British Institute of International and Comparative Law

THE LEGAL FRAMEWORK GOVERNING HYDROCARBON ACTIVITIES IN UNDELIMITED MARITIME AREAS

Nicholas A. Ioannides*

Abstract Owing to soaring energy needs and improved drilling technology, offshore hydrocarbon activities have been on the rise in recent years. A delimited maritime boundary is an essential precondition for the establishment of a safe and stable environment which will facilitate investment and development. Nevertheless, the conclusion of delimitation agreements can be a difficult task due to competing interests and long-standing enmities among neighbouring countries. Significant maritime areas remain undelimited. In order to avoid the problems of both unilateral activities and a complete 'moratorium' in undelimited areas, Articles 74(3) and 83(3) of the 1982 United Nations Convention on the Law of the Sea impose two obligations of conduct: pending delimitation agreement, States are under duty to 'make every effort to enter into provisional arrangements of a practical nature', while, at the same time, the interested parties should refrain from acts that might 'jeopardize or hamper the reaching of the final agreement'. Bearing this in mind, it is argued that unilateral drilling and, under certain circumstances, unilateral seismic surveys in undelimited maritime areas should not be allowed and such conduct might trigger State responsibility. However, given that complete inactivity in such areas was not the intention of the drafters of the Convention, it is argued that several activities may be permitted as long as they are performed in good faith and do not put any final agreement at risk.

Keywords: public international law, maritime delimitation, State responsibility, undelimited maritime areas, hydrocarbons, drilling, seismic surveys, UNCLOS, good faith.

I. Introduction

State practice reveals and international jurisprudence and scholarship confirm that the main reason States conclude a maritime delimitation agreement is their desire to reap the benefits of offshore natural resources, mainly hydrocarbons.[1] However, maritime delimitation is not an easy endeavour,

* Adjunct Lecturer of Public International Law, University of Nicosia, ioannides.n@unic.ac.cy. I would like to thank Professor Sir Malcolm D Evans, Dr Naomi Burke, Dr Constantinos Yiallourides, as well as the two anonymous reviewers for their invaluable comments. Any errors are my own.

[1] *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, para 48; DW Bowett, 'The Economic Factor in Maritime Delimitation Cases' in *International Law at the Time of its*

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

hence many maritime areas remain undelimited, generating tensions among the interested States. Over the last few years, activities in areas where no delimitation agreements exist have soared because of increased energy needs and technological progress. With a view to precluding conflicts in areas where two or more States' maritime claims overlap, Articles 74(3) and 83(3) of the 1982 UN Law of the Sea Convention (LOSC or the Convention)[2] impose two obligations on the States involved. In particular, pending delimitation agreement States are under duty to 'make every effort to enter into provisional arrangements of a practical nature'. At the same time, the interested parties should abstain from acts that might 'jeopardize or hamper the reaching of the final agreement'. Failure on the part of States to observe these obligations triggers State responsibility, albeit the duties under concern are not owed to any State but to all the LOSC parties. In any event, these provisions do not seem to envisage an absolute 'moratorium' of activities in undelimited areas. As this article demonstrates, States appear to be entitled to carry out several activities as long as they act in good faith and their operations are not prejudicial to the aim of reaching a delimitation agreement. Be that as it may, unilateral drilling in an undelimited area should always be prohibited as it engenders irreversible consequences which put at risk the conclusion of the final agreement, while seismic surveys might also aggravate a dispute and cause permanent damage to the marine environment.

II. THE LEGAL REGIME APPLICABLE TO UNDELIMITED MARITIME AREAS

A. The Theoretical Background

1 Introduction

By way of definition, '"undelimited" maritime areas are areas where the continental shelves or exclusive economic zones (EEZs) of States overlap or

Codification: Essays in Honour of Roberto Ago (Giuffrè Editore 1987) 53; B Kwiatkowska, 'Economic and Environmental Considerations in Maritime Boundary Delimitations' in JI Charney and LM Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff 1993) vol I, 75; Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing 2006) 287–8; *Continental Shelf (Libyan Arab Jamahiriyia/Malta)* (Judgment) [1985] ICJ Rep 13, para 50; TL McDorman *et al.*, 'The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?' (1985) 9(2) Marine Policy 101; D Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 275; T Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press 2015) 456, 559, 583; MD Evans, 'Maritime Boundary Delimitation' in DR Rothwell *et al.* (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 274; DR Rothwell and T Stephens, *The International Law of the Sea* (2nd edn, Hart Publishing 2016) 85; S Fietta and R Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press 2016) 88–9; this observation also applies to continental lands: 'the prospect of the future exploration and exploitation of oil resources led directly to the first tentative steps toward the establishment of boundaries'. *Dubai/Sharjah Border Arbitration* [1981] 91 ILR 543, 562.

[2] United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

may potentially overlap, and no final delimitation is in place (whether by agreement or judicial award)'.[3] Some States put forward excessive claims aiming to designate a large maritime area as 'disputed', which could result in the stagnation of activities within it. Therefore, only those assertions which are made by States in good faith within the purview of international law and which pay regard to the potential rights of third States should be taken into account.[4] Such conduct demonstrates that the claimant State seeks only to enjoy its maritime entitlements in an undelimited maritime area and is not attempting to encroach upon another State's legitimate rights or prevent any legitimate economic activities from taking place. Additionally, in determining the relevant maritime area in delimitation cases, the International Court of Justice (ICJ) has stressed that: '[t]he relevant area comprises that part of the maritime space in which the *potential entitlements of the parties overlap*'.[5] This view accords with the general obligation of good faith under international law, also reflected in the LOSC, to refrain from abuse of rights by setting out extreme claims.[6] Bearing this in mind, it is argued that the term 'undelimited' should be preferred over the term 'disputed', as it is more neutral and objective,[7] especially when excessive claims have been made in respect of an extensive maritime area which can hardly be considered as disputed in its entirety.

Usually, maritime areas rich in natural resources become a 'bone of contention' among neighbouring States striving to avail themselves of the dividends from hydrocarbons found in the seabed and subsoil of the waters adjacent to their coasts. In order for a State to undertake unimpeded offshore hydrocarbon activities a definitive delimitation of its maritime space is indispensable.[8] As Leanza notes:

[3] British Institute of International and Comparative Law (BIICL), Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (2016) 1.

[4] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, para 34; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61, para 99; Cottier (n 1) 460; T Davenport, 'The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims' in R Beckman *et al.* (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar 2013) 106; BIICL Report (n 3) 30–1.

[5] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, para 159 (emphasis added); *Black Sea* case (n 4) para 99; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Judgment) [2018] ICJ Rep 1, para 115.

[6] 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.' LOSC (n 2) art 300; SD Murphy, *International Law relating to Islands* (Brill 2017) 258.

[7] BIICL Report (n 3) 30–1; interestingly enough, in the *Jan Mayen* case the ICJ made a distinction between an area which a State claims ('area of overlapping claims') and an area on which a State might actually have entitlements ('area of potential overlapping entitlement'). *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38, paras 18–19.

[8] 'The importance of stable and definitive maritime boundaries is all the more essential when the exploration and exploitation of the resources of the continental shelf are at stake … the sovereign

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

> [i]n the absence of total delimitation, it seems that no State has the right to the … resources or to grant concessions for their exploration in the areas still disputed and subject to claims by adjacent or opposite States … Delimitation of the continental shelf can be determined only through agreement of the States involved, and until such agreements have been entered into, none of the coastal States can claim exclusive use of the disputed area.[9]

However, the rule that sovereign rights over the natural resources of the continental shelf belong to the coastal State *ipso facto* and *ab initio* implies that such rights exist before boundary delimitation has been concluded. In other words, a delimitation agreement or a judgment delimiting a given maritime area does not have a constitutive character, that is, they do not generate sovereign rights over the continental shelf. Rather, they determine the extent up to which every State is entitled to enjoy those rights. Hence, no State should attempt to exercise those rights within an area covered by overlapping claims prior to any definitive delimitation since doing so would run the risk of encroaching upon another State's sovereign rights, if that area was subsequently allocated to the latter.[10] Until the conclusion of such an agreement, Articles 74(3) and 83(3) LOSC stipulate two obligations for the interested parties:

> 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 the transitional period, *not to jeopardise or hamper the reaching of the final agreement*. Such arrangements shall be without prejudice to the final delimitation.[11]

States should respect these duties even when no negotiations for a delimitation agreement have commenced.[12] Nonetheless, the duty to 'make every effort to

rights of coastal States, and therefore *the maritime boundaries between them, must be determined with precision to allow for development and investment*.' (Emphasis added.) *Bangladesh v India Award* [2014] para 218 https://pcacases.com/web/sendAttach/383; *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 85; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Rejoinder of Nigeria, para 10.39.

[9] U Leanza, 'The Delimitation of the Continental Shelf of the Mediterranean Sea' (1993) 8(3) IJMCL 373, 394.

[10] See sections IIA2, IIA4 and IIB.

[11] LOSC (n 2) arts 74(3) and 83(3) (emphasis added); according to Lagoni, the deliberations during UNCLOS III reveal that para 3 of arts 74 and 83 LOSC does not represent a codification of international law. R Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78(2) AJIL 345, 354; even though it is argued that State practice in several regions could be evidence that these provisions express general principles of international law, there is no clear determination on whether art 74(3) and 83(3) LOSC have been crystallized into rules of customary international law. BIICL Report (n 3) 43, 54, 114; there was a shared understanding between the delegations at UNCLOS III that interim measures were necessary in cases of pending delimitation. Lagoni (n 11) 353; such provisional measures are called 'sovereignty-neutral'. Rothwell and Stephens (n 1) 443.

[12] *Guyana v Suriname Award* [2007] 30 RIAA 1, para 459; MH Nordquist, S Rosenne and SN Nandan (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff 1993) vol II, 815; Lagoni (n 11) 354; arguably, the obligation to make every effort to enter

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

enter into provisional arrangements', entails an obligation of conduct and not of result; thus, the States involved are not obliged to reach a provisional arrangement.[13] On any account, the final delimitation could very well disregard any provisional measures agreed prior to its conclusion.[14] Although it is not clear whether the relevant provisions form part of customary international law, they impose a duty on the States concerned to act in good faith[15] and observe the customary principle of peaceful settlement of disputes. Consequently, even non-States parties to the LOSC should observe these principles which, although they do not require the conclusion of an agreement, they do necessitate positive action by the parties so as to fulfil the aim of the particular provisions, which is to prevent conflict and safeguard their respective rights.[16]

Apart from restricting several unilateral activities in undelimited areas, particularly the exploitation of natural resources, Articles 74(3) and 83(3) LOSC could be construed as promoting certain activities in such areas, since

into provisional arrangements occurs as soon as overlapping claims have been set forth by the interested parties. BIICL Report (n 3) 17; the obligations included in these provisions emerge even when one of the parties in a dispute refuses to negotiate. Y Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46(4) ODIL 315, 316; see also fn 91.

[13] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, para 244; *Guyana v Suriname* (n 12) para 461; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, 4, para 627; *Railway Traffic between Lithuania and Poland* (Advisory Opinion) [1931] PCIJ Rep Series A/B No 42, 116 (an obligation to negotiate does not entail an obligation to reach an agreement); E Milano and I Papanicolopulu, 'State Responsibility in Disputed Areas on Land and at Sea' (2011) 71(3) Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 611, 613, 615–16; Davenport (n 4) 110– 11; C Redgwell, 'International Regulation of Energy Activities' in M Roggenkamp *et al.* (eds), *Energy Law in Europe: National, EU and International Regulation* (3rd edn, Oxford University Press 2016) 61–2; BIICL Report (n 3) 13; as stated by the Special Chamber of the ITLOS, the obligation 'not to jeopardize' is an obligation of conduct as well. See fn 87.

[14] Lagoni (n 11) 359.

[15] 'The Special Chamber notes, however, that the language in which the obligation is couched indicates that the parties concerned are under a duty to act in good faith.' *Ghana/Côte d'Ivoire* (n 13) para 627; see section A3.

[16] *The Palestine Mavrommatis Concessions* [1924] PCIJ Rep Series A No 2, 13; *Tacna-Arica Question (Chile/Peru)* [1925] 2 RIAA 921, 929–34; *Lac Lanoux Arbitration (Spain v France)* [1957] 12 RIAA 281, 306–17; *North Sea cases* (n 1) paras 85–87; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* (Judgment) [1974] ICJ Rep 3, para 79(3); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Judgment) [1974] ICJ Rep 175, para 77(3); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, para 87; according to Lagoni, the obligation to negotiate in good faith ceases only when the negotiations lead to an agreement. Lagoni (n 11) 357; but see also fn 91; DM Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93(4) AJIL 783–4; PD Cameron, 'The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and the Caribbean' (2006) 55(3) ICLQ 559, 562–70; B Kwiatkowska, 'Equitable Maritime Boundary Delimitation: A Legal Perspective' (1988) 3(4) IJCEL 287, 293–4; N Klein, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21(4) IJMCL 423.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

it was not the intention of the drafters to impose a complete 'moratorium' in cases where a delimitation agreement had not been reached.[17]

As the authoritative Virginia Commentary notes: '[t]he phrase "not to jeopardize or hamper the reaching of the final agreement" does not exclude the conduct of some activities by the States concerned within the disputed area, so long as those activities would not have the effect of prejudicing the final agreement.' Furthermore, it is mentioned that during the Third United Nations Conference on the Law of the Sea (UNCLOS III) several delegations criticised a compromise formula inflicting a duty on States to 'refrain from activities or measures which may aggravate the situation' since they considered that clause as introducing a moratorium on economic activities pending delimitation.[18]

The drafters' reluctance to freeze all activities in undelimited areas is aptly illustrated by the Report of the Chairman of Negotiating Group 7 in 1979:

> …a number of delegations have found it *necessary to suggest prohibitive rules against arbitrary exploitation of natural resources or other unilateral measures within the disputed area*. Such rules are aimed to prevent States from acting in a manner which could prejudge or impede the completion of the final delimitation. *While the concept of a moratorium has raised considerable criticism* in this connexion, many delegations seem to agree that the parties to a delimitation dispute should avoid activities which could aggravate the situation.[19]

Moreover, the Arbitral Tribunal in the *Guyana v Suriname* case endorsed the position that not all activities should be prohibited in an undelimited maritime area pending delimitation:

> The first obligation contained in Articles 74(3) and 83(3) is designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation. In the view of the Tribunal, this obligation constitutes an implicit acknowledgment of the *importance of avoiding the suspension of economic development in a disputed maritime area* … The second obligation imposed by Articles 74(3) and 83(3) of the Convention, the duty to make every effort … not to jeopardise or hamper the reaching of the final agreement", is an important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of

[17] See sections IIB and IIC; Y Tanaka, 'Article 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts' in A Prölss, *United Nations Convention on the Law of the Sea: A Commentary* (Beck-Hart-Nomos 2017) 579; BIICL Report (n 3) 19; Y van Logchem, 'The Scope for Unilateralism in Disputed Maritime Areas' in C Schofield *et al.* (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 179–81; Davenport (n 4) 100, 102–3; *Guyana v Suriname Award,* CounterMemorial of Suriname, 117; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* Reply of Ghana, 151–2.

[18] Nordquist *et al.* (n 12) 815, 970, 972, 975.

[19] Statement by the Chairman, NG 7/26 (26 March 1979) in R Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (Oceana Publications 1987) vol IX, 434 (emphasis added).

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

settling disputes peacefully. However, it is important to note that *this obligation was not intended to preclude all activities in a disputed maritime area*.[20]

2. *The duty of mutual restraint*

As noted in the excerpt from the Chairman's Report, the drafters of the Convention explicitly referred to the need to avoid unilateral exploitation of natural resources in an undelimited area. Therefore, it can be argued that they considered unilateral drilling as an action that could aggravate the dispute and jeopardize the reaching of a final agreement. The prohibition on putting the final arrangement at risk and 'a specific duty to exercise mutual restraint in a difficult situation for the States concerned' have long been acknowledged, notwithstanding the fact that certain activities could be considered legitimate provided that they would not endanger the final settlement.[21]

An example of restraint according to good faith with respect to drilling in undelimited areas is the conduct of Canada in the Gulf of Maine against the backdrop of its dispute with the United States:

> Although Canada declined to commit itself to an agreed moratorium respecting oil and gas operations in the disputed area, *the boundary dispute has naturally had an inhibiting effect on exploration for and exploitation of the mineral resources of this area*. *In order to avoid any aggravation of the dispute* that might have made a negotiated settlement more difficult … Canada has unilaterally exempted its permittees from the work requirements that are normally demanded by Canadian regulations. The result of this measure … has been that *no drilling has been carried out in the disputed area* and the mineral resource potential of the area remains to be fully determined.[22]

Another interesting case concerns the tensions over an undelimited area between Lebanon and Israel. Notably, although Israel has delineated blocks in the area in question, no hydrocarbon activities have taken place in the particular undelimited maritime area.[23] This conduct is an indication of Israel's exercise of restraint, which, either consciously or unintentionally

[20] *Guyana v Suriname* (n 12) paras 460, 465, 470 (emphasis added).

[21] Nordquist *et al*. (n 12) 815, 984; Lagoni (n 11) 362; Fietta and Cleverly (n 1) 117; see section IIC.

[22] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Memorial of Canada, para 222 (emphasis added); see also the 1997 Additional Agreement between Romania and Ukraine whereby the two States pledged to refrain from unilateral hydrocarbon activities pending delimitation. Reproduced in *Maritime Delimitation in the Black Sea (Romania v Ukraine)* Memorial of Romania, 80–1; within the context of the Timor-Leste/Australia conciliation, one of the confidence-building measures proposed by the Conciliation Commission envisaged that Australia should remove an offered offshore block situated in an area where Timor-Leste had also laid claims. Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia (09 May 2018), para 95(4); for additional examples of restraint see BIICL Report (n 3) 40–116.

[23] D Meier, 'Lebanon's Maritime Boundaries: Between Economic Opportunities and Military Confrontation' (2013) <http://lebanesestudies.com/wp-content/uploads/2013/10/maritime.pdf> 6, 10.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

observes the obligation set forth in Articles 74(3) and 83(3) LOSC not to 'jeopardize or hamper the reaching of the final agreement', in spite of the fact that it is not a party to the LOSC (Lebanon is a State party). The situation has become more complicated given that in early 2017, Lebanon enacted two decrees necessary for the commencement of a licensing round (concerning the delineation of blocks and on the bidding process)[24] and expressed its determination to grant concessions in the undelimited maritime area (Lebanese Blocks 8, 9 and 10 overlap in part with Israeli Blocks 1, 2 and 3).[25] Inevitably, this provoked a reaction on the part of Israel,[26] but Lebanon has already granted a licence for Blocks 4 and 9,[27] spurring additional turmoil.[28] However, the French oil company Total, which is one of the licensees of the Lebanese Block 9, has said that it is fully aware of the dispute between the two States and, as a result will operate at a distance of 25 km from the disputed area.[29] This is an important development since it helps reduce the tension between the States and demonstrates that oil companies might be reluctant to operate in areas where the legal regime is undefined.[30]

The duty of mutual restraint from undertaking unilateral exploration and exploitation operations in an undelimited area could also stem from the provisions of Articles 56, 58, 60, 77, 80, 81 and 246(5) LOSC dealing with exclusive sovereign rights, jurisdiction and 'due regard' obligations.[31] In particular, Articles 56(1)(a) and 77(1) LOSC stipulate that the coastal State enjoys exclusive sovereign rights over the natural resources of the continental shelf/EEZ. Articles 56(1)(b)(i), 60 and 80 LOSC grant exclusive jurisdiction

[24] Decree 42/2017 and Decree 43/2017 <http://www.lpa.gov.lb/>.

[25] Based on a study completed by the Lebanese Petroleum Administration, the blocks that were opened for bidding during the first licensing round are: blocks 1, 4, 8, 9 and 10.' <http://www.lpa.gov.lb>.

[26] Communication from the Permanent Mission of Israel to the United Nations transmitted to the Secretary-General on 2 February 2017.

[27] Lebanese Petroleum Administration, 'First Offshore Licensing Round Results' (14 December 2017) <http://www.lpa.gov.lb/prequalification%20results.php>.

[28] Israel Note Verbale transmitted to the Secretary-General of the United Nations (21 December 2017); Lebanon Note Verbale transmitted to the Secretary-General of the United Nations (26 January 2018).

[29] 'Total strengthens its position in the Mediterranean region by entering two exploration blocks offshore Lebanon' (Total, Press Release, 9 February 2018) <https://www.total.com/en/media/news/press-releases/total-strengthens-position-in-mediterranean-region-by-entering-two-exploration-blocks-offshore-lebanon>.

[30] HL Lax, *Political Risk in the International Oil and Gas Industry* (Springer 1983) 8–9; M Pratt and D Smith, *How to Deal with Maritime Boundary Uncertainty in Oil and Gas Exploration and Production Areas* (AIPN 2007); PM Blyschak, 'Offshore Oil and Gas Projects Amid Maritime Border Disputes: Applicable Law' (2013) 6(3) JWELB 211; C Yiallourides, 'Oil and Gas Development in Disputed Waters under UNCLOS' (2016) 5(1) UCL Journal of Law and Jurisprudence 81–5.

[31] RJ McLaughlin, 'Maritime Boundary Delimitation and Cooperative Management of Transboundary Hydrocarbons in the Ultra-deepwaters of the Gulf of Mexico' in S-Y Hong and JM Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009) 211.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

to the coastal State as regards the establishment and use of installations and structures on the continental shelf and in the EEZ, while by virtue of Article 81 LOSC the coastal State 'shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes'. Furthermore, according to Article 246(5) LOSC, the coastal State may withhold its consent to the carrying out of marine scientific research if such project involves activities related to exploration and exploitation of natural resources. Lastly, Articles 56(2) and 58(3) LOSC envisage that the coastal State shall have 'due regard' to the rights and duties of third States when exercising its sovereign rights in its EEZ, while when exercising their rights and carrying out their duties in the EEZ of another State, third States shall have 'due regard' to the rights, duties and laws of the coastal State.

Arguably, if a State drills in an undelimited area which subsequently transpires to fall within another State's jurisdiction, the former has violated the latter's exclusive sovereign rights.[32] This view is predicated on the rule that the sovereign rights of a coastal State over its continental shelf exist *ipso facto* and *ab initio*, namely they belong to a State inherently and exist independently of both declaration and delimitation. A range of legal instruments enshrine this rule, while international courts and tribunals have repeatedly stressed its significance,[33] with the exception of the recent and controversial *Ghana/Côte d'Ivoire* case.[34] Delimitation establishes the definitive limit up to which a State may exercise its pre-existing sovereign rights over the continental shelf and not to the creation of such rights. Bearing this in mind, it is argued that, when a maritime dispute exists, it would be safer for States to exercise their rights over the undelimited area closer to their coasts and landwards of the median line (in case of opposite coasts) or at a distance from the equidistance line (in case of adjacent coasts) and in all cases to avoid unilateral drilling. Competing States should abstain from carrying out activities in close proximity to the hypothetical median/equidistance line and/or in the undelimited area lest they breach the other

[32] BIICL Report (n 3) 20–1; Nicaragua reserved its right to claim compensation for any natural resources that may have been extracted on its side of the delimitation line prior to its establishment. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras),* Memorial of Nicaragua, 4.

[33] United States, 'Proclamation by the President with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf' (28 September 1945). Reproduced in 40 Supplement to AJIL (1946) 45; Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311, art 2(2)(3); *North Sea cases* (n 1) paras 18–20, 63; *Aegean Sea case* (n 8) para 85; LOSC (n 2) art 77(2)(3); *Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, 4, paras 408–409; *Nicaragua v Colombia* (n 5) para 115; 'boundaries are found, not made'. MD Blecher, 'Equitable Delimitation of Continental Shelf' (1979) 73(1) AJIL 63; '[i]t must be kept in mind that judges find entitlements; under no circumstances may they grant them'. *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012* at 151, Separate Opinion of Judge Ndiaye, para 88; see section IIB.

[34] *Ghana/Côte d'Ivoire* (n 13) paras 591–594; for a brief commentary on that judgment see section IIB.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

party's rights, should it subsequently be determined that the area falls under the jurisdiction of that other state.

3 Good faith

The principle of good faith is an essential component of and permeates the legal framework regulating the conduct of States in undelimited maritime areas. Therefore, a brief discussion of several features of the principle of good faith is necessary. On the whole, it is a background principle supporting legal rules and providing guidance with respect to their implementation, but it does not create obligations in and of itself.[35] Furthermore, the fact that it is embodied in fundamental instruments such as the UN Charter (Article 2(2)) and the Friendly Relations Declaration highlights its significance.[36] The 1969 Vienna Convention on the Law of Treaties contains several references to good faith (Articles 26, 31, 46 and 69) since States by concluding treaties they pledge to exercise their rights and perform their obligations in a benevolent way in compliance with international law.[37] The Arbitral Tribunal in the *Philippines v China* case acknowledged the pivotal role good faith has in international relations and its importance regarding the prevention of tensions.[38] The ICJ has also lent its weight to good faith:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.[39]

The principle of good faith should be used as a yardstick in circumscribing and assessing State conduct in relation to a number of issues. For instance, as mentioned earlier, a maritime claim made by a State can be considered legitimate if it is made in good faith since this indicates that there is no attempt to impinge upon the legitimate rights of another State (abuse of rights)[40] and the State's assertions are based on legal entitlements rather than legally unfounded maximalist political positions. In the case of natural resources, albeit every State has exclusive rights over those, it should not exercise those rights in a way which is detrimental to another State's rights.

[35] M Shaw, *International Law* (8th edn, Cambridge University Press 2017) 77; R Kolb, Good Faith in International Law (Hart Publishing 2017).

[36] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

[37] *Right of Passage over Indian Territory* (*Portugal v India*) (Judgment) [1960] ICJ Rep 6, 142; Shaw (n 35) 685.

[38] *The Philippines v China Award* [2016] paras 1171–1172 <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

[39] *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 46; *Nuclear Tests Case (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, para 49.

[40] S Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 49, 53; LOSC (n 2) art 300.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

As alluded to above and analysed further below, the principle of good faith dictates that States should not act unilaterally in undelimited maritime areas in a manner which inflames tensions and/or impairs the rights of other States. Additionally, and in order to resolve a dispute, States need to engage into meaningful negotiations, namely to participate in those talks and cooperate in good faith;[41] in other words, they need to show 'reasonable regard' for the other party's rights.[42] Bearing this in mind, it is submitted that the principle of good faith, in essence, imposes limitations on the manner in which States may exercise their sovereignty/jurisdiction in order to uphold the respective parties' rights and mitigate conflicts.[43]

4. *State responsibility*

It should also be pointed out that a breach of the obligations enshrined in Articles 74(3) and 83(3) LOSC gives rise to State responsibility and imposes the duty on the wrongdoer to cease the unlawful behaviour and guarantee non-repetition.[44] According to Article 48(1)(a) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA):

> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group … .

As the commentary to Article 48 ARSIWA stresses: 'obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations erga omnes partes"'.[45] In the *Genocide* case, the ICJ noted that States parties have 'a common interest', namely to fulfil the purposes of the Genocide Convention.[46] In *Belgium v Senegal* the ICJ referred to and endorsed the concept of obligations erga omnes partes. In particular, the Court stressed that:

> These obligations [stemming from the Convention against Torture] may be defined as "obligations erga omnes partes" in the sense that *each State party has an interest in compliance with them in any given case* … The common

[41] *North Sea cases* (n 1) paras 85, 87; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 99, 102–103; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, paras 141–143; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 145.

[42] Reinhold (n 40) 56.

[43] II Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law' (1989) 83(3) AJIL 513, 514.

[44] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' with commentaries (53rd Session, 2001) UN Doc A/56/10. Reproduced in YBILC, Vol II (2001) art 30.

[45] ibid 126.

[46] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, at 23.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

> interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party … It follows *that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes* … .[47]

Therefore, it can be argued that the obligations of restraint and non-aggravation of a dispute in an undelimited maritime area form a collective/common interest derived from Articles 74(3) and 83(3) LOSC and are owed to the parties to the LOSC. Consequently, any State party to the LOSC is entitled to invoke the responsibility of another State party, despite the fact that there might be no violation of the former's sovereign rights.

Within this context, it is worth examining the common law 'rule of capture'. This particular concept was developed in US domestic law following the first onshore oil and gas activities in the 1840s and it envisages that the first to drill a well is entitled to capture the entirety of the hydrocarbons found.[48] Nevertheless, this doctrine has been rendered obsolete and cannot be accepted in cases of transboundary deposits, that is, hydrocarbon deposits straddling the maritime boundaries of two or more States, since that would cause a violation of the sovereign rights of another State.[49] According to Lagoni, when it comes to a transboundary reserve, the rule of capture should not be applied and the interested States should enter into negotiations with a view to reaching an agreement on the allocation of the common deposit.[50] Additionally, the rule of capture cannot be applied in undelimited maritime areas either, as unilateral drilling in those areas might jeopardize the reaching of a final agreement. Besides, as emphasized above, it is also possible that the State acting unilaterally will have infringed another State's sovereign rights if the area in which it operated is subsequently determined to be within the latter's

[47] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 26, paras 68–69 (emphasis added); in the *Whaling* case, Australia invoked Japan's responsibility under the International Convention for the Regulation of Whaling. *Whaling in the Antarctic (Australia v Japan)* (Application instituting proceedings) ICJ (31 May 2010).

[48] BM Kramer and OL Anderson, 'The Rule of Capture: An Oil and Gas Perspective' (2005) 35 Environmental Law 899.

[49] R Lagoni, 'Oil and Gas Deposits Across National Frontiers' (1979) 73 AJIL 217, 219–20; C Robson, 'Transboundary Petroleum Reservoir: Legal Issues and Solutions' in G Blake *et al.*, *The Peaceful Management of Transboundary Resources* (Graham and Trotman/Martinus Nijhoff 1995) 3; R Bundy, 'Natural Resource Development (Oil and Gas) and Boundary Disputes' in Blake ibid 23; T Daintith, 'Finders Keepers? How the Law of Capture Shaped the World Oil Industry' (RFF Press 2010) 370–2, 394; NA Ioannides, 'The China-Japan and Venezuela-Guyana Maritime Disputes: how the law on undelimited maritime areas addresses unilateral hydrocarbon activities' (EJIL:*Talk*! 25 January 2019) <https://www.ejiltalk.org/the-china-japan-and-venezuela-guyana-maritime-disputes-how-the-law-on-undelimited-maritime-areas-addresses-unilateral-hydrocarbon-activities/>.

[50] Lagoni (n 49) 235; J Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law 2014) 504.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

area of jurisdiction. An example of State practice against the rule of capture is the conduct of Vietnam and China in the South China Sea, where both States have rejected the application of the rule of capture in the cases of both transboundary reserves and reserves situated in undelimited maritime areas.[51]

Moreover, if a State has granted licences for hydrocarbon activities in an undelimited area, which is later determined to appertain to another State, it might be under an obligation, according to the relevant contracts, to compensate the oil company to which it has awarded a concession, since that permit will become invalid.[52] For instance, in the wake of the settlement of a maritime dispute between Malaysia and Brunei in 2009, Malaysia had to revoke a licence it had granted to the US oil company 'Murphy' for blocks previously situated in the disputed area, since by virtue of the agreement those blocks now fell within Brunei's maritime areas. As a result, Malaysia awarded 'Murphy' 'equally lucrative stake holdings in substitute blocks' by way of compensation.[53]

In any event, mere claims over an undelimited maritime area do not seem sufficient to hinder reaching a final agreement since they are of a declaratory nature.[54] On the other hand, activities supported by military action seeking to assert a State's claims over a given undelimited maritime area and to create a *fait accompli* will be at variance with the obligation to not jeopardize, as the Arbitral Tribunal held in the *Philippines v China Award*.[55]

At this point, it is important to recall the distinct natures of the legal regimes of the continental shelf and EEZ. In the former, the coastal State has inherent, exclusive sovereign rights. This is not the case as regards the EEZ: third States do enjoy certain rights within the EEZ given that the establishment of the EEZ concept was a compromise aiming at striking a balance between the freedom of the high seas on the one hand and coastal States' economic interests on the other.[56] Consequently, a State does not have an automatic entitlement to the waters above its continental shelf unless it has made a claim to an EEZ and such a claim cannot of course be definitive until there has been a delimitation

[51] MH Loja, 'Is the Rule of Capture Countenanced in the South China Sea? The Policy and Practice of China, the Philippines and Vietnam' (2014) 32(4) JENRL 483, 508.

[52] DM Ong, 'Implications of Recent Southeast Asian State Practice for the International Law on Offshore Joint Development' in Beckman *et al.* (n 4) 215–16; I Townsend-Gault, 'The Malaysia/Thailand Joint Development Arrangement' in H Fox (ed), *Joint Development of Offshore Oil and Gas* (BIICL 1990) vol II, 182.

[53] Ong (n 52) 204–8, 216.

[54] *The Philippines v China Award* (n 38) paras 705–706; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

[55] *The Philippines v China Award* (n 38) paras 704–708; Lagoni holds the view that the sailing of warships linked to the subject matter of the controversy in the disputed area could jeopardize or hamper the conclusion of a final agreement. Lagoni (n 11) 354, 365.

[56] DP O'Connell, *The International Law of the Sea* (IA Shearer ed, Clarendon Press 1982) vol I, 477–80; B Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (Martinus Nijhoff 1989) 233; DR Rothwell and N Klein, 'Maritime Security and the Law of the Sea' in N Klein *et al.* (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2010) 28; *The Philippines v China Award* (n 38) paras 248–249.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

agreement. Thus, it could be argued that activities undertaken by a third State in the water column in an undelimited maritime space at a certain distance from the shores of another coastal State and closer to the provisional median/ equidistance line might not constitute a violation of the latter's sovereign rights.[57] Nonetheless, if a State has declared an EEZ, even without having concluded a delimitation agreement, third states should act in good faith, have 'due regard' to the rights of the coastal State and not carry out activities that can be detrimental to the coastal State's rights in the water column in close proximity to the outer limit of the latter's territorial sea.[58]

In any case, even if a State has proclaimed an EEZ, in the absence of delimitation and in the event of overlapping EEZ entitlements its claimed exclusive rights cannot be considered definitive.[59] Therefore, any attempt on the part of a coastal State to prevent other States from exercising certain activities in the waters of an undelimited area claiming to be part of its EEZ would be hard to justify, especially the closer to the provisional median/ equidistance line these activities take place. This is all the more so if we consider that certain aspects of the high seas freedom apply even when a duly declared and delimited EEZ is in place and the coastal State is under an obligation to have due regard to the rights and duties of other States in its EEZ.[60]

5. Interim measures

Non-aggravation of disputes is also particularly important in the context of provisional measures procedures. As the Permanent Court of International Justice (PCIJ) put it:

> …the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[61]

Judge Elias also noted that: 'the aggravation or expansion of the dispute must relate to a situation or state of fact which may be worsened by act of one or both parties pending the final decision—that is, something done which might frustrate the giving of an effective decision.'[62]

In the *Ghana/Côte d'Ivoire* case, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) examined, *inter alia*, whether a tacit delimitation agreement existed between the Parties. The Chamber noted that

[57] BIICL Report (n 3) 20.

[58] LOSC (n 2) art 58(3).

[59] *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 132; *Tunisia/Libya* (n 4) para 87.

[60] LOSC (n 2) arts 56(2), 58(1)(2).

[61] *The Electricity Company of Sofia and Bulgaria* (Interim Measures of Protection) [1939] PCIJ Rep Series AB No 79, 199; see also *Trail Smelter case (United States/Canada)* [1941] 3 RIAA 1905, 1965; *The Philippines v China Award* (n 38) paras 1169, 1176; Ong (n 16) 798–801.

[62] *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection), Separate Opinion of Judge Elias, 28.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

States align their blocks with those of their neighbouring States 'out of caution and prudence to avoid any conflict and to maintain friendly relations with their neighbours'. Nevertheless, the Special Chamber did not assimilate the limits of the oil blocks to a maritime boundary because it did not want to 'penalise' such cautious and prudent behaviour. This notwithstanding, the Chamber praised the Parties' conduct aimed at avoiding tensions.[63]

6. Environmental harm

Further, States should be careful when carrying out activities in undelimited areas in order to avoid the risk of damaging the environment both in undelimited areas and areas within the maritime zones of other States.[64] The Special Chamber of ITLOS highlighted this point in the *Ghana/Côte d'Ivoire* (Provisional Measures) case in applying Articles 192–193 LOSC, when it stressed the importance of inter-State cooperation in order to thwart serious environmental harm.[65] Aware of the risk of irreversible negative effects to the seabed stemming from oil drilling, as well as from the cessation of such activities, the Chamber ordered Ghana to strictly monitor its activities in the undelimited area, while it also ordered both States to cooperate with a view to preventing serious harm to the marine environment.[66]

B. Case Law Relevant to Undelimited Maritime Areas

In the *Aegean Sea Continental Shelf* case (Request for Interim Protection), Greece requested interim measures in respect of the exploration activities Turkey had carried out in areas of the Aegean Sea in which Turkey and Greece had overlapping claims. In the opinion of the ICJ, these activities did not entail the risk of physical harm of the seabed and subsoil and no installations were established on the disputed continental shelf:

> [w]hereas seismic exploration of the natural resources of the continental shelf without the consent of the coastal State might, no doubt, raise a question of infringement of the latter's exclusive right of exploration; whereas, accordingly, in the event that the Court should uphold Greece's claims on the

[63] *Ghana/Côte d'Ivoire* (n 13) para 225.

[64] *Trail Smelter case* (n 61); *Nuclear Weapons Advisory Opinion* (n 41) para 29; *MOX Plant (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, 95, para 82; *Pulp Mills* (n 41) para 101; BIICL Report (n 3) 20; the LOSC attaches great importance to and contains a range of detailed provisions concerning the protection of the marine environment. On this matter see: C Yiallourides, 'Environmental Protection in Undelimited Waters: Caution, Precaution and the Limits of International Law' Global Ocean Regime Conference: Promoting Cooperation in Overlapping Maritime Areas (Jeju-do, 16–18 May 2018).

[65] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, 146, paras 68–73 (see relevant case law cited by the Special Chamber).

[66] ibid paras 89–91, 99, 101, 108(1)(c)(d); see also section IIB.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

> merits, Turkey's activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece … this power [to issue interim measures] is conferred on the Court only if it considers that circumstances so require in order to preserve the respective rights of either Party; and whereas this condition, as already noted, presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights … the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation.[67]

In other words, the Court took the view that since the mere conduct of seismic surveys does not generate any irreversible damage to the seabed, subsoil and their natural resources, and as it does not create any new rights nor deprive the other State of any rights it might be entitled to,[68] such activities could be permissible under international law and did not warrant the indication of provisional measures, even though this could constitute a potential violation of an exclusive Greek right to exploration.[69] Therefore, according to the Court, the 'litmus test' for resolving whether oil and gas activities in undelimited maritime areas might be sufficiently detrimental to another State's rights in order to justify awarding provisional measures is whether the activities cause irreparable damage to the geological structure of the seabed and subsoil, which might subsequently be awarded to that State.

It should not escape notice that the threshold for prescribing interim/provisional measures is higher than that for determining whether there has been a breach of the obligation not to jeopardize or hamper the reaching of a final agreement.[70] Irrespective of whether an exploratory activity might be sufficient for the issuance of interim/provisional measures by a court or tribunal, it may very well constitute an infringement of the obligations stipulated in Articles 74(3) and 83(3) LOSC, which do not require a violation of a State's sovereign rights.

Given the finding of the ICJ that seismic research in an undelimited area, which later might be determined to appertain to Greece, might constitute a violation of its exclusive sovereign rights to explore the natural resources of

[67] *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection) Order of 11 September 1976, ICJ Rep 3, paras 30–33.

[68] ibid para 29.

[69] *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection), Separate Opinion of Judge Mosler, 26; 'I consider equally irreparable the prejudice caused by the gathering of information [by Turkey] on the resources of the Greek shelf and the possibility of disclosing them, which would raise an insurmountable obstacle to their exploitation … .' *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection), Dissenting Opinion of Judge Stassinopoulos, 37; *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection), Request by Greece for Interim Measures, 64.

[70] *Aegean Sea case* (n 67) para 31; *Guyana v Suriname* (n 12) para 469; van Logchem (n 17) 187–91; Murphy (n 6) 268.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

its continental shelf,[71] it would be reasonable to infer, *a minore ad maius*, that unilateral activities in an undelimited area causing serious damage—such as a permanent change to the seabed (e.g. oil drilling)—would most likely be a violation of the coastal State's sovereign rights, if the area in question subsequently comes to fall within its jurisdiction.[72] Following the same line of thinking, it is argued that if unilateral exploration and exploitation activities in undelimited areas might be considered as detrimental to a State's sovereign rights following a delimitation, they might also constitute a breach of the obligation 'to not jeopardize', which anyway requires a lower evidentiary threshold than the violation of sovereign rights.

In the *Guyana v Suriname* dispute, the first case to have discussed Articles 74(3) and 83(3) LOSC, the Arbitral Tribunal examined the conduct of exploration and exploitation activities in undelimited waters. In construing Articles 74(3) and 83(3) LOSC, the Tribunal held that these provisions reflect the need to avoid 'the suspension of economic development in a disputed area' and seem to impose an obligation to enter into negotiations in good faith.[73] The Tribunal upheld the distinction between acts causing permanent physical change (drilling operations), and those that do not (seismic surveys). On this basis, the Tribunal stated that since the latter activities do not result in irreparable physical change, they do not hamper the reaching of a final agreement and, hence, should be permissible; whereas drillings undertaken unilaterally are to be considered unlawful since they may jeopardize the reaching of a final agreement.[74] Finally, the Tribunal found both the threat of the use of force by Suriname against a drill ship operating on behalf of Guyana and the conducting of unilateral exploratory drilling by Guyana in the undelimited area without prior consultation with Suriname to be in breach of the obligations laid down in Articles 74(3) and 83(3) LOSC.[75]

After the application of Côte d'Ivoire for provisional measures seeking to achieve cessation of the unilateral drilling activities of Ghana in an undelimited maritime area, a Special Chamber of ITLOS (constituted to hear the dispute between the two States) in its Order of 25 April 2015 emphasized the risks which Ghana's exploration and exploitation activities, including exploratory drilling, posed for the environment and noted that damage to the

[71] The ITLOS Special Chamber also pondered the risk of damage occurring from data gathering. See fn 82.

[72] In case of unilateral seismic surveys that are being conducted in a maritime area indisputably falling within the jurisdiction of a coastal State by virtue of a duly declared EEZ and an established maritime boundary, an infringement of arts 56 and 77 LOSC occurs. See section IIA2.

[73] See fn 20; Y Tanaka, 'The *Guyana/*Suriname Arbitration: A Commentary' (2007) 2(3) HJJ 28; S Fietta, 'Guyana/Suriname' (2008) 102(1) AJIL 119, 119–28; S Fietta, 'Introductory Note to Arbitral Tribunal Decision Guyana v Suriname' (2008) 47(2) ILM 164, 164–5; Fietta and Cleverly (n 1) 439–52; Davenport (n 4) 100–4.

[74] *Guyana v Suriname* (n 12) paras 460, 466–468, 470, 480–481; Y Tanaka, 'Article 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts' in Prölss (n 17) 665.

[75] *Guyana v Suriname* (n 12) para 488(2)(3).

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

seabed and subsoil could not be remedied by compensation.[76] In the end, the Chamber concluded that Ghana's activities might cause irreparable harm to the Ivorian sovereign rights and, therefore, ordered Ghana not to commence any new drilling.[77] The Chamber also reiterated an important point, namely 'any action or abstention by either party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute'.[78]

A noteworthy aspect of the Order is that the Chamber took into consideration any financial losses Ghana was likely to suffer if its current hydrocarbon activities ceased. Striking a balance between the protection of the rights of both parties, even though it prohibited any future activities, the Chamber did not order the termination of Ghanaian activities already taking place, distinguishing its position from previous case law, and, probably, paving the way for the creation of a precedent sanctioning unilateral drilling *ex post facto*.[79] However, as Tanaka notes, the fact that Ghanaian oil and gas activities took place on its side of the equidistance line may have played a role in the Chamber's decision.[80] In any case, the argument that Ghana did nothing wrong because it undertook hydrocarbon operations on its side of the equidistance line is not satisfactory and generates uncertainty as any financial losses on the part of Ghana could be compensated, and there is a risk that other States may use the decision in order to justify unilateral drilling in an undelimited area.[81]

Another crucial point is the Chamber's finding that access to information concerning natural resources falls within the ambit of a State's exclusive rights,[82] something which the ICJ had alluded to in the *Aegean Sea Continental Shelf* case.[83] This is a jurisprudential reminder that even exploration for the purpose of acquiring seismic data in another State's continental shelf/EEZ constitutes a violation of sovereign rights and should be prohibited. This is because by virtue of Articles 56(1)(a) and 77(1) LOSC, exploration for natural resources in a duly delimited continental shelf/EEZ is vested exclusively in the coastal State. Hence, the affected State can request

[76] *Ghana/Côte d'Ivoire* (n 65) paras 88–91; A Sarmiento Lamus and R González Quintero, 'Request for Provisional Measures in the *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*' (2016) 31(1) IJMCL 160.

[77] *Ghana/Côte d'Ivoire* (n 65) paras 96, 102, Dispositif para 1(a).

[78] ibid para 103; see also *M/V "SAIGA" (No 2) (Saint Vincent and the Grenadines v Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, 24, para 44; *M/V "Louisa" (Saint Vincent and the Grenadines v Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, 58, para 79; *"Arctic Sunrise" (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, 230, para 99.

[79] *Ghana/Côte d'Ivoire* (n 65) paras 98–100.

[80] Tanaka (n 12) 325; this was later on confirmed by the Special Chamber on the merits. *Ghana/Côte d'Ivoire* (n 13) para 633.

[81] Tanaka (n 12) 325, 327; see fns 92–93.

[82] *Ghana/Côte d'Ivoire* (n 65) paras 94–95, 108(1)(b).

[83] See fns 67 and 69.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

return of any date acquired and, if the delinquent State has sold such data to third parties (such as oil companies), it may also seek compensation. Moreover, unilateral seismic activities in an undelimited maritime area may also provoke political or forceful reaction on the part of another State interested in the area against the State operating unilaterally, hence exacerbating tension.[84]

What is more, even though international courts and tribunals have sanctioned unilateral seismic research in undelimited areas because they consider such activities do not cause permanent damage to the marine environment, recent scientific data suggests otherwise. In particular, it has been argued that seismic surveys may have a serious impact on the marine environment that might indeed be irreversible.[85] In light of the new evidence, perhaps the position that seismic activities do not cause irreparable harm should be revisited.

Notwithstanding the above, on the merits the Chamber condoned the unilateral drilling operations undertaken by Ghana in the undelimited maritime area. It rightly found no violation of Ivorian sovereign rights[86] since at the time the drilling took place there was no definitive determination as to whether the area was under Côte d'Ivoire's jurisdiction, and it was eventually decided that Ghana's oil drilling had in fact taken place in areas to which it was entitled. In any event, the finding that there was no breach of Ivorian sovereign rights does not bear upon the matter of State responsibility triggered by unilateral drilling operations in undelimited areas. The reason is that a violation of sovereign rights is not a precondition for determining whether there has been an infringement of Article 83(3) LOSC, which imposes an obligation on States to show restraint and not to perform activities in an undelimited area that might jeopardize the reaching of the final agreement. As the Special Chamber noted, the obligation 'not to jeopardise or hamper the reaching of a final agreement' is an obligation of conduct and States have to act 'in a spirit of understanding and cooperation' pending delimitation. Although the Chamber itself admitted that '[i]t would … have been preferable if Ghana had adhered to the request of Côte d'Ivoire earlier to suspend its hydrocarbon activities in that area', it did not attach any legal significance to the fact that Ghana did not terminate its drilling and, thus, did not hold Ghana internationally responsible for its unilateral activities in the undelimited maritime area.[87]

[84] Murphy (n 6) 268–9.

[85] C Yiallourides, 'Protecting and Preserving the Marine Environment in Disputed Areas: Seismic Noise and Provisional Measures of Protection' (2017) JENRL 1; Recommendations issued following a workshop on 'Mitigating the impact of underwater noise on marine biodiversity in the south eastern European waters in the Mediterranean Sea' (22–23 November 2017 – Split, Croatia); L Weilgart, 'The Impact of Ocean Noise Pollution on Fish and Invertebrates' (Oceancare 2018).

[86] *Ghana/Côte d'Ivoire* (n 13) para 594.

[87] ibid paras 629–634; NA Ioannides, 'A Commentary on the Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)' (2017) 3 MSSLJ 48; see sections IIA2–A4.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

At any rate, when a State operates unilaterally in another State's duly defined maritime areas violating the latter's sovereign rights it is other rules that apply and not Articles 74(3) and 83(3) LOSC. This strengthens the argument that Articles 74(3) and 83(3) LOSC serve a purpose other than directly protecting a State's sovereign rights. Rather, these particular provisions promote restraint and prohibit unilateral drilling lest the reaching of a final agreement is jeopardized and States' sovereign rights are violated following the drawing of a maritime boundary.[88] The fact that Côte d'Ivoire asserted that Ghana's unilateral activities had taken place in the Ivorian maritime area might have played a role in the Chamber's judgment. This is because the Chamber could not have considered activities in the undelimited area as actions that had occurred in the Ivorian maritime area, given that jurisdictional competence within the area was undefined prior to the delimitation.

Since a breach of Articles 74(3) and 83(3) LOSC is not contingent on whether the activities are being carried out in a State's maritime area and whether they infringe its sovereign rights, it suffices to prove that they are being performed in an undelimited/disputed maritime area and that the responsible State is (a) aware that one or more States have made claims in good faith and (b) that those activities might jeopardize or hamper the reaching of a final agreement. An example highlighting the 'awareness/knowledge' element of this formulation can be found in the Special Chamber's judgment. The Chamber thought that since Côte d'Ivoire had been conducting parallel hydrocarbon operations and its proposals for delimitation of the maritime area were well known, Ghana 'was or should have been aware' that it was operating in a disputing area.[89] Despite this, Ghana had continued drilling in the undelimited area, risking exacerbating tension and hampering the reaching of a final agreement. As the ICJ has put it, even if one State considers that its activities are taking place on its own territory, this does not preclude their potential unlawfulness.[90]

It should also be stressed that although the two obligations in Articles 74(3) and 83(3) LOSC are 'interlinked', the obligation 'not to jeopardise' should be respected even when negotiations have not taken place.[91] Put another way, neither of the parties is absolved of its duty 'not to jeopardise' simply because there is no invitation by the other to enter into negotiations.

Being mindful of the above and in accordance with the *Guyana v Suriname* Award, the Chamber should have resolved that unilateral drilling activities in the undelimited area constituted a breach of Article 83(3) LOSC, even if no

[88] See section IIA2.

[89] *Ghana/Côte d'Ivoire* (n 13) paras 586–588.

[90] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665, para 97.

[91] If one of the parties is reluctant to enter into negotiations and does not acquiesce in the other party's research activities in a certain disputed area, it should be prepared to justify its decision, otherwise it could be considered as acting in bad faith. Lagoni (n 11) 366; Ong (n 16) 802–3; *Reference re Secession of Quebec* [1998] 2 SCR 217, paras 95, 103.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

violation of the sovereign rights of Côte d'Ivoire eventually materialized once the boundary was established, since Ghana neither showed restraint nor good faith once Côte d'Ivoire had raised its objections.

Judge Paik (now President of the ITLOS) noted that even though the activities were conducted by Ghana in an area finally assigned to it, this fact does not eliminate wrongfulness stemming from the violation of the obligation provided for in Article 83(3) LOSC. As he rightly remarked: 'to condone the unilateral activities of such a scale in the circumstances of the present case would certainly send a wrong signal to States pondering over their next move in a disputed area elsewhere'.[92]

Interestingly enough, Judge Evensen had supported a similar position in the *Tunisia/Libya* case:

> [a]ny acceptance by the Court that the drilling of oil-wells, in an area which was disputed, should have any relevance for the delimitation, would really be an invitation to Parties to violate certain basic trends laid down in the Fourth Geneva Convention of 1958 and the draft convention of 1981, and might invite aggressive attitudes, through the staking out of claims, instead of conciliatory approaches.[93]

C. *Activities Permissible in Undelimited Areas*

Having concluded that unilateral drilling in an undelimited area should always be prohibited[94] and seismic surveys might also jeopardize the reaching of a final agreement, it is worth considering which activities might be permitted in such areas. Recalling the relevant conventional and customary rules, as well as the pertinent case law and State practice, and given the reluctance of the drafters of the Convention to accept a complete 'moratorium' in undelimited areas, it is argued that several activities carried out in good faith within the hypothetical median/equidistance limit could be considered permissible provided they do not jeopardize the reaching of a final agreement. The reason

[92] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, 4, Separate Opinion of Judge Paik, para 19; the Chamber's position on activities in the undelimited area has been criticized by several authors. N Bankes, 'ITLOS Judgment in the Maritime Boundary Dispute between Ghana and Côte d'Ivoire' (The JCLOS Blog, 27 October 2017) <http://site.uit.no/jclos/2017/10/27/itlos-judgment-in-the-maritime-boundary-dispute-between-ghana-and-cote-divoire/>; N Ermolina and C Yiallourides, 'State Responsibility for Unilateral Hydrocarbon Activities in Disputed Maritime Areas: The case of Ghana and Côte d'Ivoire and its implications' (The JCLOS Blog, 23 November 2017) <http://site.uit.no/jclos/2017/11/23/State-responsibility-for-unilateral-hydrocarbon-activities-in-disputed-maritime-areas-the-case-of-ghana-and-cote-divoire-and-its-implications/>.

[93] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 278, Dissenting Opinion of Judge Evensen, para 26.

[94] As Churchill notes: 'there is probably a rule of international law which prohibits States from exploiting seabed resources in disputed areas'. RR Churchill, 'Joint Development Zones: International Legal Issues' in Fox (n 52) 57; RR Churchill and VA Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 192.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

why express reference to the median/equidistance line is made is that both claims made and activities undertaken within this limit demonstrate good faith,[95] which is an essential component of Articles 74(3) and 83(3) LOSC. This view has been confirmed in the *Ghana/Côte d'Ivoire* case, where the Special Chamber in essence determined that Ghana's hydrocarbon activities did not trigger the latter's State responsibility because they had taken place 'only in an area attributed to it'.[96] It is also supported by the preparatory works of UNCLOS III, since the Informal Single Negotiating Text included a provision on undelimited areas (Article 61(3)) which provided that pending a delimitation agreement States should not extend their EEZ beyond the median line.[97]

Of course, there are instances where the median/equidistance line cannot be easily defined because of territorial disputes (e.g. over islands). In such cases, pending delimitation, the State purporting to act on its side of the median/ equidistance line in an undelimited area should exercise additional caution since the uncertainty in respect of the location of the boundary is high and activities in such an area run a serious risk of encroaching upon an area that might at a later stage be allotted to another State.

It is also stressed that a coastal State may undertake unilateral activities pertaining only to the water column within its proclaimed EEZ in areas landward of the median/equidistance line, and so closer to its coast, without having concluded a delimitation agreement. This is because activities relating to the water column (e.g. fishing) usually do not cause irreparable damage that might pose a serious threat to the reaching of a final agreement as long as they are undertaken in a sustainable fashion.[98] A State which has declared an EEZ will have a stronger claim to undertake activities concerning the water column than a State undertaking activities in the high seas given the additional rights accorded to the coastal State by virtue of the EEZ regime.[99] Nonetheless, as

[95] '… a claim to the equidistance line would be a good faith claim that is consistent with the LOSC and international law.' RC Beckman and CH Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) IJMCL 193, 211–12; prior to ICJ proceedings, Danish and Dutch concessionaires had been operating within the equidistance limit following notification to Germany. AG Oude Elferink, 'North Sea Continental Shelf Cases' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006, online edn) para 15 <www.mpepil.com>; Canada had granted hydrocarbon permits on its side of the equidistance line in the Gulf of Maine. McDorman *et al.* (n 1) 91; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Rejoinder of Colombia, para 8.58.

[96] *Ghana/Côte d'Ivoire* (n 13), para 633.

[97] Official Records of the Third United Nations Conference on the Law of the Sea, Informal Single Negotiating Text, A/CONF.62/WP.8/Part II, art 61(3); Nordquist *et al.* (n 12) 806.

[98] Murphy (n 6) 269.

[99] 'In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

stated above, it should be noted that without a delimitation agreement, the full extent of the area in which a coastal State is entitled to exercise its sovereign rights is not determined with certainty.[100]

Some activities in an undelimited maritime area which could be permissible include: regulation and monitoring of fishing; naval patrols; search and rescue operations; regulation and surveillance of archaeological excavations regarding underwater cultural heritage; marine scientific research regulation and monitoring; control of navigation; pollution control activities.[101] These activities should not be considered equivalent to *effectivités*, since such activities undertaken in the marine domain cannot be used to justify the appropriation of maritime areas.[102] Notably, though, such kinds of activity illustrate the special interest which a coastal State may have in a given undelimited maritime area, namely a State's 'predominant interest',[103] which could play a role in a future delimitation. In contrast, unilateral drilling operations should be considered to be a violation of these provisions since they cause irreparable physical change and are the gravest form of unilateral conduct, and as such they jeopardize the reaching of a final agreement, whilst seismic surveys might also put the conclusion of a final agreement to risk.

islands, installations and structures; 44 (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.' LOSC (n 2) art 56.

[100] See section IIA4.

[101] *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)* [1998] 22 RIAA 209, paras 258–317; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, paras 80, 237–46; *Nicaragua v Colombia* (n 5) paras 80, 217, 220 (case law referring to the conduct of the parties); China invoked its responsibilities with respect to maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, ecological environment conservation, navigation safety as well as fishery production service in order to justify its land reclamation activities but, eventually the Arbitral Tribunal found that those reclamation activities were unlawful. *The Philippines v China Award* (n 38) paras 865, 936, 1022–1023, 1149.

[102] I Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27(1) IJMCL 59; on the concept of *effectivités* see *Legal Status of the Eastern Greenland* (Judgment) [1933] PCIJ Rep Series A/B No 53, 45–6, 63; *Island of Palmas case (Netherlands/USA)* [1928] 2 RIAA 829, 839–40; *Nicaragua v Honduras* (n 101) para 165; *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554, para 63; *Case concerning the Frontier Dispute (Benin/Niger)* (Judgment) [2005] ICJ Rep 90, para 47.

[103] 'A single conglomeration of other purported factors and elements, the sum being greater than the value of its constituent parts. It derives its force from the "piling up" of evidence, designed to demonstrate that one party to a dispute has a greater interest in a particular offshore area than another … .' MD Evans, *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, Oxford, 1989) 208; *Anglo-French Continental Shelf Case (United Kingdom of Great Britain and Northern Ireland/France)* [1977] 18 RIAA 3, para 188.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press

III. CONCLUSION

Owing to the increased interest of States in the exploration and exploitation of offshore natural resources, their increased technological capacity to conduct such operations and the fact that many maritime areas in which there are overlapping claims remain undelimited, disputes are inevitable in the years to come. In an effort to stave off and de-escalate tensions, Articles 74(3) and 83(3) LOSC impose two obligations on States parties pending the conclusion of a delimitation agreement, namely to enter into negotiations for the establishment of practical arrangements and to avoid activities that might jeopardize the reaching of the final agreement. Even though these provisions have yet to crystallize into customary international law, they do reflect general principles of good faith and peaceful resolution of disputes, which should be observed by all States. After a thorough study of relevant theory and case law, it is submitted that since unilateral drilling in undelimited maritime areas constitutes the gravest form of violation that might occur pending a delimitation because of the irreversible damage it causes and the serious risk it poses to the reaching of the final agreement, it should be prohibited in every case. Furthermore, unilateral seismic surveys in undelimited areas, although tolerated by international jurisprudence, might also jeopardize the reaching of the final agreement by causing permanent harm to the marine environment and generating financial damage to the State to which jurisdiction might ultimately be accorded, if the resulting data was available to or used by a third State. Such activities may trigger State responsibility as they might be at odds with the obligations embodied in Articles 74(3) and 83(3) LOSC and which are owed to all States parties to the Convention. According to ARSIWA, any party to the LOSC is entitled to ask the wrong-doing State to cease its operations and guarantee non-repetition of the unlawful conduct. However, these duties do not purport to stand in the way of all unilateral activity in an undelimited area, as the LOSC preparatory works and relevant case law demonstrate. As a result, various forms of unilateral activities should be understood to be permitted in undelimited areas provided they are performed in good faith and do not put the conclusion of a final arrangement at risk.

https://doi.org/10.1017/S0020589319000010 Published online by Cambridge University Press