel with three such distinguished jurists. They have provided a number of insightful observations about dispute resolution mechanisms from the perspective of individuals who sit on the bench and decide actual maritime boundary and law of the sea disputes.

In my brief remarks, I will address the topic from a slightly different angle – through the lens of a private practitioner who is often called upon to advise States on their dispute resolution options for law of the sea issues, and to appear before courts and tribunals as counsel and advocate. My intervention will be mainly devoted to practical issues that are relevant in considering alternative mechanisms available for the resolution of maritime boundary disputes.

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1 Rodman Bundy is a partner in the litigation department of the Paris office of Eversheds LLP.
Basic Options for Dispute Resolution

1. The options available to States for dealing with maritime boundary disputes essentially boil down to the following:

   - Maintenance of the status quo (i.e., the disputed boundary remains unresolved);
   - Negotiation of a boundary agreement;
   - Third party settlement by means of binding adjudication or arbitration, whether before the International Court of Justice, the International Tribunal for the Law of the Sea, or ad hoc arbitration including Annex VII arbitration under UNCLOS;
   - Mediation; or
   - Agreement on practical arrangements of a provisional nature, such as joint development zones, pending a final settlement of the boundary issue. This option has been the subject of a previous panel.

(i) Maintenance of the Status Quo

2. Maintenance of the status quo sometimes occurs despite the existence of overlapping claims, but this situation can be fundamentally incompatible with the wishes of the states concerned to explore for or exploit the natural resources that may be situated within the disputed area (witness the 35-year old dispute between Cambodia and Thailand in the Gulf of Thailand). Oil and gas companies take disputed boundary matters into account in their risk assessment of offshore projects and are generally loath to invest significant amounts of money in maritime areas that are subject to competing claims. In a few extreme cases, including one example in Southeast Asia, the naval forces from one country interdicted the drilling operations of a foreign oil company operating under a production sharing agreement entered into with a neighboring State in an area that was subject to competing claims. This resulted in a substantial waste of money for the oil company and a moratorium over exploration activities in the disputed area until the boundary issue was resolved.

(ii) Negotiated Agreement

3. Delimitation by negotiated agreement has been discussed by previous speakers. Suffice it to say that a negotiated agreement is a desirable solution that keeps the matter within the control of the interested governments, although it can often require significant political will on the part of the States concerned to reach a compromise. Preparation for boundary negotiations entails much the same kind of factual and legal research required for the submission of a boundary dispute to third party settlement. Notwithstanding this, it is a fact of life