



HOUSE OF LORDS

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The Select Committee on the Arctic

Inquiry on

THE ARCTIC

Evidence Session No. 5

Heard in Public

Questions 50 - 62

TUESDAY 22 JULY 2014

11.40 am

Witnesses: Professor Robin Churchill, Professor Maurice Mendelson QC and Professor Philip Steinberg

Members present

Lord Teverson (Chairman)
Lord Addington
Baroness Browning
Lord Hannay of Chiswick
Viscount Hanworth
Lord Hunt of Chesterton
Lord Moynihan
Lord Soley
Baroness Symons of Vernham Dean
Lord Tugendhat

Examination of Witnesses

Professor Robin Churchill, University of Dundee, **Professor Maurice Mendelson QC**, Blackstone Chambers, and **Professor Philip Steinberg**, Centre for Borders Research, University of Durham

Q50 The Chairman: Professors three, I welcome you to the Select Committee on the Arctic. This is our fifth public evidence session. Today we have been looking at security and defence and now at the law of the sea, UNCLOS in particular. I remind you that we are being broadcast. I think you have a good idea of the sort of questions that we will ask. I ask you to try to keep your comments to the point. I know that is sometimes difficult, as we ask broad questions on occasion. In particular, I remind you that you do not all need to answer all the questions, but if you have something important to contribute, please do so. We leave it up to you on who wants to lead on which questions. Perhaps Viscount Hanworth could start us off.

Q51 Viscount Hanworth: I have a general question about how the provisions of UNCLOS apply to the Arctic in respect to the various areas of the ocean—namely, the territorial and contiguous seas, the exclusive economic zone and, indeed, the continental shelves. The

provisions of Article 76 of UNCLOS, regarding the continental shelves, seem to me to give inordinate rights to the seaboard nations. I also presume that any objections to this would have been muted by the supposition that these nations would, in reality, have rather little interest in the distant reaches of the continental shelf. Could you comment on this? Also, could you tell me whether there is any likelihood of a moratorium being declared in respect of the regions surrounding the North Pole, similar to the moratorium that prevails in the Antarctic?

Professor Maurice Mendelson QC: I think that the chances of the present regime being changed regarding the continental shelf in particular and its extent are negligible. Originally, from about 1945 onwards, states have claimed sovereign rights—not full sovereignty, but sovereign rights—over the natural resources, living and non-living, of the seabed. Originally, this was regarded as being only the natural prolongation under the sea of the land—the continental crust—and it went out only for a relatively short distance. Because of a number of developments, one of which was the emergence of the concept of the exclusive economic zone, going up to 200 nautical miles from the baselines, it was decided at the third UN Conference on the Law of the Sea, the one that produced the Law of the Sea Convention in 1982, that all coastal states that did not have others in the way, as it were, could claim up to 200 nautical miles regardless of whether they had a real natural prolongation or not. It is a bit like the caucus race in *Alice in Wonderland* where all the creatures have to have a prize. That was rather the philosophy at the Law of the Sea conference and it was generally accepted with little demur.

Countries that have a real natural prolongation beyond 200 miles were certainly not willing to give that up as well, so you have the states with long natural prolongations, such as the United States, the United Kingdom, Canada, Australia and so on, definitely wanting to hang

on to that, and it was generally accepted that they would be able to do so. The only complication was that there is no sharp division geologically between the end of the physical continental margin and deep seabed—the abyssal plain—which are supposed to be under a different regime. Very complicated scientific criteria—or a menu, if you prefer—were drawn up and set out in Article 76, which enabled the outer limit of the continental margin to be determined. Then you have this system of the Commission on the Limits of the Continental Shelf, which is supposed to police this, if that is not too strong a word.

In respect of the second part of Lord Hanworth's question about the possibility of a moratorium, personally I think that it is extremely unlikely. The moratorium embodied in the Antarctic Treaty came about at a fairly unique period in history where—you will have to forgive these metaphors—there was a thaw in relations between the West and the Soviet bloc and it was felt that one way of giving effect to that was through scientific co-operation in, among other places, the Antarctic. The nature of the territorial claims, such as they were in the Antarctic, was rather special and different from what you find elsewhere. You had countries that were not riparians of the Antarctic, such as the United Kingdom, but others too, making claims there. So in 1959 there was a unique moment and opportunity. The Arctic is rather different and I do not see that the rather small number of riparian states—the eight riparian states—are likely to agree to any internationalisation of the area. I think there is scope for greater co-operation. Indeed, recently there has been greater co-operation in non-contentious matters.

The Chairman: Professor, can I make one request? When we talked briefly before the session started, you said that it would take a long time to go through the questions that we wrote down originally about how the provisions of UNCLOS apply to a body of water such as

the Arctic Ocean and so on. Rather than go through that mechanically, would it be possible to give us a written answer, which we could use for the report?

Professor Maurice Mendelson QC: Certainly.

The Chairman: That would be a useful approach to that side of it.

Q52 Lord Hannay of Chiswick: I have a follow-up question. Does the fact that one aspect of the Law of the Sea Convention was reopened in the 1990s, on deep-sea mining, but none of the rest of it was rather reinforce your view of the likelihood of anyone contesting the continental shelf arrangements?

Professor Maurice Mendelson QC: A further little tweak was made in 1995, when there was a straddling stocks agreement, but essentially it does not undermine your point. My copy of the Law of the Sea Convention is inscribed by a very distinguished practitioner and subsequently judge in the International Court of Justice with the words, “*Tantae molis erat*”. The full quotation is “*Tantae molis erat urbem Romanam condere*”, or “What a great effort was required to found the city of Rome”. This Convention required such huge effort that I think states are very unlikely to want to or to be able to muster sufficient unanimity or agreement to amend it in these respects.

Viscount Hanworth: I also have a brief question. I believe that the limits on the continental shelf are defined by a submarine contour at 2,500 metres. I am seeking confirmation of that. If that is the case, clearly it is a huge depth—I can measure that from ground level up into the sky and it is very far in my experience. Is it a reasonable contour or could it be much closer?

Professor Maurice Mendelson QC: There are in fact alternative criteria for measuring the outer limit, but it is essentially the choice of the coastal state which one they want to deploy.

I am sorry, but I do not quite follow the point about the height, because this is height under water.

Viscount Hanworth: I was intuiting what sort of depth it would be, simply because I know what it equates to above sea level.

The Chairman: Shall we let Professor Churchill come in?

Professor Robin Churchill: Thank you, Lord Chairman. I think that what has just been said is an oversimplification of the position under the convention. The outer limit is fixed either by reference to points that are 60 miles from the foot of the continental slope or points where the thickness of the sedimentary rocks is at least 1% of the distance from that point to the foot of the continental slope. Each of those criteria is subject to two overall limitations. One is the 2,500 metre isobath; the other is 350 miles from the baselines. There is a further provision, which is particularly relevant to the Arctic, especially the Russian Arctic, which is that you can go beyond 350 miles on submarine ridges. So I think the position is perhaps a little more complicated than was indicated previously.

The Chairman: I think we are going to move on to Lord Moynihan at this point.

Professor Maurice Mendelson QC: Could I just add a further small correction? The outer limit can be 100 nautical miles from the 2,500 metre isobath. It is not the isobath itself.

The Chairman: Professor Steinberg, I think you wanted to make a point.

Professor Philip Steinberg: No, I think we have got that pretty well settled.

Q53 Lord Moynihan: You have very kindly indicated that you are going to respond in writing to the practical details of the legal framework, which covered the totality of my original question.

The Chairman: I was really referring to question 1.

Lord Moynihan: With my gratitude for that and the time that it has given me, let me ask a related question about how disputes are settled and the role of the International Tribunal for the Law of the Sea. If you could cover that in writing, that would be very helpful. For the benefit of our work, what is really interesting is how this *lex maritima* will apply to the Arctic and where you see tensions developing between the application of that body of law to the fact that in the Arctic the focus tends to be on the work of the Arctic states in resolving issues. With Russia becoming increasingly prominent in exercising its authority in the rights of passage of foreign vessels through Russian waters, do you anticipate that your workload is going to increase significantly, particularly Professor Mendelson's, in that context? In other words, where are the likely tensions going to develop in the context of this body of law with regard to fishing, navigation and shipping? How collaborative is Russia being within this framework?

Professor Robin Churchill: Thank you. That is a very big question. I will take the issues one by one. Before we leave the seabed completely, I should say that there is a likelihood of possible dispute about the outer limit of the continental shelf. Only the Norwegian outer limit of the continental shelf has been established in accordance with the convention—that is to say, the Commission on the Limits of the Continental Shelf making recommendations and then those recommendations being accepted by Norway. All the other Arctic states—to leave aside the United States for the moment—are in the process of doing that. Russia, for example, made a submission in 2001 and was told that the Commission on the Limits of the Continental Shelf did not agree with its view of its outer limit of the continental shelf. The commission asked the Russians to go away and make a resubmission. Thirteen years later, they have still not done that. There are rumours that the Russians are going to do it, but one can imagine that there is a potential point of tension there, especially if the Russians and the

commission do not agree where the outer limit of the Russian shelf is. It is still unknown what will happen with Canada and Greenland, because those submissions are still in the process of being considered.

There is also the position with the United States, which cannot make a submission because it is not a party to the convention. If it establishes the outer limit of the continental shelf beyond 200 miles unilaterally, there is the question of how far that may be accepted by other Arctic states and, indeed, by the generality of states.

As for fishing, within 200 miles that would be regulated by coastal states, but if in several decades the central Arctic becomes ice-free and open to fish—and, indeed, if there are fish there—there is still no regime beyond the general obligations of the Law of the Sea Convention to co-operate. The general view is that some sort of regime ought to be developed fairly quickly in a precautionary way to prevent the same kind of destruction of high-seas fisheries as has happened elsewhere. I think that Professor Steinberg will comment on the navigation issues.

Professor Philip Steinberg: Sure. Before getting into navigation, on the continental shelf delimitation there are two potential areas of contestation—perhaps that is a little too strong—or disagreement down the way. The first is the Commission on the Limits of the Continental Shelf determining geophysically where the limits should be, which, as was just mentioned, as been done only with Norway in the Arctic. Then, of course, if the limits of the shelf are found to be overlapping between two different countries, that in turn has to be negotiated, just as it does with other maritime waters and boundaries. So there are two potential areas there, although, returning to the previous question, there is the question of how much this really matters. How much economic activity is really going to take place on the seabed in these extreme depths and extreme distances from land? Right now, even in

more temperate, more accessible waters, no economic activity is taking place beyond the outer continental shelf, so certainly the Arctic would not seem to be a primary candidate for that kind of very high-risk activity.

Secondly, although it comes back to the first question and the complexities of the formula for defining the limits of the continental shelf, I want to point out as the representative from Durham University, which created the map that I see you all have in front of you—I did not create it; I came after they made the map, which is just a disclaimer—that the lines that you see on the map are the furthest hypothetical extent of where the lines might be drawn. What you see there is a mix of the 350 nautical mile limit and the 2,500 metre plus 100 nautical mile limit. Those are all the potential outer limits, but that in turn is dependent on determining that the continental shelf geophysically goes out that far. Those data, except in the case of Norway, have not yet been certified or made public, so I want to make it clear that what we see on that map is the potential, which very likely will not be realised when all the geological data comes in.

On the other challenges, to return to that question, the navigational challenges are posed not only by the melting of ice but by the persistence of ice. Right now—this is coming out a lot, particularly as Canada has tried to make its claims for the North-West Passage being internal waters—there are various references to the Arctic not being normal water because of its partially frozen character. Where does that change things? Once you take the specific climate of the Arctic away, in a lot of ways, as came out in the previous session, the Arctic is much like any other maritime region and can be governed in such ways. The climate, though, provides real challenges for navigation and leads to the different livelihoods of the people who live there, which partly comes out in their permanent participation in the Arctic Council. These issues will come out more when we talk about Article 234.

Q54 The Chairman: I owe an apology to Lord Moynihan. I meant to quote the first question rather than the second, so I apologise to him for that. In fact, it would be useful if we could agree with our clerk afterwards who might give us formal evidence just going through the mechanics of how the law of the sea works and the disputes procedure.

Perhaps I could press you on one issue. When we read a number of articles about the tribunal, we find that it seems to take an awfully long time to come to a decision and perhaps has a queue that is equal to those of other international courts. Is it respected? Does it have the capacity to deal with these disputes or does this need to be fixed by the United Nations?

Professor Robin Churchill: Perhaps I might respond to that. Under the convention, where a dispute cannot be settled by agreed means by the parties to the dispute, either party to the dispute can refer it to binding legal settlement. Then there is a choice of means: the International Court of Justice, the International Tribunal for the Law of the Sea, and arbitration. States can make a choice of means. As it happens, only about a quarter of the parties to the convention have made any choice at all and less than a quarter have chosen the tribunal. Only where the choice of the parties to a dispute coincides—in other words, where both parties to the dispute have chosen the tribunal—will the tribunal hear the case. Statistically there is a very small chance of the tribunal hearing cases. In fact, it has dealt with only half a dozen disputes so far for that very reason. Most disputes go to arbitration.

The Chairman: So are they sitting around twiddling their thumbs—in Hamburg, is it?

Professor Robin Churchill: Yes, in Hamburg. Not entirely, because the tribunal has two other kinds of jurisdiction. One is what is known as the prompt release of vessel jurisdiction where, if a fishing or other vessel is arrested for an alleged pollution offence and the coastal nation does not release the ship on payment of a bond, the tribunal can order its release. The other

is that the tribunal can prescribe provisional measures to ensure that the rights of the parties are not injured pending a case that is being heard by an arbitral tribunal. That has happened in relation to one case involving the Arctic, which is the current case between the Netherlands and Russia over the arrest of Greenpeace's ship the "Arctic Sunrise". You may remember that last September Greenpeace protesters tried to board a Russian drilling platform in the Sea of Kara. The ship was arrested, as were the protestors. The Netherlands has brought a case against Russia, which is currently going to arbitration. Although the Russians have said that they do not intend to play any part in that arbitration, nevertheless the arbitration is going ahead without the Russians. The Tribunal for the Law of the Sea ordered provisional measures in that case, which were that the ship should be released upon payment of a bond and that the crew and protestors should be released. That did in fact happen, as part of a general amnesty by President Putin, along with the release of members of Pussy Riot and others. Whether he was influenced by the tribunal, whether it was world opinion or whether this just got swept up in the general amnesty, I do not know.

The Chairman: I think that if we knew the mind of President Putin, we might all be better off.

Lord Hannay of Chiswick: Could I just follow up that thought a little? Is it correct to say that a lot of weight is put in academic terms on the existence of this tribunal in Hamburg and its ability correctly, if empowered, to deal with disputes? All the anecdotal evidence that we have tends to point to a great unwillingness of countries to allow themselves to be submitted to the tribunal in Hamburg. For example, the Chinese reaction to the Philippines' attempt to get their territorial waters dispute dealt with in that way is probably pretty instructive. Are we right in thinking that UNCLOS is capable, through the machinery that it

has, of dealing with these problems in the Arctic, or is it a purely theoretical capability that may well be frustrated?

Professor Maurice Mendelson QC: My Lord Chairman, if I may say so, I think that this whole issue of the Tribunal for the Law of the Sea is a red herring. The Tribunal has decided only one maritime delimitation case. If you want to know how continental shelves, exclusive economic zones and so on get delimited between opposite or adjacent states, it is, first, by the International Court of Justice in The Hague, which has resolved quite a significant number of such disputes, secondly, by arbitral tribunals and, above all, by agreement between the states themselves. With great respect to that august tribunal, I personally would almost exclude it from the discussion. There are other means by which delimitation can take place.

I also stress, because I think that it is relevant here, that the machinery for delimiting between opposite and adjacent states is different from the machinery for deciding the outer limit of the continental margin beyond 200 nautical miles. That is the Commission on the Limits of the Continental Shelf. It is a body of scientists, not of lawyers—there is not a single lawyer on it. This is a further point that I wanted to underline: the Commission presents its own problems because it is extremely slow at determining these submissions. In 2011, it said that it thought that it would take until 2032 to resolve the most recent of those submissions. Since then, there have been something like 17 further submissions, so we are going way out to the 2050s, probably, not to mention the ones that have not yet been put in or the Russian one that has not been resubmitted.

The Chairman: That is very useful. Lord Hannay, do you want to continue with the United States?

Q55 Lord Hannay of Chiswick: There has already been some reference to the signature but non-ratification by the United States of the Law of the Sea Convention. Could you comment on how that affects the situation in the Arctic? Does the US lose by not ratifying this and bringing it into effect, although of course it treats it as customary international law? What impact does that have in the overall question of governance of the Arctic?

Professor Maurice Mendelson QC: The United States, as the Committee may know, initially refused to ratify the convention because it was dissatisfied with some of the provisions relating to the deep seabed, as well as probably on ideological grounds. However, when—due to a very large extent, I might say, to the efforts of British Foreign Office official, David Anderson, now retired—a new so-called agreement relating to the implementation of Part XI of the deep seabed mining provisions, perhaps more appropriately called the “agreement on the emasculation of Part XI of the Law of the Sea Convention”, was concluded, those obstacles were removed. Indeed, there was a joint statement, I think in 2012, from a number of eminent former Secretaries of State or National Security Secretaries such as Condoleezza Rice and Henry Kissinger saying that the obstacles had been removed so there was no reason not to ratify, while the current President and his predecessors have said that it is in the interests of the United States to ratify. The problem is in the Senate. It is clear that some of the opposition is ill informed. People think that it is going to stop them fishing in the lakes in their own states. The United States says that it regards the convention as embodying customary international law, which is a body of law developed through state practice that binds all states. But, as has already been indicated, the main disadvantage for the US is that it cannot get a determination from the Commission on the Limits of the Continental Shelf that would be binding on all other member states regarding its outer limits. It does not have the legal standing to apply to that commission. That is one problem. Another problem is that

the US has other interests in other parts of the world—for example, it is resisting some of China’s maritime claims in the South China Sea that the US regards as excessive—but it rather limits its ability in political terms to object to those claims and to rely on the Law of the Sea Convention if it is not itself a party.

Professor Philip Steinberg: Going back to the original question of whether the United States loses or gains anything, it really does not gain anything from not being a party to the law of the sea, certainly with regard to the recognition of the outer limits of the continental shelf margins, on which the US is going through the motions of gathering all the scientific data. I have asked people in the US Government, “What will you do with these data once you get them?”, and I have never really gotten a good answer. It does not appear as though ratification or accession is anywhere on the horizon. Even at the time when that was probably most likely, about eight years or so ago when there was a Democratic supermajority in the Senate of 60, it still was not the two-thirds necessary for ratification. I had a number of discussions with key Senate Foreign Relations Committee people at that time, and effectively they said, “We’re not going to bring it to a vote because we think we’ll lose, and that would just create a whole political cascade”. In terms of the damage caused to UNCLOS as a whole, though, it is arguable that the US consistently saying that it is customary law strengthens it.

The Chairman: What about legal security and investment?

Professor Philip Steinberg: That is of course where it hurts the US.

The Chairman: If ever economic development is going to take place it is going to be very expensive; you have to raise capital and there needs to be legal certainty.

Professor Philip Steinberg: Right. That will hurt the US because it will discourage investment in its exclusive economic zone or outer continental shelf; it does not have the same level of

certainty under UNCLOS and has not been delimited in the same way in which other countries' shelves are. That, of course, is a point that is being raised by the mining and petrochemical industries in the US—much the same dynamic that led to the original seabed regime in 1982 where various interested parties, both nation states and private enterprise, were willing to give up a degree of rights in return for security for their investments.

Q56 The Chairman: We move on to a question that came up regarding Article 234. I knew of UNCLOS but had never heard of Article 234 until it came up in one of our seminars. It appears to be important because ice is disappearing and it gives special rights. I do not want to get into this in huge detail, but it seems to be one of the dynamics over the next decade, or beyond that, and I would like very briefly to understand the implications.

Professor Philip Steinberg: The first thing to specify is exactly what the rights are that Article 234 grants. They are relatively limited. Basically, coastal states can exercise additional environmental protections in their exclusive economic zones, if those zones—this is a direct quote—have “the presence of ice ... for most of the year”. Of course there is a lot of ambiguity in that. It also has to be non-prejudicial to transit. Obviously all those issues themselves can be contested. What does “non-prejudicial to transit” mean? What does “environmental protection” mean, since all kinds of things are done under the name of environmental protection? But there is also the question: what is “the presence of ice”? The presence of ice is in no way identified. Clearly it does not have to be 100% ice cover, because if we are thinking about the environmental hazards caused by ice to navigation, floating ice sheets are often much more dangerous than a solid chunk of ice that you are taking an icebreaker through and you know what you are going through. Canada, in interpreting this, has chosen the threshold of 10%, so if on a satellite image 10% of the pixels show iciness, they say, “These are ice-covered waters”, but that is an entirely arbitrary decision. “Most of

the year” is of course easier to define; presumably it is more than six months. Depending on how one defines “ice-covered”, which presumably means a substantial presence of ice, for the foreseeable future in the Arctic there is likely still to be a substantial amount of ice for most of the year—that is, for more than half the year. Certainly the weakening of ice cover means that that cover will not be multiyear ice since it freezes and melts each year, so it is much easier to take an icebreaker through and the like. That is likely to encourage navigation but is unlikely to mean that Article 234 will not be relevant. However, the other half of that is the fact that Article 234 does not give that many protections anyway; there is not that much that states can do under the article. It gets conflated with the whole issue of the North-West Passage and Canada drawing straight baselines and declaring internal waters, but you do not need iciness to do that. In fact, Article 234 becomes irrelevant if they are Canada’s internal waters.

Q57 Lord Soley: I would like to understand a little better if I could the effectiveness of UNCLOS in settling potential disputes in the area of the maritime map, if you like. I found your map very helpful, although I was slightly puzzled. Whenever I see shaded areas I get worried, because they are usually areas of potential conflict. There is a bit between Denmark and Russia where we know there have been disputes over the Pole, but Canada comes into that as well. So, first, how effective is UNCLOS at settling potential disputes? Secondly, a very simple question: how settled would you describe the maritime boundaries of the Arctic at the moment? Are they settled or seriously unsettled?

Professor Philip Steinberg: On the first question about how UNCLOS is leading to the settlement or potentially facilitating it, seabed mapping is a very good example, in that you have contesting states actually mapping together. The US and Canada, which you can see on the map have a contested area between them—that is an actual maritime boundary, not

just the limit of the shelf—are working together in mapping the border regions. Effectively, the US is doing the bathymetric data and Canada is gathering the seismic geological data, because if the US were to make a filing, both states would need both sets of data to make their filings. Likewise, on the other side, Canada and Denmark, which also have disputed regions, are sharing data and working together on the same research ships and the like. So in that sense the provisions for beginning to define the rules are being worked through on the ground.

How settled are the boundaries? The states are all making their filings to the Commission on the Limits of the Continental Shelf. In many ways, we have to wait until the commission makes all the Arctic determinations, which presumably will be in quite a while, and then see how much overlap there is. Here I am echoing something from the previous session: given that these are often actually relatively low-stakes conflicts in terms of economic good, national pride of all sorts is involved in several of the countries, but very often we see conflicts that reflect conflicts in other regions, so they should be relatively easy to resolve since there is a mechanism for resolving them.

Professor Robin Churchill: If I may, I will just add one or two points on your second question about the boundaries. If we are talking about boundaries between neighbouring states, Norway and Russia have agreed the whole of the maritime boundary from the land terminus to the outer limit of the continental shelf. There are agreed boundaries between Greenland and the Norwegian island of Jan Mayen, between Iceland and Jan Mayen, and between Iceland and Greenland. There is a boundary between Greenland and Svalbard, which belongs to Norway, covering the area within 200 miles, but I understand that they have agreed in principle on the boundaries either side of that. There is an area of outer continental shelf—that is, beyond 200 miles—in the Norwegian Sea called the Banana Hole because of its

shape, and there is a three-party agreement between Iceland, Denmark and Norway where they have agreed provisional boundaries, subject to possible revision in light of the recommendations from the Commission on the Limits of the Continental Shelf. The main boundary that is not agreed is between Canada and the United States in the Beaufort Sea, which has been a long-standing bone of contention and as far as I know is not close to being resolved, is it?

Professor Philip Steinberg: No, but it is not being worked on either. It is not causing friction. It is not an area where anyone wants to be drilling for oil.

The Chairman: There are a couple of supplementaries. Lord Soley wants to ask a quick one, then Viscount Hanworth, then Baroness Symons. I want to make sure that we leave time to talk about the countries in the area as well.

Q58 Lord Soley: To be clear, all three of you are saying UNCLOS is basically fit for purpose in what it is doing to limit potential dispute. You think it is about right. Is that correct?

Professor Maurice Mendelson QC: The provisions of the Law of the Sea Convention about delimitation of the continental shelf and exclusive economic zones between opposite or adjacent states are extraordinarily vague. They basically say simply that these areas shall be delimited in accordance with international law in order to achieve an equitable solution. Happily, however, the case law of the International Court of Justice and arbitral tribunals has given a number of pointers, so that it is not a totally subjective test, although it would be equally true to say that these are not mathematical criteria.

Q59 Viscount Hanworth: It seems to have been a difficult and lengthy process to gather information on the topography of the continental shelf and the seabed. I just wonder whether this is indeed the case. I had imagined that all the information had been gathered

many years ago as an adjunct of submarine warfare, so the question arises: is there a genuine difficulty in determining the topography, or is it mainly a sort of diplomatic blind?

Professor Philip Steinberg: From my understanding it is genuinely a long, painstaking, difficult and very expensive process. I do not know whether either of the other witnesses can speak about the military data. It could be that some of them are not being made public even within their countries. Ultimately, the deliberations by the Commission on the Limits of the Continental Shelf are not public and the submissions are not public until they are agreed upon, but there are some provisions in which potentially classified data could work their way into the open. In a lot of cases, though, I believe that even those data probably do not exist and are being gathered now.

Professor Robin Churchill: A lot of the problem is the interpretation of the data. Whether something is part of the natural prolongation of the state or whether there is some discontinuity is one of the major issues. It is not totally straightforward.

Viscount Hanworth: Those are the ridges that you were talking about.

Professor Robin Churchill: Yes.

Q60 Baroness Symons of Vernham Dean: I might be being very dense about all this, but I could not help noting the point that you made earlier about the Tribunal for the Law of the Sea being a bit of a red herring, that it had not actually decided very much—one tribunal case, I think—and that the rest were dealt with at the International Court of Justice in The Hague. The US is not a party to UNCLOS, while Russia has gone away for 13 years to think about resubmitting a case. With regard to the business about seabed mapping, the US and Canada could have done that anyway without UNCLOS surrounding them. I suppose I am saying that it seems to be a huge edifice for not really deciding very much.

Professor Maurice Mendelson QC: If you are talking about the edifice of the International Court of Justice, arbitral tribunals, and to a limited extent the International Tribunal for the Law of the Sea, first you have to bear in mind that the existence of these means of settlement are themselves important, because they create not binding precedents but guidelines and so on and so forth, which can be used in negotiating boundaries. Secondly, quite often states like to have an international tribunal to blame if the line gets put in the wrong place. When the United Kingdom delimited its boundary with Norway and huge fields in the North Sea turned out to be on the Norwegian side, Ministers and civil servants got quite a bit of egg on their faces. So when it came to the English Channel and the Western Approaches, it was thought a good idea—no doubt there were other reasons—to go to a special Court of Arbitration and say, “You do it”, because if there turned out to be an oilfield on the other chap’s side, you could say, “It wasn’t our fault. We didn’t agree to this. It was this tribunal”. So there are good reasons why the third-party settlement system exists, although obviously if states can agree between themselves, that is best.

Baroness Symons of Vernham Dean: But when the biggest and most powerful economy in the world is not a party to it, and another very important state has decided that it will take its bat and ball away for 13 years, does that not undermine the value of such an enormous edifice of law?

Professor Maurice Mendelson QC: The outer-limit issue is one thing—the reference to Russia is about the outer limit and so on and the United States being precluded—but the system of boundaries and quite extensive areas of continental shelf up to 200 miles is all a going concern. It works, and it does not exist only for the benefit of the Arctic; it applies throughout the world and is quite useful for solving disputes between states. Even the

United States of America went to the International Court of Justice with Canada over the Gulf of Maine dispute, for example. It is a tool that states find useful.

Professor Philip Steinberg: I would just add that it also provides a language, as it were, for each state arguing for what it wants, and in that sense it delimits the debate and provides potential grounds for a compromise. So whether it is China saying that the South China Sea is its historic waters—and one can debate whether this huge swathe of water very far from its boundaries is potentially its internal waters—or various straight baseline directives that are likewise challenged, in particular by the US, as illegitimate in terms of preserving freedom of navigation and for drawing straight baselines, the argument is being made back to UNCLOS and back to the standards that are being set up. That then provides a means for challenging whether that is, say, a legitimate declaration of historic waters, a straight baseline or the like, and out of that challenge comes some form of compromise. Whether it is formally worked out in arbitration, in the International Tribunal for the Law of the Sea, in the ICJ or diplomatically, it gets a dialogue going.

The Chairman: Professor Churchill, did you want to add a sentence on this?

Professor Robin Churchill: I will make just two or three very small points very quickly. The importance of the Law of the Sea Convention is that it is really in a sense a framework, particularly for jurisdiction and the way the sea is divided up into zones. We take that for granted now, but that was not the position when the convention was being negotiated; there were huge disagreements about how far offshore states had jurisdiction over fisheries, the protection of the environment and so on.

The point about dispute settlement is that historically in international law most disputes have never been settled by an international court; they have nearly always been settled by negotiations or other diplomatic means. International courts and tribunals are really a back-

up, and sometimes the fact that states know that there is a court there induces them to come to an agreement, which they might not have done otherwise, because they do not want to be taken before a court.

The Chairman: Baroness Symons, do you want to continue with a very short supplementary on this?

Q61 Baroness Symons of Vernham Dean: That is a nice little segue into China, really. Obviously there is growing international interest in the Arctic, whether it is because of climate change and the ice melt or whether it is because of the increasing interest in the commercial potential of the region. What is the attitude to UNCLOS of states that have been developing those interests in the region? I touched a moment or two ago on the United States and Russia in particular, but what about China? Is China engaged at all? Do we know anything about how it views UNCLOS?

The Chairman: I assume that all three of you probably have some interest in this question, so perhaps I could go along the row for a concise answer to the question. One thing that also comes out of this is that China has unofficially been taken to court over the Philippines. Some of the literature that we have read has suggested that China might say, "Well, forget UNCLOS. We'll move out".

Professor Robin Churchill: There is some Chinese practice generally that is not in accordance with the convention, but you can say that about a lot of states, so the Chinese are not unique in that. The dispute with the Philippines has gone to arbitration; it has not gone to the International Tribunal for the Law of the Sea because neither the Philippines nor China had chosen that as their preferred means, and China has said that it will not take part in the arbitration proceedings, which is very unfortunate. Actually, it could probably have put up a good case that the tribunal did not have jurisdiction, but it has chosen not to do that.

Professor Maurice Mendelson QC: I think it is important to stress that international adjudication or arbitration requires consent, either ad hoc or in advance. China clearly has some interests in Arctic waters, notably fishing. I am not sure that it will be that interested in the North-West Passage or the northern passage because there are other alternatives, one of them being—I declare an interest here—the Grand Nicaragua Canal project, which will enable goods to be moved through rather more temperate waters from one side of the world's oceans to the other.

Professor Philip Steinberg: A very quick answer is that I am not aware of any state that has challenged UNCLOS applying to the Arctic. There has certainly been some creative interpretation in some cases in suggesting that because of certain issues in the Arctic—and of course Article 234 already suggests this kind of thinking—there might be specific provisions, or certain ways of applying, UNCLOS, but I do not believe that the overall framework of the UNCLOS zonation of the ocean that you see reflected on the map and the like has been challenged by anyone.

Lord Soley: Very briefly, you have left me feeling—I think this is right, but maybe it is not—that UNCLOS, together with other methods, is really a series of processes that are allowing us to resolve the problems without difficulty, and that it is not a set body as such but is like the British constitution: it does not exist but it works. Is that a fair summary of where you are at?

Professor Robin Churchill: I think there is a great deal in that, yes. As I said before, it is a framework treaty, and a lot of the details get filled in by other agreements elsewhere, whether bilateral, regional and so on. As I think was mentioned in the previous session, there are now two regional agreements in the Arctic. It is typical of seas generally that more

detail on fisheries, environmental issues and navigational issues get supplied by agreements outside UNCLOS but in accordance with its general principles.

Q62 The Chairman: Very quickly, there is just one area that I want to clarify. We have mentioned the North-West Passage a number of times. On the map, the baseline, which is the fundamental thing from which everything is measured, is drawn by Canada across huge areas of sea from one island to another. Is that interpretation unique worldwide, is it derided generally, is Canada really chancing its arm, or is it credible?

Professor Maurice Mendelson QC: It is being very creative but it is not the only state to have been creative in this way. Others resist it. There are some criteria. I would not like to express an opinion on whether it has been too creative, but certainly it is not unprecedented for extensive claims of that sort to be made. It also backs it up with an historic waters claim, although that is also contested.

Professor Philip Steinberg: In fact the two are necessary, because if straight baselines are not around historic waters, you do not have all the internal waters rights that come with historic internal waters. I believe that the United States has protested—how many hundreds of straight baseline claims around the world?

Professor Robin Churchill: Seventy-odd.

Professor Philip Steinberg: Is it just 70-odd? I thought it was over a hundred, but it is quite a long list.

The Chairman: Professor Churchill, Professor Mendelson and Professor Steinberg, thank you very much indeed for giving us your evidence today. We look forward to your written evidence on the factual detail of some of these areas of the world. At this point I end the public session, and I must ask members of the public to leave so that we can tie up our business here.