



**British Institute of
International and
Comparative Law**

Obligations of States in Undelimited Maritime Areas

**Report of Conference held on
22 July 2016**

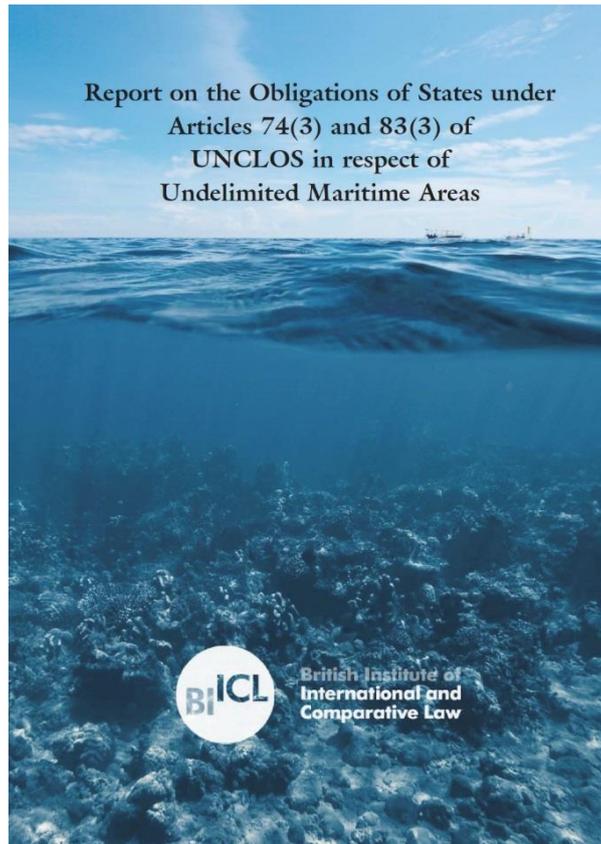


Obligations of States in Undelimited Maritime Areas

Report of Conference held on 22 July 2016

The Conference launched the *Report on the Obligation of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Areas*

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Front cover photo: The Research Team (final panel discussion).

L to R: Dr Naomi Burke, Dr Kentaro Nishimoto, Judge David Anderson, Professor Malcolm Evans (Conference Chair), Dr Makoto Seta, Professor Robin Churchill, Jill Barrett (Project Director).

Obligations of States in Undelimited Maritime Areas

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and Comparative Law**

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CONFERENCE REPORT

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Obligations of States in Undelimited Maritime Areas

1. INTRODUCTION

On 22 July 2016 the British Institute of International and Comparative Law ("BIICL") hosted a half-day conference on "Obligations of States in Undelimited Maritime Areas" to discuss its *Report on the Obligation of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Areas* ("the Report"). The Report, whose online version was published on 30 June 2016,¹ sets out the findings of the homonymous research project that was undertaken by BIICL in collaboration with renowned scholars on the law of the sea, and was funded by the Government of Japan. The aim of the conference was to share the results of the project, seek feedback on the Report and stimulate wider discussion of this subject.

The conference was attended by 95 people including prominent academics in the field, experienced legal practitioners from the private sector and government legal service as well as Embassy representatives. It was chaired by Professor Sir Malcolm Evans KCMG, University of Bristol. This report summarises the proceedings.²

1.1 PROJECT DIRECTOR'S OPENING REMARKS

Jill Barrett, Arthur Watts Senior Research Fellow in Public International Law at BIICL and Director of the research project,

¹ BIICL website, at: <http://www.biicl.org/undelimited-maritime-area>. A printed copy of the Report was given to each conference participant. A limited number of further copies of the printed Report are available and may be requested from BIICL Events Team at: eventsregistration@BIICL.ORG

² This report was written by Sotirios Lekkas, DPhil candidate, University of Oxford, and edited by Jill Barrett. The author is grateful to the speakers for reviewing the report in draft.

opened the conference by setting out the objectives of the project and its main outcomes. The project investigated the obligations of States arising out of Articles 74(3) and 83(3) of the UN Convention on the Law of the Sea (“UNCLOS”). In particular, it focused on the obligation on States not to jeopardise or hamper the reaching of a final delimitation agreement in respect of overlapping continental shelves or exclusive economic zones, in areas where no provisional arrangements apply. In the Report, this obligation is referred to for short as “the obligation not to jeopardise or hamper”. It is distinguished from and compared with other obligations of restraint imposed on States under other provisions of UNCLOS or other rules of international law, such as the “no harm” principle and the obligation not to extend or aggravate a dispute pending its resolution.³



Jill Barrett, Project Director, introduces the *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas*.

³ This terminology is explained in the Report, Section 1, paras 4 and 5.

Ms Barrett introduced the other members of the research team: Judge David Anderson, Professor Robin Churchill, Dr Kentaro Nishimoto, Dr Makoto Seta and Dr Naomi Burke, paying tribute to their respective contributions to the project.⁴ She summarised the team's working method as follows: first they studied the existing literature and judicial decisions and wrote an overview of the general law in draft.⁵ Then seven regions were chosen for a detailed study of State practice.⁶ They then looked again at the general law in light of the practice found, and elaborated on, amended and rethought a number of areas.⁷ She identified some of the legal issues which the team revisited in light of the regional State practice studies. These related to the geographical scope (which areas are covered?) and the material scope (which activities are covered?) of the obligations under Article 74(3) and 83(3) of UNCLOS.

One research question was whether the obligation not to jeopardise or hamper has a precise geographical scope, and, if so, whether such scope should be defined by reference to the whole undelimited area or the actively disputed area, where these are different. The regional State practice studies revealed numerous instances of ambiguity or disagreement between States about the scope of the disputed area. This seemed to militate against reading a specific geographical limitation into Articles 74(3) and 83(3). This helped to inform the team's conclusion that there is no geographical limit to the obligation not to jeopardise or hamper. Rather, it is the propensity of the act to jeopardise or

⁴ The biographies of the members of the research team are in Annex I to the Report.

⁵ Report, Section 2 (provisional draft). The draft report was discussed at an expert roundtable on 22 January 2016. The proceedings of that event are summarised at Annex III to the Report.

⁶ Report, Section 3.

⁷ Report, Section 2 (as published).

hamper the reaching of a final delimitation agreement that must be considered. The location of the act is highly relevant to this, but should not be considered in isolation.⁸

This approach however makes it even more difficult to define the kind of acts that may jeopardise or hamper. Clearly an act carried out beyond but close to the disputed area such as syphoning, could have a physical effect within it. But could a legislative or executive act relating to the area, or even an unrelated act such as arresting the other State's foreign minister, violate the obligation? State practice on this question was inconclusive; although there are examples of States objecting to other States' legislative decrees and executive acts such as publishing licensing prospectuses in respect of a disputed area, it is rare for such statements to refer to these UNCLOS obligations.⁹

Ms Barrett concluded with the challenges arising from the examination of State practice in undelimited maritime areas which are also subject to disputes about territorial sovereignty or the status of maritime features. Disentangling the practice relevant to the interpretation of Article 74 and 83 obligations from the practice relating to these other disputes was particularly challenging in significant parts of several of the regions covered in the study, namely the Caribbean, Africa, South China Sea and East Asia. In light of these difficulties the team reflected on this question at a general level and added a section to the Report that summarises the legal and practical issues, indicating where further study would be useful.¹⁰

⁸ Report, Section 2.6.2, paras 100–7, and Section 4.2, paras 409–10.

⁹ Report, Section 2.6.1, paras 74–99.

¹⁰ Report, Section 2.6.4, paras 112–19, and Section 4.2, paras 406–8.

She hoped that the Report would generate further discussion and research on this important subject, here and in other countries, and that this conference would help to start this process.

1.2 CHAIR'S OPENING REMARKS

Professor Sir Malcolm Evans presented an overview of the legal issues arising under Article 74(3) and Article 83(3) of UNCLOS. Despite their apparent transient nature, the provisions continue to be of the utmost importance, since maritime boundaries in many areas of the world remain unsettled.

Sir Malcolm commended the Report for its cautious approach, which he considered wise given the contentiousness of the subject matter. The tension between flexibility and predictability is reflected in many ways in the practice of maritime boundary delimitation. However, he doubted whether the intentionally open-ended wording of the provisions of Articles 74(3) and 83(3) of UNCLOS makes it desirable or even possible to identify its content with absolute precision. He remarked that the flexibility of the provision serves both the purposes of the rule of law and the necessities of dispute resolution.



The Chair, Professor Sir Malcolm Evans, presents his introductory remarks.

Sir Malcolm stressed that caution is also called for in analysing the scope of the obligations of Article 74(3) and 83(3) of UNCLOS, since the provision lays itself open to a multitude of possible interpretations. At a meta-level, establishing the circumstances that may jeopardise or hamper the reaching of the final delimitation agreement hinges on an understanding of other equally open-ended legal concepts of UNCLOS, such as the possible extent of States' obligations in the continental shelf and the exclusive economic zone. Yet, abandoning any nexus with the relevant areas appears too broad an approach, as there is no logical limit to the range of behaviours that could bear upon the propensity to jeopardise or hamper the ability to conclude a final agreement.

Furthermore, a modest approach is apposite due to the uncertainties surrounding the temporal scope of the obligation. The "transitional period" during which the obligation applies could, on one view, be construed as the period between entering into provisional arrangements and the conclusion of a final agreement. Sir Malcolm however commended the Report for arguing that the obligation also applies before such provisional arrangements are in place.

Finally, Sir Malcolm commended the Report's approach to the relationship between State practice and the way such practice affects the content of the obligations of Articles 74(3) and 83(3) UNCLOS. States' motivations for undertaking certain courses of action is more often than not unclear, as governments rarely provide detailed legal explanations for their actions.



The audience listening to introductory remarks (left and centre blocks). Centre of front row: Lady Hazel Fox, former Director of BIICL, and editor of *Joint Development of Offshore Oil and Gas*, BIICL 1989–90.

2. LEGAL ISSUES RELATING TO ARTICLES 74(3) AND 83(3) OF UNCLOS

2.1. ANTECEDENTS, LEGISLATIVE HISTORY, AND APPLICATION OF ARTICLES 74(3) AND 83(3) UNCLOS

Judge David Anderson offered some personal observations on the antecedents of Article 74(3) and 83(3) of UNCLOS, the negotiating history of these provisions and how they have been applied by States Parties and by international courts and tribunals.

The common paragraph 3 provision has no direct antecedents. There is nothing similar in the 1958 Convention on the Continental Shelf.¹¹ Nor is the same rule applicable in relation to the territorial sea under UNCLOS, or any other instrument.¹² Judge Anderson traced its origins to the principle of good faith that constitutes a general principle of international law. Yet, the meaning of this fundamental principle that applies in a variety of contexts is not elaborated in any international instrument. An expression of the principle of good faith is a duty to maintain the *status quo ante* under certain circumstances. Such circumstances include at least, the conclusion of treaties, and judicial settlement.

Judge Anderson identified the three stages of treaty-making where an obligation to maintain the status quo ante could be relevant: (i) when States agree to negotiate a treaty; (ii) while the negotiations are ongoing; and (iii) when a treaty has been signed and before its entry into force. An obligation not to frustrate the object and purpose of a treaty when a State agrees to enter into negotiations for the conclusion of a treaty and whilst those negotiations are in

¹¹ *Convention on the Continental Shelf* (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

¹² Art 15 UNCLOS; Art 12, *Convention on the Territorial Sea and Contiguous Zone* (signed 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

progress was proposed in the International Law Commission's ("ILC") Draft Articles on the Law of Treaties.¹³ Although such a general provision was not included in the Vienna Convention on the Law of Treaties ("VCLT"), the provisions of Articles 74(3) and 83(3) UNCLOS seem to parallel the ILC's proposal in the specific context of maritime boundary negotiations.

The duty to maintain the *status quo ante* also applies in international litigation while a case is pending. Quite often parties seek provisional measures of protection, or occasionally complain about actions by the other party after the seising of the court or tribunal. A recent example is the *South China Sea Award* where the tribunal pronounced that the parties to a dispute settlement procedure are under an obligation not to aggravate the dispute or disputes at issue during the pendency of that settlement process.¹⁴

As to the drafting history of Articles 74(3) and 83(3) of UNCLOS, the initial stages of their negotiation was marked by disagreements between a group of States supporting the median line as a default rule for maritime delimitation, and another group of States equal in size supporting the view that delimitation could only be effected on the basis of equitable principles. In view of the impasse, the idea of moratoria on resource related activities, and interim arrangements began to gain traction. Common paragraph (3) of Articles 74 and 83 of UNCLOS is a synthesis of those views, albeit not a well drafted one.

According to Judge Anderson, the present study of State practice shows that Articles 74(3) and 83(3) have been applied expressly in certain instances and tacitly in others. Provisional arrangements

¹³ Art 15(a) ILC, Draft Articles on the Law of Treaties (1966) II YBILC 187ff.

¹⁴ *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (Merits) 12 July 2016, Permanent Court of Arbitration, para 1169.

of a practical nature have taken many forms, but, in their absence, restraint is not always exercised. Investors, and particularly oil companies, remain wary of disputed maritime areas. When activities (eg drilling) have taken place in undelimited areas they may have resulted from a deliberate policy to try to create facts on the ground – this does happen. In many instances it seems to result from administrative shortcomings and failures of communication between domestic agencies. For example, an energy ministry may license areas or issue concessions without consulting the foreign ministry’s legal experts about the course, or the maximum extent, of the State’s maritime limits. Other problems arise because charts are sometimes old and unreliable, producing uncertainty as to where even a provisional equidistance line would run. Judge Anderson concluded with a brief overview of the relevant judicial practice. Both limbs of Article 74(3) and 83(3) have been applied only by the *Guyana v Suriname* Arbitral Tribunal. The award found a violation of the provisions of both sides without awarding any compensation.¹⁵ Parties have not sought a ruling on the legality of conduct during negotiations under those provisions in more recent delimitation cases that are pending before international courts and tribunals.

2.2. WHAT DOES PRACTICE TELL US ABOUT THE UNCLOS OBLIGATION OF RESTRAINT?

Professor Robin Churchill addressed the methodological limitations relating to the examination of State practice in the particular context of establishing the content of Articles 74(3) and 83(3) of UNCLOS.

According to Professor Churchill, a thorough examination of State practice was relevant to the project in two respects: to establish the existence and scope of a customary international rule, and to interpret the provisions of Articles 74(3) and 83(3) of UNCLOS. In

¹⁵ *Arbitration between Guyana and Suriname* (2007) XXX RIAA 1, paras 485–6.

his view, State practice predating UNCLOS is arguably indicative of a customary rule prohibiting States from engaging in exploitation or exploration activities involving physical change of the sea-bed.

Professor Churchill explained that State practice could be instructive for the interpretation of these UNCLOS provisions in two ways. First, Article 31(3)(b) of the VCLT provides that practice subsequent to the conclusion of a treaty can be taken into account, together with its context, for the ascertainment of the content of a treaty provision. Nonetheless, subsequent practice in that sense is only relevant if it reflects the collective view of the parties on the interpretation of the treaty. Second, Article 32 of the VCLT provides that subsequent practice may be taken into account as a supplementary means of interpretation of the treaty, if that practice is “in the application of the treaty”. A rather persistent problem in that respect is establishing that State practice relates to the application of Articles 74(3) and 83(3) UNCLOS, given that States rarely clarify their motivations for *not* taking a certain course of action. This makes it difficult to draw firm conclusions from the State practice that the study identified.

Professor Churchill identified three interpretational issues in connection to the provisions of Article 74(3) and 83(3) UNCLOS: (i) What is the substantive scope of the obligation not to jeopardise or hamper, and is it a subjective or an objective standard? (ii) Is the obligation geographically limited, and, if so, what is its geographical scope? (iii) What is the temporal scope of the obligation? According to Professor Churchill, none of these issues is adequately clarified by recourse to the drafting history of the Convention, or by the sparse existing judicial practice.

As to the substantive scope of the provision, Professor Churchill observed that there is a tendency in State practice to take a subjective approach as to what constitutes jeopardising or

hampering that contrasts with the objective approach of the Tribunal in the *Guyana v Suriname* award.¹⁶ He pointed out that certain activities seem to be clearly in violation of the obligation, especially exploitation activities and exploratory activities involving drilling. State practice in relation to seismic surveys and the licensing of prospecting activities is still mixed. As to fisheries, he indicated that fishing in the undelimited area would probably not “jeopardise or hamper”, but taking enforcement measures against the vessels of another party to the delimitation dispute probably would.

With respect to the geographical remit of the obligation, Professor Churchill noted that there is not much practice with respect to activities unconnected with the undelimited area, so it is difficult to deduce whether there are any such acts that could be considered as capable of jeopardising or hampering. The Order on Provisional Measures of the International Tribunal for the Law of the Sea (‘ITLOS’) in the case between Côte d’Ivoire and Ghana can be read as suggesting that activities in undelimited areas that could not be plausibly claimed by the other party would not constitute jeopardise or hampering.¹⁷ According to Professor Churchill, practice is still divided in relation to this “plausibility test”, although the concept has certainly some currency.

As to the issue of temporal scope, Professor Churchill argued that the provision is called into application from the point that a State proclaims a maritime zone. With respect to acts of proclamation Professor Churchill mentioned a further question that remains unresolved: whether the proclamation of a continental shelf or EEZ

¹⁶ Ibid, para 465–70.

¹⁷ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)* (Provisional Measures) 2015 <<https://www.itlos.org/en/cases/list-of-cases/case-no-23/>>, paras 58 and 62.

on the basis of the median line could itself be interpreted as practice relating to the obligation of Article 74(3) or 83(3) UNCLOS.

2.3. OUTSTANDING ISSUES – OBLIGATIONS OF RESTRAINT AND SOVEREIGNTY DISPUTES

Dr Kentaro Nishimoto explored the role of disputes relating to territorial sovereignty or to the status of maritime features in the application of the obligation not to jeopardise or hamper the reaching of final agreement under Articles 74(3) and 83(3) of UNCLOS.

By way of introduction, Dr Nishimoto highlighted the main characteristics of the obligation not to jeopardise or hamper as they emerge in the extensive analysis of State practice contained in the Report. As the provisions themselves establish no geographical limit to the underlying obligation, the more influential factor seems to be the propensity of the activity to jeopardise or hamper the reaching of the final agreement. He questioned whether a categorical test is justified such as the one which the *Guyana v Suriname* tribunal appeared to propose, namely that the activity causes physical change to the sea-bed.¹⁸ As an example, Dr Nishimoto mentioned the ITLOS provisional measures order in the *Ghana/Côte d'Ivoire* case which suggested that certain exploration and exploitation activities might be permissible in undelimited areas.¹⁹ Although he cautioned against reading too much into the Order, he suggested that it could be construed as an indication that the *Guyana v Suriname* test could be further refined. He further raised the issue of the permissible responses to violations of the obligation not to jeopardise or hamper. He suggested that the obligation itself could have an impact on the availability of

¹⁸ *Guyana v Suriname* award (n15) para 467.

¹⁹ See n17.

countermeasures for the affected State, although in practice States often respond to violations without exercising restraint.

In relation to the main point of his presentation, Dr Nishimoto used the South China Sea arbitration between the Philippines and China as a case study to elucidate the application of the obligation at issue in situations involving disputes relating to sovereignty over maritime features, and the status of such features. In that particular case, the arbitral tribunal under UNCLOS Annex VII lacked jurisdiction with respect to sovereignty disputes. Nevertheless, it held that it had jurisdiction to determine the parties' maritime entitlements in the area to which issue the status of certain maritime features was incidental.²⁰ In the event, the Tribunal found that there were no features capable of generating maritime entitlements in the central part of the South China Sea.

This, according to Dr Nishimoto, raises intricate questions about the applicability of the obligation not to jeopardise or hamper in comparable contexts. In principle, no delimitation issue arises in the absence of overlapping entitlements, and thus the obligation not to jeopardise or hamper is inapplicable. Yet, he suggested that some restraint might still be in order, at least until a binding determination on the absence of such entitlements is made. When entitlements to maritime zones overlap, a further question was whether the content of the obligation not to jeopardise or hamper differs depending on whether sovereignty disputes exist in the area of overlap, or not. He concluded that when sovereignty disputes exist, coastal States are faced with the tension between exercising sovereignty over their territory, and abiding by the obligation not to jeopardise or hamper.

²⁰ See n14; also *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (Award on Jurisdiction and Admissibility) 2016 <https://pcacases.com/web/sendAttach/1506>.

Dr Nishimoto added that situations involving sovereignty disputes reveal the intricate relationship between the obligation under Article 74(3) and 83(3) of UNCLOS and other obligations that potentially exist under international law not to aggravate or extend disputes. In those situations, it is difficult to establish whether States are acting pursuant to their obligations under UNCLOS, or to more general duties of self-restraint relating to the non-aggravation of existing disputes.

2.4. THE ROLE OF NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION WITHIN THE OBLIGATIONS OF STATES IN UNDELIMITED MARITIME AREAS: IMPLICATIONS OF RECENT INTERNATIONAL JURISPRUDENCE AND PRACTICE

Professor David Ong, acting as a discussant to the proceedings, drew attention to the potential role of obligations with respect to environmental protection and shared natural resources within the application of the obligations to enter into provisional arrangements as well as not to jeopardise or hamper the reaching of the final delimitation agreement under Articles 74(3) and 83(3) of UNCLOS.

By way of introduction, Professor Ong proposed that a duty to negotiate is intrinsic to the obligation to arrive at a delimitation agreement and any provisional arrangements prior to this delimitation agreement. Such a duty to negotiate arises due to the close relationship between Articles 74(3) and 83(3) of UNCLOS, on the one hand, and Articles 74(1) and 83(1), on the other. He remarked that this relationship should be taken into account in determining the substantive scope of the obligations in paragraph (3).

Professor Ong also maintained that duties of environmental protection bring several procedural aspects into the application of the obligations envisaged under Articles 74(3) and 83(3) of UNCLOS. The *Pulp Mills* judgment of the ICJ, as well as, *inter alia*,

the *Chagos Archipelagos Marine Protected Area* and *South China Sea UNCLOS Annex VII Arbitration Awards*, suggest that further corollaries of the obligation to negotiate are obligations to inform, consult and exchange information.²¹ The overlap between those obligations with the obligations arising under Article 74(3) and 83(3) of UNCLOS becomes apparent in the scenario where the State engages in activities in the undelimited area that could have an impact on the marine environment.

Professor Ong further argued that the close relationship between the provisions within Articles 74 and 83 of UNCLOS also means that State practice relevant to the interpretation and application of the obligation not to jeopardise or hamper could be found in already delimited areas. In that respect, he drew attention to obligations of restraint relating to shared natural resources, especially to mineral resources in delimitation agreements. For illustrative purposes, he referred to the 2010 Norway-Russian Federation delimitation agreement that provided for a duty to refrain from exploitation of oil and gas deposits found close to the boundary line pending the conclusion of a transboundary unitisation arrangement.²² Similar solutions have been adopted by the USA – a non-party to UNCLOS – and Mexico in their 2012

²¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 49 para 77; *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award) 18 March 2015, Permanent Court of Arbitration, para 519; *South China Sea Arbitration (Merits)* (n14) paras 939–49.

²² Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (signed 15 September 2010, entered into force 7 July 2011), UNTS registration no. 49095, registration date: 1 November 2011.

agreement relating to transboundary deposits found beyond 200nm in the Gulf of Mexico.²³



Panel 1 responds to questions from the audience.

Left to Right: Dr Kentaro Nishimoto, Professor Malcolm Evans, Judge David Anderson (face not visible), Professor Robin Churchill.

2.5. DISCUSSION AND CONCLUSIONS ON LEGAL ISSUES RELATING TO ARTICLES 74(3) AND 83(3) OF UNCLOS

Dr Nishimoto, in response to a question from the floor, elaborated on the Tribunal's reasoning in the *South China Sea* award. Although based on a historic title, China's claim to the 9-dash line

²³ Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf Beyond 200 Nautical Miles (signed 9 June 2000, entered into force 17 January 2001) 2143 UNTS 417; Agreement Between the United States of America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico (20 February 2012, entered into force 18 July 2014) <<http://www.state.gov/documents/organization/185467.pdf>>.

was, to the Tribunal, a claim to entitlement to a maritime zone, and as such subject to its jurisdiction. The question was whether the obligation not to jeopardise or hamper applies where there is a dispute as to the existence of overlapping entitlements. In other words, does the obligation apply until there is a binding determination that in fact there is no overlap? Professor Ong added that the Tribunal's reasoning was that the UNCLOS rules on maritime entitlements superseded such historic titles. However, Professor Ong considered this questionable, due to the fact that the Preamble to UNCLOS expressly affirms that: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

The panel was invited to clarify whether and, if so, under which circumstances might a court or tribunal considering a dispute under UNCLOS incidentally touch upon questions of territorial sovereignty, in a case where sovereignty over an island is claimed by two States? Professor Churchill argued that the best approach is for courts and tribunals to avoid determining sovereignty over islands even if this means that in certain circumstances the maritime boundary would only partially be delimited. The *Gulf of Maine* judgment of the ICJ is an example.²⁴ Along similar lines, Judge Anderson stressed that courts and tribunals with jurisdiction under UNCLOS are competent to hear disputes relating to the interpretation and application of the Convention. The Convention lacks any provision concerning the acquisition or maintenance of territory, which is governed by other areas of international law. He agreed with the majority in the *Chagos* case.²⁵

²⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246, 265–6, paras 19–20.

²⁵ See (n 21) para 215–17.

One participant commented that the Tribunal in the *South China Sea* case, in applying the non-aggravation principle, required a specific nexus between the activity and the disputed rights and obligations, and asked whether this finding could have a bearing on interpreting the geographical scope of the obligation not to jeopardise or hamper.²⁶ The same participant remarked on the value of State practice in treaty interpretation, given the high threshold set by the ICJ in the *Kasikili/Sedudu Island* judgment and the *Nuclear Weapons Advisory Opinion*.²⁷ In response, Professor Churchill pointed out that the ICJ's exacting requirements related to the application of Article 31(3)(b) of the VCLT, whereas the relevance of State practice as a supplementary means of interpretation under Article 32 was not subject to the same considerations. This was the basis on which the research team considered the relevance of State practice to the interpretation of Articles 74(3) and 83(3).

A participant also inquired whether the adoption and entry into force of UNCLOS might have modified the customary rule of restraint predating UNCLOS. In response, Professor Churchill pointed out that the practice predating UNCLOS was not the principal consideration of the drafters of the Convention, rather, the solution adopted was a negotiated one.

²⁶ *South China Sea Arbitration (Merits)* (n14) para 1174.

²⁷ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, 1075–87, paras 47–63; *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 255, para 55.

3. PRACTICAL IMPLICATIONS OF ARTICLES 74(3) AND 83(3) OF UNCLOS

3.1. UNILATERAL HYDROCARBON ACTIVITIES IN DISPUTED MARITIME AREAS: RECENT PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS

Stephen Fietta critically assessed the findings of the *Guyana v Suriname* tribunal on the content of the obligation not to jeopardise or hamper in the particular context of unilateral hydrocarbon activities, from a practitioner perspective.

Articles 74(3) and 83(3) of UNCLOS regulate activities, including hydrocarbon activities, in two ways. The duty to make every effort to enter into provisional arrangements pending delimitation is meant to promote activities in the undelimited area.²⁸ Conversely, the obligation not to jeopardise or hamper is a limit to such unilateral activities.²⁹ As to the content of the obligation, the Tribunal in the *Guyana v Suriname* award distinguished between activities that lead to permanent physical change to the sea-bed, which are impermissible; and those that cause no such change, which will normally not fall foul of the prohibition.³⁰ Thus, it found that drilling on the continental shelf was a violation, whereas seismic exploration would be lawful.

According to Mr Fietta, even activities not involving physical change to the marine environment can, depending on the circumstances, have a jeopardising or hampering effect on the conclusion of the final agreement. First, he argued that the Tribunal's reliance on the *Aegean Sea Continental Shelf* Provisional Measures Order was inapposite, since the ICJ's order predated

²⁸ *Guyana v Suriname* award (n15) para 459.

²⁹ *Ibid.*

³⁰ *Ibid* para 467.

UNCLOS.³¹ Mr Fietta contended that the threshold for the granting of provisional measures by the ICJ is high and exceptional and the same considerations do not apply in the context of Articles 74(3) and 83(3) UNCLOS. The *Guyana v Suriname* award concedes this point.³² Mr Fietta further maintained that the nature of the activities allowed by the provisional measures standard, especially seismic exploration activities, can clearly have a jeopardising or hampering effect by allowing one of the parties a considerable negotiating advantage. He observed that allowing seismic activities ignores the exclusive nature of the coastal States' sovereign rights over the continental shelf and its resources that exist independently of any claim. Lastly, he maintained that the *Guyana v Suriname* award was fact-specific and its findings *obiter dicta*, since both parties to the dispute engaged in seismic activity in the disputed area without protest on the other side.³³

In conclusion, Mr Fietta suggested that reliance on provisional measures jurisprudence and the risk of irreparable harm test is inappropriate for the interpretation of the obligation not to jeopardise or hamper the reaching of the final agreement under Articles 74(3) and 83(3) UNCLOS.

³¹ *Ibid*, para 468-469; *Aegean Sea Continental Shelf (Greece v Turkey) (Interim Measures)* [1976] ICJ Rep 3, 10–11 paras 30–31.

³² *Guyana v Suriname* award (n15) para 469.

³³ *Ibid*, para 481.



On Panel 2, Stephen Fietta presents his remarks.

L to R: Dr Naomi Burke, Dr Nuno Antunes, Professor Evans, Stephen Fietta, Penelope Nevill.

3.2. UNDELIMITED AREAS: IMPEDIMENT TO PETROLEUM OPERATIONS?

Dr Nuno Antunes explored the question whether the existence of an undelimited area was an impediment to petroleum operations, that is, in the context of areas of overlapping continental shelf entitlements. The notion of “undelimited area” is not necessarily the same as “disputed area”, and he agreed with the analysis in paragraph 102 of the Report on this point.

By way of introduction, Dr Antunes gave an informative account of practice relating to petroleum operations in undelimited areas. He distinguished three strands of practice. First, States might engage unilaterally in petroleum operations without engaging in any type of discussion with other relevant States. The findings of the Tribunal in the *Guyana v Suriname* case relating to seismic testing seemed

to exemplify these types of situations.³⁴ Second, States might enter into practical arrangements pending delimitation with a view to engaging in petroleum activities. Third, States might conclude a formal joint development or unitisation agreement of a permanent or temporary duration to establish a framework for petroleum operations.

According to Dr Antunes, State practice shows considerable diversity. For example, Australia and Timor-Leste have established a joint petroleum development zone in a part of the Timor Sea, pending final settlement of their delimitation dispute.³⁵ Unilateral petroleum operations had taken place outside the joint zone before the agreement. Certain discovered fields in the undelimited area, straddling the joint development zone, led to the execution of a unitisation agreement.³⁶ Similarly, an oil field was discovered through unilateral acts in the undelimited maritime area between Angola and the Republic of the Congo. The two States concluded a unitisation agreement relating to this specific field (unit area), whereas the maritime boundary remains undelimited.³⁷ By contrast, Israel and Lebanon seem to undertake no petroleum operations in a clearly defined disputed area between them in the Levant Sea, whereas petroleum operations continue in the undisputed areas.

³⁴ *Guyana v Suriname* award (n15) para 469.

³⁵ Timor Sea Treaty (signed 20 May 2002, entered into force 2 April 2003) 2258 UNTS 3; Treaty on Certain Maritime Arrangements in the Timor Sea (signed 12 January 2006, entered into force 27 June 2006) 2483 UNTS 358.

³⁶ Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Lest relating to the Unitization of the Sunrise and Troubadour Fields (signed 6 March 2003, entered into force 23 February 2007) 2483 UNTS 317.

³⁷ Protocol of Agreement Dated 10 September 2001 between the Republic of the Congo and the Republic of Angola Approving Offshore Unitization Zone 14K & A-IMI (signed 10 September 2001, entry into force N/A), not published, reprinted in: DA Colson and RW Smith (eds), *International Maritime Boundaries* (Brill 2011) 4288–95.

Conversely, Kenya has unilaterally issued licences in the maritime area also claimed by Somalia that is the subject of ongoing litigation before the ICJ.³⁸

According to Dr Antunes, the recent provisional measures order in the delimitation case between Ghana and Côte d'Ivoire pending before an ITLOS Special Chamber is an example of the practical implications of ongoing petroleum activities in a disputed (previously, undelimited) area. In that case, Ghana issued several licences in the disputed area, and some petroleum activities had already reached an advanced stage by the time ITLOS was seized of the matter. The Special Chamber found that the activities undertaken by Ghana in the disputed area resulted in modification of the physical characteristics of the continental shelf, and, hence, there was a risk of irreparable prejudice of Côte d'Ivoire's claimed rights.³⁹ By contrast, the Chamber decided not to order the suspension of all petroleum activities, as this would entail considerable financial loss to Ghana.⁴⁰ Dr Antunes stressed the importance of the "reversal" of the assessment – that is, the decision not to order the suspension – in light of the economic interests involved. He suggested that the Special Chamber's reliance on the degree of interference with the continental shelf between different stages of petroleum operations seemed appropriate in the context of provisional measures. However, he also agreed with the argument in paragraphs 88–89 of the Report that access to information through seismic surveys could in some cases hypothetically lead to the irreversible prejudice to one party's position, and therefore jeopardise or hamper, even without physical damage.

³⁸ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Application) 2014
<http://www.icj-cij.org/docket/files/161/18362.pdf>.

³⁹ *Ghana/Côte d'Ivoire Order* (n17) para 89.

⁴⁰ *Ibid*, para 99–100.

Reflecting on the content of the obligation of Articles 74(3) and 83(3) of UNCLOS, Dr Antunes remarked that even if a “plausibility” test were involved in determining its geographical scope, such a test would be particularly difficult to apply in situations between States with adjacent coasts. In a situation involving opposite coasts, the application of a “plausibility” test would perhaps be rather different. In conclusion, he remarked that the same obligation could not prevent all petroleum operations regardless of the circumstances.

3.3. THE OBLIGATION NOT TO JEOPARDISE OR HAMPER AND THE OBLIGATION NOT TO AGGRAVATE A DISPUTE: ISSUES OF ADJUDICATION IN LIGHT OF THE SOUTH CHINA SEA ARBITRATION

Dr Naomi Burke addressed the options available to States seeking to prevent or stop conduct contrary to the obligation not to jeopardise or hamper the reaching of the final agreement under Articles 74(3) and 83(3) of UNCLOS.

According to Dr Burke, the desirability of recourse to compulsory dispute settlement under UNCLOS depends on whether States seek to stop the prejudicial conduct, delimit the maritime boundary, or both. In principle, maritime boundary delimitation disputes are subject to the compulsory dispute settlement system set out in Part XV of UNCLOS. If a delimitation dispute were submitted to a competent court or tribunal, parties could seek to stop any activity pending delimitation by requesting provisional measures under Article 290 of UNCLOS. In that case, the activity would be assessed under the criteria developed by international courts and tribunals in the provisional measures context, such as urgency.

Dr Burke commented that the *South China Sea Arbitration* exemplifies the difficulties in submitting disputes concerning compliance with the obligation not to jeopardise or hamper. China had opted out of compulsory dispute settlement in relation to disputes regarding the interpretation or application of Articles 15,

74 and 83 UNCLOS, as it was entitled to do pursuant to Article 298 of UNCLOS. Dr Burke submitted that the provisions of Articles 74(3) and 83(3) of UNCLOS are arguably covered by the Article 298 opt-out provision, and indeed the Philippines did not pursue this line of argument. She further recalled that the obligation not to jeopardise or hamper applies only in the case of overlapping entitlements, whereas the overall tenor of the Philippines' claims focused on the absence of such entitlements under UNCLOS. Drawing on provisional measures jurisprudence, the Tribunal concluded that parties engaged in dispute settlement have an obligation not to aggravate or extend the dispute that has been submitted for settlement and that such a duty represents a principle of international law.⁴¹ Dr Burke noted that if a delimitation dispute is brought to dispute settlement, then this principle will apply to any behaviour that might constitute a violation of the obligations of Article 74(3) or 83(3).

Dr Burke also noted that, while it is possible to submit a stand-alone claim concerning violations of Articles 74(3) and 83(3), it will be difficult, if not impossible to do so where the opposing State has made a declaration under Article 298(1)(a)(i) of UNCLOS. She remarked that similar issues could be brought before a court as environmental disputes, or on some other basis with more chance of success.

She concluded that the obligation not to jeopardise or hamper under Articles 74(3) and 83(3) of UNCLOS is more important in the diplomatic context, whilst the purpose of those provisions is largely fulfilled by other principles in the judicial context.

3.4. LEGAL UNCERTAINTY IN UNDELIMITED AREAS

Penelope Nevill, in response to BIICL's invitation to provide a critique of the Report's findings, assessed its contribution to legal

⁴¹ *South China Arbitration (Merits)* (n14) para 1169.

certainty as to the practical implications of Articles 74(3) and 83(3) of UNCLOS. She set the tone for her presentation by stating that from a practitioner's viewpoint, knowing in advance the certainties and uncertainties of the law is critical for risk assessment, and, thereby, pivotal for strategic and transactional decision-making.

Ms Nevill argued that the Report's approach was not so helpful in identifying the geographic and temporal scope of the obligation, as well as the actions that would amount to a breach of the obligation under examination by listing several examples from the Report. In particular, she criticised the Report for its non-committal approach with respect to whether action at the diplomatic, legislative, or executive level could amount to jeopardising or hampering. She also remarked that the focus on the taking of non-renewable resources as conduct in breach of the obligation was under-inclusive: resources that are considered renewable, such as fisheries, could become non-renewable if exploited unsustainably. Furthermore, she took issue with the Report's stance in relation to the identification of permissible activities in the continental shelf for the exploration of mineral resources. She commented that the only firm conclusion that could be drawn was that some activity in an undelimited area would not need the consent of the other party. Along similar lines, Ms Nevill expressed doubts about the Report's open-ended conclusions with respect to fisheries, marine scientific research, and protection of the marine environment in the undelimited area.

On the other hand, Ms Nevill praised the Report's approach to the analysis of state practice. Indeed, she pointed out that the Report included a valuable synthesis as to the various practical ways that States have in practice shown restraint, that is, by provisionally applying the equidistance line, concluding provisional arrangements, or otherwise.

The only certainty provided by the Report, according to Ms Nevill, is that there is legal uncertainty, and, therefore, the way to avoid risk remains concluding a provisional agreement whether formal or informal. Although she acknowledged the inherent indeterminacy of many international rules negotiated to have a universal remit, she urged the authors to try to “pin their colours to the mast”. She commented, however, that the compendium of State practice included in the Report provides clear and useful guidance for practitioners.



The audience (centre and right blocks) participate in discussion with Panel 2.

3.5. DISCUSSION AND CONCLUSIONS ON PRACTICAL IMPLICATIONS OF ARTICLES 74(3) AND 83(3) UNCLOS

A participant asked whether it is permissible to carry out a seismic survey for the purposes of determining the extent of a coastal State’s entitlement to a continental shelf beyond 200 nautical miles, in order to find out if there are overlapping claims. In response, Stephen Fietta agreed that such unilateral activity could be legitimate. He stressed that the emphasis should not be on the type of activity but rather on the circumstances in which the activity takes place. He clarified that his critique of the *Guyana v Suriname*

award did not relate to the general proposition that unilateral activity which might affect the other party's rights in a permanent manner constituted jeopardising or hampering. He disagreed with the way the Tribunal applied it in the context of seismic surveys conducted unilaterally for the purposes of hydrocarbon development. In his view seismic intelligence on hydrocarbon resources is useful even in areas of no interest, and may advantage the party possessing it in delimitation negotiations. David Anderson responded that he was not sure he agreed that seismic surveying, even three-dimensional, could constitute jeopardising or hampering. He recalled occasions when he had access to seismic information that the other party to delimitations negotiations did not. However, although it may indicate areas of potential interest, its usefulness was limited as it did not indicate where to drill. He suggested that geographical considerations are far more important in that respect.

The issue of potential seismic information sharing between the parties concerned was also raised. Mr Fietta replied that State practice is not settled on the existence of an obligation of transparency or notification of resource-related activities and their location. Dr Burke agreed that the identification of such practice is difficult. Dr Antunes remarked that information-sharing in relation to resource activity in undelimited areas might not always be possible. He proposed that another way to achieve a compromise is the provision of assurances by the State undertaking the activity to transfer all information about resources to the other State, if the final delimitation results in the allocation of the area to the other party.⁴² Also, he suggested that in practical terms seismic research for the purposes of petroleum development involves large maritime areas. A creative way to overcome difficulties in keeping with international law is for different licensees to share information obtained through seismic surveying. He suggested, however, that

⁴² See *Ghana/Côte d'Ivoire Order* (n17) para 92.

such exploratory activity requires considerable investment, and thus oil companies are often hesitant to share its outcomes.

Questions relating to the role of historic rights in the context of the *South China Sea* award were also raised. Dr Burke pointed out that the South China Sea dispute is quite unique, as the extent of the entitlements claimed on the basis of historic rights clearly exceeded those provided under UNCLOS. She further observed that claims of entitlements based on historic rights are rare in maritime boundary litigation. Sir Malcolm interjected that the basis of the Tribunal's findings was that historic rights, if any, were extinguished by China's adherence to UNCLOS.⁴³

⁴³ *South China Arbitration* (Merits) (n14) para 262.

4. GENERAL DISCUSSION AND CONCLUSIONS

The panel consisted of all members of the research team. The audience was invited to address questions to the panel on any aspect of the Report, and to make general comments on the subject.



Dr Makoto Seta responds to a question from the audience during the final panel discussion.

L to R: Dr Naomi Burke, Dr Kentaro Nishimoto, David Anderson, Professor Malcolm Evans, Dr Seta, Professor Robin Churchill, Jill Barrett.

A participant commented on the negotiation of Articles 74(3) and 83(3) of UNCLOS. He recalled that the text was negotiated informally between the USA and the USSR, and was later brought to the group of five (France, Japan, UK, USA and USSR). He reported that the language of Articles 74(3) and 83(3) UNCLOS originates from a provisional arrangement between Norway and

the Soviet Union.⁴⁴ The provisional arrangement distinguishes between undisputed (“white”) and disputed (“grey”) areas; activities in “grey” areas could jeopardise or hamper the final agreement. Its goal was to shape the “grey” (disputed) area in such a way that the outcome of the delimitation would follow the shape of the “grey” area. A further corollary of that distinction was that third parties were allowed to engage in activities in “white” areas, whereas third parties’ activities were excluded in “grey” areas. He argued that the overarching aim of Articles 74(3) and 83(3) was that such provisional arrangements could create final settlements. He suggested that the operation of the provision is reflected in the 2010 Norway-Russia delimitation that was in fact negotiated decades ago as a provisional arrangement.⁴⁵

The panel was asked to elaborate further on the scope of application of the provisions of Article 74(3) and 83(3) of UNCLOS.

Sir Malcolm enquired whether the exercise of restraint could be construed itself as an indication that an undelimited area – that is, an area where maritime entitlements overlap – existed. Ms Barrett responded that such a conclusion is often not possible due to the lack of clarity as to the reasons behind the exercise of such restraint. The unwillingness of States to provide reasons for their actions or non-actions may well be to avoid any prejudice to the issue of delimitation, or, in some cases, to a sovereignty claim.

Another member of the audience queried whether the obligations under Article 74(3) and 83(3) of UNCLOS arise where the

⁴⁴ Agreement between Norway and the Soviet Union on a temporary practical scheme for fishing in an adjacent area in the Barents Sea (Grey Zone Agreement) (signed and provisionally entered into force 11 January 1978, entered into force 27 April 1978) not reported.

⁴⁵ See n22.

existence of a final delimitation agreement is in dispute. In response, Dr Burke suggested that the issue was raised in the ongoing *Ghana/Côte d'Ivoire* case. Judge Anderson remarked that there is still a duty of self-restraint in those areas, as other obligations stemming from the concept of good faith are applicable. Dr Antunes furthermore contended that comparable issues arise in practice in areas where delimitation agreements are in place, and transboundary resources are found. Such issues are often addressed through the conclusion of practical arrangements, including joint development of resources.

Several comments from the audience related to the scope of the Report, and to further research questions that arose from the Report.

A participant asked whether the obligations under Article 74(3) and 83(3) UNCLOS are the only obligations applicable to undelimited maritime areas. In response, Dr Nishimoto gave some examples of potential overlap of obligations in the undelimited area. States are also obligated to exercise some form of restraint in accordance with the principle of good faith. He also pointed out that provisional arrangements concerning fisheries often enjoin states not to enforce their laws against the vessels of the other party, but this could create a tension with the obligations relating to the management of those resources.

A participant suggested that the issues relating to marine genetic resources and mineral resources could be addressed in more detail in the Report. Dr Makoto Seta responded that what emerges from the Report is that the content of the obligation was flexible, and could encompass those activities, although different activities involve different considerations.

Another participant remarked that the Report focused on the activities prohibited in the undelimited area. He enquired whether

recommendations or best practice could be distilled to resolve disputes in those areas, such as joint exploration activity and information-sharing. Dr Antunes recalled as an example that Spain and Portugal shared information and co-ordinated their positions in relation to the delineation of the outer limit of their respective continental shelves, an approach that could also be resorted to in respect of petroleum exploration data and information. Judge Anderson remarked that joint research had also taken place in the Arctic. Ms Barrett raised the methodological issue that such informal government-to-government arrangements are more often than not confidential.

A further participant raised the issue of maritime areas for which it is uncertain whether they fall within national jurisdiction or are part of the International Sea-bed Area. Two issues arise in respect of those areas. First, applications to the UN Commission on the Continental Shelf ("CLCS") are, in accordance with its Rules of Procedure, not considered pending delimitation; for example, claims relating to areas in the Southwest Atlantic and the Southern Ocean. Second, if applications were submitted to the International Sea-bed Authority that could encroach upon areas of national jurisdiction, this would raise issues about the powers of the Authority. Similarly, another commentator queried whether the practice between the USA – a non-party to UNCLOS – and Mexico with respect to maritime areas beyond 200 nautical miles could be indicative of *opinio juris* as to a duty of self-restraint in those areas pending delimitation.⁴⁶ The panel was also asked to comment on why the research had focused on undelimited areas within 200 nm of the coast rather than areas beyond.

⁴⁶ *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas* (BIICL 2016) paras 178–87.

In response to these questions, Ms Barrett explained that the scope of the Report was not limited to maritime areas within 200 nautical miles. Research had focused on these areas as that is where most relevant State practice takes place, but where practice was found beyond 200 nm it is included in the Report as, for example, the practice between the USA and Mexico in the Western Gap and with Cuba in the Eastern Gap.⁴⁷ She suggested that, looking at this US practice in both these areas together, there is a very strong inference to be drawn as to the underlying *opinio juris* with respect to an obligation of restraint pending delimitation, but (as usual) it is difficult to pinpoint concrete evidence of it in published government statements. With regard to the Southern Ocean, Ms Barrett noted that States having territorial claims in Antarctica have expressed their intention to delay indefinitely any submission of data to the CLCS or have asked the CLCS not to examine it until further notice. This may well cause problems for the ISA in the future as it leaves undefined the boundary between the area under its authority and those (potentially) under national jurisdiction. This is of course a different issue from the absence of delimitation between opposite and adjacent States (the focus of this research), but also important for future oceans governance. Dr Burke also remarked that resources straddling the Area and areas within national jurisdiction are subject to a special notification system under Article 142 of UNCLOS, whereas no comparable system exists with respect to undelimited areas within national jurisdiction.

Several members of the audience commented that the Report will be very useful to them as a mine of information on State practice relating to the UNCLOS obligation not to jeopardise or hamper and to other obligations of restraint in undelimited maritime areas.

⁴⁷ Ibid.

This report was written by Sotirios Lekkas, DPhil candidate, University of Oxford, under the direction of Jill Barrett, BIICL, Project Director.
27 August 2016

Annex I: Speaker Biographies

David Anderson

David H Anderson CMG was a Judge of the International Tribunal for the Law of the Sea (1996–2005), after retiring as Second Legal Adviser to the Foreign & Commonwealth Office. Whilst with the FCO (1960–1996), he advised on all aspects of international law, including the law of treaties and the law of the sea. Between 1973 and 1995, he played an active part in the Third UN Conference on the Law of the Sea, the Secretary General’s Consultations about Part XI and the Straddling Fish Stocks Conference; he negotiated over a dozen maritime boundary treaties; and spent three years with the UK Mission to the UN in New York. He acted as UK Agent in the *Fisheries Jurisdiction* case (*UK v Iceland*) before the ICJ in 1972. Presently, he is listed as an Arbitrator under Annex VII of UNCLOS. He has published extensively on law of the sea matters.

Jill Barrett

Jill Barrett is the Arthur Watts Senior Research Fellow in Public International Law at BIICL, where she leads the Watts programme of international law research and events. She specialises in the law of treaties, the polar regions, international environmental law and law of the sea. Her recent publications include Barrett and Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty*, (BIICL 2016) and ‘Securing the Polar Regions through international law’ in Footer et al (eds) *Security and International Law* (Hart 2016). She is also Visiting Reader in the School of Law, Queen Mary University of London, and was Visiting Professor at Kobe University, Japan, in 2013, where she taught international law to postgraduate students. Jill was previously Legal Counsellor at the Foreign & Commonwealth Office. During her 20-year FCO career she advised on legal aspects of UK foreign policy, and represented the

UK at the UN and a variety of international conferences including Antarctic Treaty Consultative Meetings, CCAMLR, London Convention, International Whaling Commission and UN Commission on Environment and Development. She was Deputy Agent for the UK in the *Mox Plant* cases under UNCLOS and the OSPAR Convention. Before joining the FCO, she was Lecturer in Law at SOAS, London University, specialising in the People's Republic of China, and Lecturer in Law at Durham University.

Naomi Burke

Dr Naomi Burke O'Sullivan is the Arthur Watts Research Fellow in Law of the Sea at BIICL. She joined BIICL in November 2015 to work on this project regarding the obligations of States in respect of undelimited maritime areas. She also teaches public international law to undergraduate students at Fitzwilliam College, University of Cambridge.

Naomi has particular expertise in law of the sea and international humanitarian law. Prior to joining BIICL she worked in private practice at a boutique law firm specialising in public international law. She has also worked at the Irish Department of Foreign Affairs and as a clerk at the International Court of Justice. Naomi holds an LLB from Trinity College Dublin, a Masters from IEP Paris (Sciences Po) specialising in conflict and security studies, an LLM from NYU School of Law and a PhD from the University of Cambridge. Her PhD thesis entitled "The Maritime Zones of Non-Self-Governing and Occupied Territories" examined issues related to the entitlement to maritime zones and the exploitation of marine resources where sovereignty over land territory is disputed. Her recent publications include ASIL Insight, 'Annex VII Arbitral Tribunal Delimits Maritime Boundary between Bangladesh and India in the Bay of Bengal', 22 September 2014 and 'Nicaragua v Colombia at the ICJ: Better the Devil you don't?' Cambridge Journal of International and Comparative Law 2 (2013).

Robin Churchill

Robin Churchill is Professor of International Law at the University of Dundee where he has taught a variety of modules in international and EU law. His main research interests are the law of the sea, international environmental law and human rights, on all of which he has published widely. His books on the law of the sea include *The Law of the Sea* (with Vaughan Lowe) (Manchester University Press, fourth edition currently in preparation) and *The EC Common Fisheries Policy* (with Daniel Owen) (OUP 2010). He was awarded the 2011 Mangone Prize of the International Journal of Marine and Coastal Law for his series of annual reviews of dispute settlement in the law of the sea.

Malcolm Evans

Professor Sir Malcolm D Evans KCMG OBE is Professor of Public International Law at the University of Bristol. He is an expert in both international human rights protection and the international law of the sea. He is a member and Chair of the UN Subcommittee for the Prevention of Torture (the SPT) and currently Chair of the Meeting of Chairs of UN Human Rights Treaty Bodies. He is also a member of the Foreign Secretary's Human Rights Advisory Group. From 2002 – 2013 he was a member of the OSCE ODIHR Advisory Council on the Freedom of Religion or Belief. He is currently General Editor of the *International and Comparative Law Quarterly* and Co-Editor in Chief of the *Oxford Journal of Law and Religion*.

He is the author of *Relevant Circumstances and Maritime Delimitation* (Clarendon Press 1989) and numerous other publications and journal articles on law of the sea. He is also editor of *International Law* (4th edn, OUP 2014) and *Blackstone's International Law Documents* (12 edn, OUP 2015). He was

appointed Knight Commander of the Order of St Michael and St George (“KCMG”) in the 2016 New Year Honours.

David Ong

David M Ong is Research Professor of International and Environmental Law at Nottingham Trent University. His main research interests are in the law of the sea and international environmental law. He was a consultant on offshore joint development issues to the Guyanese legal team in the *Guyana v Suriname* maritime boundary delimitation arbitration (2007) and served as technical expert on Joint Development at the Second UN/UNDP South-South High Level Meeting on Oil and Gas Producing Developing Countries held in Nairobi, Kenya (2009).

He wrote the entry on “Joint Exploitation Areas” for the *Max Planck Encyclopaedia of Public International Law* (2011) and has published in the *American Journal of International Law* (1999), *European Journal of International Law* (2001), *Irish Yearbook of International Law* (2008), *Nordic Journal of International Law* (2010), *Netherlands International Law Review* (2011), *International Journal of Law in Context* (2015) and *International Journal on Minority and Group Rights* (BRILL 2015).

Stephen Fietta

Stephen Fietta is founder and principal of Fietta, an international law firm based in London. Stephen is also a Visiting Senior Lecturer at King’s College, London. He is ranked by Chambers Global Directory as one of the world’s top ten public international law practitioners. He has advised on cases before the International Court of Justice, International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights and multiple domestic courts. He has particular expertise in law of the sea, and acted as counsel for Barbados in the *Barbados v Trinidad*

and Tobago Annex VII arbitration. He also has one of the world's most prolific and longstanding practices in investment arbitration, having appeared in more than 30 pending and decided cases under the World Bank (ICSID), UNCITRAL and other rules.

Before establishing Fietta in December 2015, Stephen co-founded the world's first specialist public international law firm (Volterra Fietta) in 2011. Stephen is the co-author (with Dr Robin Cleverly) of *A Practitioners Guide to Maritime Delimitation* (OUP 2016).

Nuno Antunes

Dr Nuno Antunes is a Partner in the Portuguese law firm Miranda & Associados. His practice, focusing on the oil and gas sector, covers international, constitutional, regulatory, contractual, tax, M&A, environmental and negotiation matters. Nuno regularly advises IOCs and service companies, as well as State institutions, on licences and concessions, LNG projects, international unitisations, tax litigation and advice, transfer of participating interests, joint operations, foreign investment, financing, insurance, compliance, and foreign exchange. He has also worked as a consultant on petroleum law and contract matters.

Prior to joining Miranda & Associados in 2006, Nuno worked as legal adviser to the Prime Minister of Timor-Leste for the petroleum sector, advised in the negotiations of the Timor Sea maritime boundaries and petroleum resources, and was a member of drafting committees on petroleum laws and regulations, including the petroleum fund. He was Legal Coordinator of the Portuguese Task Group for the Extension of the Continental Shelf, appointed expert to the Portuguese Strategic Commission on the Oceans, and member of Portuguese delegations to various international meetings on ocean affairs. He has taught public international law and constitutional law, and is a regular speaker in post-graduation courses and conferences.

Nuno is a specialist in law of the sea, and holds licentiate degrees in Naval Military Sciences (Portuguese Naval Academy) and in Law (University of Lisbon), and an MA and a PhD from the University of Durham. He has written several books and articles on law of the sea matters, including the monograph *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (BRILL 2003). Nuno is currently appointed by Portugal to the list of arbitrators established under UNCLOS.

Penelope Nevill

Penelope Nevill is a barrister at 20 Essex Street. Penelope has a broad public international law practice, which combines traditional interstate cases with investment treaty arbitration and domestic litigation and advice work. She is an experienced practitioner, starting her career as a litigation lawyer at leading New Zealand law firm, Chapman Tripp, in 1997 before moving to academia following her LLM at the University of Cambridge (2001–2002), and the Bar in 2010. Her practice encompasses investment treaty arbitration, law of the sea, law of territory, recognition, environment and wildlife law, sanctions (EU, UN and national), treaty law, human rights, corporate social responsibility (OECD Guidelines and Ruggie Principles), international and regional organisations, jurisdiction and immunities, public law and EU law. She also has considerable knowledge of international humanitarian law and the use of force and has worked on territorial sovereignty and delimitation disputes. She is on the Attorney-General's Specialist Public International Law "B Panel", and the general "C Panel".

Penelope is also a Senior Research Fellow and Affiliated Lecturer at the Transnational Law Institute, King's College London, where she lectures on undergraduate and post-graduate courses. She is a visiting lecturer at the University of Auckland and the University of

Cambridge, having previously been a College Lecturer and Fellow at Downing College and the Lauterpacht Centre for International Law.

Kentaro Nishimoto

Dr Kentaro Nishimoto is Associate Professor, School of Law, Tohoku University, Japan. He teaches international law to undergraduate and postgraduate students and conducts research on international law, specialising in the law of the sea. He has published many articles on law of the sea in Japanese. His publications in English include 'The Role of International Organizations in Disaster Response: A Case Study of Recent Earthquakes in Japan', in David D Caron et al (eds), *The International Law of Disaster Relief* (OUP 2014), 295–313. His conference presentations include "The Legal Issues of the East China Sea: A perspective from Japan", *The Sea in the Middle: Marine Security & Sino-Japanese Relations in the East China Sea*, 21 March 2014, King's College London, and "International Law Issues Relating to the Impact of Disasters on the Maritime Environment", Sixth Japan-Netherlands Law Symposium, 26–27 August 2013, Leiden, The Netherlands.

Dr Nishimoto was previously Project Lecturer at the Graduate School of Public Policy, and Project Researcher at the Graduate School of Law and Politics, University of Tokyo. He holds a PhD in Law from the University of Tokyo, Japan, entitled 'Territoriality and Functionality in the Historical Formation of the Modern Law of the Sea', and an LLM and LLB from the University of Tokyo.

Makoto Seta

Dr Makoto Seta is Associate Professor of International Law at Yokohama City University, Japan. He conducts research on the development of the international law of the sea, maritime crime

and State jurisdiction and teaches public international law. He has published several articles on the law of the sea in Japanese. His work published in English includes 'How do We Justify Unilateral Exercise of Port State Jurisdiction? The Challenge by the EU in Protecting the Marine Environment', *International Environmental Law: Contemporary Concerns and Challenges in 2014*, 473–87 and 'CIL Research Project on International Maritime Crimes: Japan's Country Report', available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Country-Report-Japan.pdf>, 1–26.

Dr Seta holds a PhD in Public International Law from Waseda University, Japan, on 'The Development of Universal Jurisdiction under the Law of the Sea' (in Japanese), an LLM in Public International Law from the London School of Economics and Political Science and an LLM and an LLB in Public International Law from Waseda University. He has won several awards for academic scholarship, most recently a Superior Thesis Award from the Yamagata Memorial Foundation in 2013.

Annex II: Conference Programme

FRIDAY 22 JULY 2016:

OBLIGATIONS OF STATES IN UNDELIMITED MARITIME AREAS

10:15am: Registration/Coffee

11:00 – 11:15am: Introduction

- Jill Barrett, Arthur Watts Senior Research Fellow in Public International Law (Research Project Director)
- Professor Sir Malcolm Evans KCMG (Chair)

11:15 – 12:45pm: Panel 1 “Legal Issues arising from Articles 74(3) and 83(3) of UNCLOS”

- Judge David Anderson: Antecedents, Legislative History and Application of Articles 74(3) and 83(3)
- Professor Robin Churchill: What does State practice tell us about the UNCLOS obligation of restraint?
- Dr Kentaro Nishimoto: Outstanding Legal Questions: Obligations of Restraint and Sovereignty Disputes
- Professor David Ong: The Role of Natural Resources and Environmental Protection within the Obligations of States in Undelimited Maritime Areas: International Jurisprudence & State Practice

12:15 – 12:45pm: Discussion

12:45 – 1:30pm: Lunch

Served in the Conference Room on the ground floor

1:30 – 2:30pm: Panel 2 “Practical Implications of Articles 74(3) and 83(3)”

- Stephen Fietta: Unilateral Hydrocarbon Activities in Disputed Areas: Recent Practice of International Courts and Tribunals
- Dr Nuno Antunes: Undelimited Areas: Impediment to Petroleum Operations? Some Reflections and Hesitations
- Dr Naomi Burke: *Philippines v China* and the Obligation not to Aggravate a Dispute
- Penelope Nevill: Legal Uncertainty in Undelimited Areas

2:30 – 3:30pm: General Discussion/ “Ask the Research Panel”

- Jill Barrett, Dr Naomi Burke, Judge David Anderson, Professor Robin Churchill, Dr Kentaro Nishimoto, Dr Makoto Seta.

The purpose of this session is to allow the audience to discuss the report with the research team, raise questions and offer feedback.

3:30 – 4:30pm: Drinks and Canapés Reception
Conference Room on the ground floor