



Symposium on Problems on the Outer Continental Shelf
International Tribunal for the Law of the Sea (ITLOS), Hamburg
25 September 2005

Abstract

Article 76 UNCLOS – Implementation Problems from the Technical Perspective

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The opinions expressed are those of the author and do not necessarily represent those of the UK Hydrographic Office or any other Government Department.

The paper will discuss the technical problems experienced by coastal States when considering and preparing claims to an extended continental shelf in accordance with Article 76 and Annex II to the UN Convention on the Law of the Sea (UNCLOS).

The initial requirement to ascertain whether the State has the possibility of claiming a extended continental shelf and if so the securing of the political will to make provision for the technical process required to bring it to fruition will be discussed followed by the technical pitfalls that await an unwary State in the desk top study procedure.

The paper will then discuss the data gathering phase and the subsequent processing and assessment of the data and the possible technical difficulties that may be encountered.

Finally the paper will discuss the vexed question of claims on ridges, focusing on what a ridge actually is within the wording of Article 76. The differences, if any between an “oceanic” ridge and a “submarine” ridge and possible claim solutions that may be considered by the claiming State. The lack of guidance from the Commission on the Limits of the Continental Shelf (CLCS) concerning this issue will also be highlighted.



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The International Seabed Authority and Article 82 of the UN Convention on the Law of the Sea

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Since the entry into force in 1994 of the UN Convention on the Law of the Sea, a great deal of attention has been focused on the implementation of article 76 of the Convention, which establishes the juridical definition of the continental shelf. In comparison, very little attention has been given to article 82, which provides that payments or contributions in kind are to be made by coastal States in respect of the exploitation of the nonliving resources of the continental shelf beyond 200 nautical miles. Those payments or contributions in kind are to be distributed by the International Seabed Authority to developing States, “particularly the least developed and the land-locked amongst them.” The Convention provides little guidance as to how article 82 might be implemented in practice. The basic idea behind the provision is quite straightforward. But the text suffers from a lack of precision and raises numerous questions of interpretation. In this presentation I hope to illustrate some of the difficult issues of principle and of practice that article 82 raises. There is a strong possibility that the first source of revenue for the international community from the resources of the deep seabed is likely to be the payments or contributions made through article 82. For that reason, it is important that the difficulties associated with article 82 are resolved sooner rather than later in order to avoid potential future disputes over the interpretation and application of the article as well as to provide certainty to industry anxious to promote activities on the continental shelf.



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CONTINENTAL SHELF SUBMISSIONS: THE RECORD TO DATE

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At this time (August 2005), four coastal States have completed their continental shelf submissions for transmittal to the Commission on the Limits of the Continental Shelf (CLCS): Russia (2001), Brazil (2004), Australia (2004), and Ireland (2005).

Of those four submissions, only Russia's has been subjected to a full review by the CLCS, which issued outer limit recommendations in 2002. Russia has responded to those recommendations by initiating a new round of field work in the Arctic, to obtain additional data that is intended to offset CLCS concerns.

The Brazilian and Australian submissions are currently undergoing review by subcommittees of the CLCS, while the establishment of a subcommittee to examine the Irish submission is imminent. The task of each subcommittee is to prepare draft recommendations for review by the Commission at large.



In general, the detailed contents of continental shelf submissions are not made public, nor are the deliberations of the CLCS concerning those submissions. In certain cases some of that information can be gleaned through unofficial channels, but for the most part interested parties must refer to the website of the UN's Division of Ocean Affairs and the Law of the Sea (DOALOS), which posts material of a more limited nature. Most of the information in this presentation is derived from that official source.

Russia's submission specified extended continental shelf areas in four distinct regions: two in the Arctic, two in the northwest Pacific. Five States responded with communications that commented on several aspects of the submission: the difficulty of assessing the proposed outer limits given the information at hand; the geological and tectonic interpretations that underpinned the proposed outer limits in the central Arctic; and problems arising from overlapping jurisdictions or questionable baselines. In its recommendations, the CLCS expressed no reservations over proposed continental shelf extensions in the Bering and Barents Seas. In the Sea of Okhotsk, the CLCS recommended a partial submission, to be accompanied by efforts to resolve jurisdictional issues with Japan. In the central Arctic Ocean, the CLCS recommended a revised submission.

Brazil's submission made a case for extended continental shelves off the country's northern margin and off the southern half of its eastern margin. This attracted only one response from another State, which was dismissed by the CLCS on the grounds that it did not originate from a State that was currently involved in a boundary dispute with Brazil.

Australia's submission identified continental shelf extensions in ten locations off the Australian mainland, off isolated islands, and off the Australian Antarctic Territory. It was also accompanied by a request that the CLCS not consider the Antarctic extension. This submission attracted eight responses from other States, most of them rejecting the possibility of establishing an extended continental shelf off Antarctica.

The Irish submission was a partial one, in that it proposed an extended continental shelf in the Porcupine Abyssal Plain only. Boundaries with neighbouring states north and south of this shelf extension remain under discussion, resulting in a deferral of Article 76 work in those regions. Responses from other States, if any, have yet to be posted.



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Article 82 United Nations Convention on the Law of the Sea (UNCLOS) – Revenue Sharing

The Mining Industry's perspective (15:00-15:30)

The paper will provide an overview of Article 82 UNCLOS and look at the philosophy and intention behind Article 82's revenue sharing provisions in relation to resources exploited on the outer continental shelf beyond 200 nautical miles. A brief examination will follow of whether the realities faced at the time of drafting are the same as those faced today. The provisions of Article 82 have yet to be successfully implemented and it seems likely that more work will be required in refining certain aspects of the Article before they can be. Any such refinements are likely to be of significant interest to the mining industry as the theory behind the Article gives way to its practical implementation.

The term mining industry covers a range of interests from oil and gas to mineral and metal deposits. Clearly, the economies of scale will be different for each of these interests as will the margins within which they operate. This is likely to have quite an individual effect on the desirability of Article 82 revenue sharing within the industry.

Most likely as a consequence of Article 82 not yet having an effect, in addition to the relative costliness of deep water exploration, the mining industry has not widely publicised its view on the implications for the industry of Article 82. Notwithstanding this, there are concerns and factors that will be relevant to the industry as a whole. A look at some of the specific incentives and disincentives that Article 82 brings for the mining industry, in addition to the role of technology in the revenue sharing equation are some of the further issues which will be addressed.

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Article 76 of the LOS Convention on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective

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Introduction

The 1982 United Nations Convention on the Law of the Sea¹ is not the first multilateral convention to address the definition of the continental shelf and its legal regime. Both these issues were addressed in the 1958 Convention on the Continental Shelf.² The legal regime applicable to the continental shelf contained in the 1958 Convention found its way into the LOS Convention without any major amendments. Major differences between the two Conventions do exist in respect of the provisions on the entitlement to the continental shelf and the establishment of its outer limits.³ The Convention on the Continental Shelf basically left the question of the outer limits of the continental shelf undecided. Article 76 of the LOS Convention establishes substantive rules and procedural mechanisms that aim to guarantee stable continental shelf limits, which will not be subject to further change in the future.

The establishment of the outer limits of the continental shelf beyond 200 nautical miles under article 76 is a complex process, which requires a coastal State to dedicate significant

¹ Adopted on 10 December 1982; 1833 UNTS 396 (hereinafter LOS Convention).

² Adopted on 29 April 1958; 499 UNTS 311.

³ Two other major differences between the two conventional regimes are the provisions on payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles contained in article 82 of the Convention and the provision on the delimitation of the continental shelf between neighboring States (article 83), which differs significantly from article 6 of the Convention on the Continental Shelf. Article 82 was closely related to the outcome on the negotiations on entitlement to and the outer limits of the continental shelf at the Third United Nations Conference on the Law of the Sea (UNCLOS III).



resources. To understand the reasons for the inclusion of article 76 in the LOS Convention this paper first looks at the origins of article 76. After the discussion of the origins of article 76, a number of provisions of article 76 are considered to illustrate some of the questions which exist in connection with its application and interpretation. In this connection, the paper does not look in detail at those provisions which probably will be discussed in the other presentations at the Symposium, such as the practice and procedures of the Commission or the article 76 provisions on the foot of the slope and ridges. As will be apparent from the discussion and the references in the paper I am indebted to my colleagues of the International Law Association's Committee on Legal Issues of the Outer Continental Shelf, of which I am one of the co-rapporteurs. However, sole responsibility for the views expressed here is mine alone and any view expressed here does not necessarily reflect the views of the Committee.

The Origins of Article 76

In order to appreciate why article 76 is such a complex provision some understanding of its origins is indispensable. In 1973, the General Assembly of the United Nations convened the Third United Nations Conference on the Law of the Sea, which was charged to adopt a convention dealing with all matters relating to the law of the sea.⁴ One of the tasks that confronted the Conference was the precise definition of the area of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction, presently known as the Area.⁵ This became a matter of urgency at the end of the 1960s, at which time it was considered that mining of the mineral resources of the deep seabed might become commercially possible in the near future. Under the then existing legal regime, the benefits of this activity would mainly have accrued to the developed States.⁶ However, developing States were successful in gaining acceptance for the idea that the area of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction and its resources were the common heritage of mankind.⁷

⁴ General Assembly Resolution 3067 (XXVIII), para. 3.

⁵ See *ibid.*; *Official Records of the General Assembly, Twenty-eighth Session Supplement No. 21 (A/8721)*, para. 23; and *Official Records of the General Assembly, Twenty-sixth Session Supplement No. 21 (A/8421)*, para. 22.

⁶ See e.g. the overview in R.R. Churchill and A.V. Lowe *The Law of the Sea* 3rd (Manchester University Press, Manchester: 1999), pp. 224-226.

⁷ See further *ibid.*, pp. 227-228.



What the need to define the limits of this area really implied, as is apparent from the task entrusted to the Third Conference, was the precise definition of the limits of national jurisdiction.⁸ This approach is reflected in the LOS Convention, which defines the Area as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.⁹

Although the existing law at the beginning of the Third Conference did not provide a clear definition of the limits of national jurisdiction, the existing law did have a profound impact on work of the Third Conference. If the outer limit of all coastal State maritime zones at that time had been based on distance from the coast, it would have stood to reason that the Third Conference would also have adopted the distance criterion to separate the area beyond national jurisdiction from areas under national jurisdiction.¹⁰ Of course, this was not the case.

The 1958 Convention on the Continental Shelf defines the continental shelf by reference to the 200 meters isobath and the so-called exploitability criterion.¹¹ The extreme position that the second criterion could have led to a division of all of the ocean floor has only been advanced by a limited number of authors.¹² As article 1 indicates, the exploitability criterion is only applicable to the seabed and the subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea. A review of materials on article 1 makes it clear that these submarine areas extend beyond the geophysical continental shelf. On the other hand, it is doubtful that the definition of the legal continental shelf contained in article 1 included all of the continental margin.¹³

⁸ See the references in footnote 5.

⁹ LOS Convention, article 1(1)(1).

¹⁰ Especially at early stages of the Conference there was support for the establishment of the limits between both areas at a distance of 200 nautical miles.

¹¹ Article 1 of the Convention on the Continental Shelf provides:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

¹² See e.g. the references in S. Oda *International Control of Sea Resources* (A.W. Sythoff, Leiden: 1963), pp. 166-168 and in I. Brownlie “Recommendations on the Limits of the Continental Shelf and Related Matters: A Commentary” in L.M. Alexander (ed.) *National Policy Recommendations; Proceedings of the Fourth Annual Conference of the Law of the Sea Institute, June 23-June 26, 1969* (University of Rhode Island, Kingston: 1970) pp. 133-158 at p. 138, note 20.

¹³ For a detailed analysis of article 1 of the Convention on the Continental Shelf see D.N. Hutchinson “The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law” 56 (1985) *British Yearbook of International Law* pp. 111-184 and B.H. Oxman “The Preparation of Article 1 of the Convention on the Continental Shelf” 3 (1972) *Journal of Maritime Law and Commerce* pp. 245-305, 445-472 and 683-723. Hutchinson concludes that article 1 of the Convention by the beginning of the 1970s became part of general customary law (Hutchinson, note 13 at p. 183) and that in the first half of the 1980s no rule of customary law had



The basis of continental shelf entitlement was discussed by the International Court of Justice (ICJ) in its Judgment in the *North Sea Continental Shelf* cases of 1969. Among other things, the Court made the well-known observation that the rights of the coastal State “in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land”.¹⁴

This observation of the Court became one of the planks of the broad margin States¹⁵ to argue that they had existing sovereign rights to the edge of the continental margin. For instance, in a statement of 8 May 1975, the Canadian Secretary of State for External Affairs referred to three sources to support the existence of this right:

- the 1958 Convention on the Continental Shelf, to which Canada was a party, recognized coastal State rights to the point of exploitability;
- the decision of the Court in the *North Sea Continental Shelf* cases, which repeatedly referred to the continental shelf as the submerged prolongation of the land territory of the coastal State; and
- a long standing State practice including the extensive issuance of oil and gas permits on the Canadian continental margin and similar action by other coastal States.¹⁶

This statement warrants a number of comments. The exploitability criterion is applicable to the seabed and the subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea. The exploitability criterion does not give a State rights beyond this area. As was noted above, it is highly unlikely that the continental shelf thus defined includes all of the continental margin. Secondly, the judgment of the International Court of Justice in the

developed validating *erga omnes* claims over the continental margin beyond 200 nautical miles to the furthest edge of the continental rise (*ibid.*, p. 184). Oxman expresses doubt as to whether the continental shelf concept contained in the Convention on the Continental Shelf covered all of the continental slope (Oxman, note 13 at pp. 719-720).

¹⁴ [1969] *Reports of Judgments, Advisory Opinions and Orders; The International Court of Justice* (ICJ Reports), p. 22, para. 19.

¹⁵ The group consisted of thirteen states: Argentina, Australia, Brazil, Canada, Iceland, India, Ireland, Madagascar, New Zealand, Norway, Sri Lanka, the United Kingdom and Venezuela (M.H. Nordquist (general ed.) *United Nations Convention on the Law of the Sea, 1982: A Commentary* (6 Volumes) (Martinus Nijhoff Publishers: 1982-2003) (hereinafter *Virginia Commentary*), Vol. I, p. 76, which also provides some further background information on the group). This was a much smaller group than the group of States which have a continental shelf beyond 200 nautical miles under article 76 of the LOS Convention. This latter group has been estimated to comprise around 40 States or more.

¹⁶ The statement is reproduced in *Third United Nations Conference on the Law of the Sea; Official Records* Vol. XIII, p. 102, para. 14.



North Sea Continental Shelf cases neither seems to give support to the basic position of the broad margin States at the Third Conference. The Court only dealt with this issue in passing and its judgment seems to equate the geophysical continental shelf with the legal continental shelf.¹⁷ Finally, State practice could not have provided a basis to claim exclusive rights in the seabed beyond the legally defined outer limit of the continental shelf. The 1958 Convention on the High Seas, which reflected customary law on that point before the development of the common heritage principle as applicable to the deep seabed provides that “no State may validly purport to subject any part of [the high seas] to its sovereignty”.¹⁸ In 1970, a similar provision was included in the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction adopted through General Assembly Resolution 2749.¹⁹

In sum, it is unlikely that before the negotiations on what was to become article 76 started the legal continental shelf extended to the outer edge of the continental margin, as was submitted by broad margin States. At the same time, the legal continental shelf did extend well beyond the 200 nautical mile limit in certain parts of the world. The 200 nautical mile limit was advocated as the limit between areas under national jurisdiction and the international seabed area by other States. Most of the Third Conference, the negotiators were concerned with finding a compromise to reconcile these positions,²⁰ which at the same time would result in an outer limit of the continental shelf which could be clearly defined. Part of the outcome of

¹⁷ The Court in the *North Sea Continental Shelf* cases was concerned with the delimitation of the continental shelf between neighboring States in a shallow sea and not with the establishment of the outer limits of the continental shelf. The latter matter was not argued by the Parties before the Court. The notion of natural prolongation was introduced by the Court in connection with its rejection of the argument of Denmark and the Netherlands that continental shelf entitlement was based on proximity, which implied a direct link between entitlement and delimitation between neighboring States by application of equidistance (see [1969] ICJ Reports, p. 30-31, paras 41-43). Two observations by the Court suggest that it did not consider that the notion of natural prolongation resulted in the extension of coastal State sovereign rights up to the outer edge of the continental margin. One is a reference to “localities where, *physically*, the continental shelf begins to merge with the ocean depths (*ibid.*, p. 30, para. 41; emphasis provided); the other is a reference to the fact that continental shelf areas seaward of the Norwegian Trough could not in a physical sense be considered to be adjacent to or a natural prolongation of the Norwegian coast (*ibid.*, p. 32, para. 45. Both the Norwegian Trough and the areas seaward of it are situated well inside the outer edge of the continental margin.

¹⁸ Convention on the High Seas (adopted on 29 April 1958; 450 UNTS 82), article 2.

¹⁹ Paragraph 2 of the Declaration provides:

The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof (General Assembly Resolution 2749 (XXV), para. 2; see also *ibid.*, para. 3).

The resolution was adopted by 108 to 0, with fourteen abstentions.

²⁰ See e.g. M.W. Lodge “The International Seabed Authority - Its Future Directions” in M.H. Nordquist, J. Norton Moore and T.H. Heidar (eds) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff Publishers, Leiden: 2004), pp. 403-409 at p. 403.



these negotiations is contained in article 76 of the Convention, which to a very considerable extent accommodates the views of the broad margin States. An important concession on the part of the broad margin States is contained in article 82 of the Convention, which provides that the coastal States shall make payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles to the international community.

Article 76 itself also does not accommodate the views of the broad margin States in their entirety. The general definition of the continental shelf contained in article 76(1) refers to the natural prolongation of the land territory to the outer edge of the continental margin. However, the detailed provisions on the establishment of the outer limits of the continental shelf may result in an outer limit landward of the outer edge of the continental margin. The inclusion of the procedure involving the Commission on the Limits of the Continental Shelf (CLCS) in article 76 is a concession by the broad margin States. This procedure sets the establishment of the outer limits of the continental shelf apart from the procedure for the establishment of the outer limits of other maritime zones. In the latter case other States can only object to the outer limits of maritime zones once they have been established by the coastal State. The procedure involving the CLCS introduces a number of checks and balances into the initial process of establishing the outer limits by the coastal State.²¹

How is one to judge the outcome of the negotiations on the definition and outer limits of the continental shelf at the Third Conference? The law as it existed at the time of the beginning of the Third Conference, together with the interests involved in this issue, almost certainly precluded an outcome under which the outer limit of zones under national jurisdiction would have been defined by a single criterion of general application. The possibility of a further compromise solution along the lines of the Convention of the Continental Shelf was excluded because of the mandate of the Third Conference, *i.e.* to arrive at a precise definition of the Area. The resulting compromise is a complex provision which seeks to accommodate all the interests involved. Part of this compromise is relatively straightforward. However, other elements could only be included at the cost of employing ambiguous language. It will be on those involved in the application of article 76 to deal with such ambiguities.²²

²¹ See further *infra*.

²² Of course, article 76 is not the only provision of the Convention displaying this characteristic. The most telling example in this respect is probably the delimitation provision contained in articles 74(1) and 83(1) of the Convention.



The Content of Article 76

Article 76 consists of 10 paragraphs, which address a number of distinct but interrelated issues. Before turning to questions in relation to specific provisions, some words about the structure of article 76 are in place. The general definition of the legal continental shelf is contained in paragraph one. This definition offers two alternative outer limits: at 200 nautical miles from the baselines or to the outer edge of the continental margin where it extends beyond that distance. The continental margin in turn is defined in article 76(3). It consists of the geophysical shelf, the slope and the rise. Article 76(2), directly following on the general definition of the continental shelf, qualifies this definition. It indicates that the continental shelf shall not extend beyond the outer limit lines specified in paragraphs 4 to 6 of article 76. This provision is relevant for the case in which a coastal State has not yet established the outer limits of the continental shelf under article 76(8).

Paragraphs 4 to 6 of article 76 provide specific formula to establish the outer edge of the continental margin where it extends beyond 200 nautical miles. Paragraph 4 contains two formula to define the outer edge of the continental margin. Both formula take as their starting point the foot of the continental slope. From the foot of the slope outer limit points can be defined by sediment thickness (also referred to as the Irish or Gardiner formula) or a distance of 60 nautical miles (the distance criterion is also known as the Hedberg formula). Paragraphs 5 and 6 contain two restraint formula. If points defined under paragraph 4 fall seaward of both restraint lines they cannot be employed. The two restraints are defined by distance from the baseline (350 nautical miles) and distance from the 2,500 meter isobath (100 nautical miles from that isobath). Paragraph 7 lays down criteria for the coastal State to delineate the outer limit of its continental shelf. Paragraph 7 provides that fixed points selected by application of paragraphs 4 to 6 cannot be more than 60 nautical miles apart. Such points are to be defined by coordinates of latitude and longitude.

Paragraph 8 of article 76 defines the role of the CLCS in the process of establishing the outer limits by the coastal State. As paragraph 8 indicates, the Commission can only issue recommendations. The significance of the recommendations is indicated by the provision that outer limits established by the coastal State on the basis of the recommendations of the Commission shall be “final and binding”. No such provision is included in any of the other provision of the Convention on outer limits of maritime zones. A further measure of the



significance of the Commission's recommendations is contained in article 8 of Annex II to the Convention, which Annex sets out the terms of reference of the Commission. Article 8 provides that in case of disagreement with the recommendation of the Commission the coastal State shall make a new or revised submissions. Thus, article 8 imposes a legal obligation on the coastal State to follow a specific course of action if it does not agree with recommendations.

Article 76(9) requires the coastal State to deposit relevant information on the outer limits of the continental shelf with the Secretary-General of the United Nations. Finally, paragraph 76(10) addresses the relationship between the establishment of outer limits of the continental shelf and its delimitation between neighboring States. The provisions of article 76 are without prejudice to such delimitation. In view of the many areas of overlapping continental shelf this provision will be relevant to a large number of submissions to the CLCS.

Having set out the content of article 76 in general terms, I would like to address some specific questions raised by its provisions in somewhat more detail.

A first question concerns the relationship between continental shelf entitlement and the establishment of the shelf's outer limits. As was noted earlier, the establishment of the outer limits beyond 200 nautical miles is a complex process requiring considerable time. Does the absence of such outer limits have any consequences for the entitlement to or the exercise of sovereign rights over continental shelf areas beyond the 200 nautical mile limit?

Entitlement to the continental shelf, as to any other coastal State maritime zone, is based on the title of the coastal State over the land.²³ In the case of the continental shelf, the basis of entitlement is distance from the coast or natural prolongation of the land territory to the outer edge of the continental margin.²⁴ The entitlement of a State exists by the sole fact that this basis of entitlement is present and does not require the establishment of outer limit lines.²⁵ This latter point is confirmed by article 77(3) of the Convention, which provides that the rights

²³ As was observed by the ICJ in the *Anglo-Norwegian Fisheries* case in respect of the territorial sea “[i]t is the land which confers upon the coastal State a right to the waters off its coasts” ([1949] ICJ Reports, at 133).

²⁴ LOS Convention See also *Continental shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985; [1985] ICJ Reports 13 at 30, para. 27 and 34-35, para. 34.

²⁵ See also *Continental shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, where the ICJ distinguishes between the definition of the continental shelf given in paragraph 1 of article 76 and paragraphs 2 to 9 of the article “which deal with the details of the outer limits of the continental shelf” ([1982] ICJ Reports 18 at 48, para. 47).



of the coastal State over the continental shelf do not depend on occupation or any express proclamation.

The fact that article 76 contains both a general definition of the continental shelf and rules to define specific outer limits also confirms that entitlement to the continental shelf is not dependent on the establishment of outer limits.²⁶ At the same time, the application of articles 76(4) to (7) may place a part of the continental margin beyond the outer limits of the continental shelf. This will for instance be the case if the continental margin extends beyond both restraints contained in article 76(5) (350 nautical miles from the baselines or 100 nautical miles beyond the 2500 meters isobath). This circumstance indicates that establishing the exact extent of the continental shelf of a coastal State does depend on the establishment of the outer limit lines of the continental shelf by the coastal State.

The above raises a further question. Does the absence of outer limits of the continental shelf established in accordance with article 76 give the coastal State the right to exercise rights over parts of the continental margin that fall beyond the potential outer limit lines under article 76? It is submitted that this is not the case. This follows from article 76(2), which provides that the continental shelf shall not extend beyond the limits provided for in paragraphs 4 to 6 of article 76.²⁷ The absence of a reference to paragraphs 7 to 9 of article 76 indicates that paragraph 76(2) is also operative and binding on a coastal State before it has implemented paragraphs 7 to 9.

At the same time article 76(2) of itself does not provide certainty over the exact extent of the continental shelf. Paragraphs 4 to 6 of article 76 are difficult to interpret and apply and only the coastal State is competent to establish the outer limit lines of its outer continental shelf in accordance with these provisions. In some areas there may be a choice between different outer limit lines applying paragraphs 4 to 6. Only the coastal State is competent to make such a choice. In conclusion, the absence of outer limit lines of the continental shelf beyond 200 nautical miles is bound to raise doubts over the exact extent of the continental shelf, with

²⁶ See also A. De Marffy Mantuano “La Fixation des Dernières Limites Maritimes: La Rôle de la Commission des Limites du Plateau Continental” in V. Coussirat-Coustère *et al.* *La Mer et son Droit; Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Éditions A. Pedone, Paris: 2003) pp. 399-419 at p. 407; T.L. McDorman “The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Regime” (1995) 10 *International Journal of Marine and Coastal Law* pp. 165-188 at p. 167; *Report of the Eleventh Meeting of States Parties* (Doc. SPLOS/73 of 14 June 2001) at p. 12, para. 75.

²⁷ As such areas would be part of the Area, there also exists an obligation not to exercise sovereignty or sovereign rights over them or their resources under article 137(1) of the Convention.



the attendant difficulties for the coastal State to exercise its sovereign rights over such areas.²⁸

The relationship between entitlement to and the establishment of outer limits of the continental shelf is also relevant in considering the implications of not meeting the time limit for making a submission to the Commission. A coastal State is required to make a submission “as soon as possible but in any case within 10 years of the entry into force of this Convention for that State”.²⁹ This is an obligation resting on States parties,³⁰ which they have to fulfill in good faith.³¹ If a State intends to establish the outer limit of its continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention, it will have to comply with the 10-year time limit.³²

Article 4 of Annex II does not spell out what consequences attach to non-compliance with the 10-year limit mentioned in it. Two options can be envisaged. A coastal State might no longer be entitled to make a submission to the CLCS once the time limit has expired. Alternatively, the CLCS might not be under an obligation to entertain a submission that is made after the 10-year time limit has expired. The above discussion on the relation between entitlement and establishment of the outer limits of the continental shelf indicates that non-compliance with the time limit contained in article 4 of Annex II does not have any consequences for the entitlement of the coastal State over its continental shelf. Non-compliance could leave

²⁸ See also *Issues with respect to Article 4 of Annex II to the United Nations Convention on the Law of the Sea* (Doc. SPLOS/64 of 1 May 2001) at p. 12, paras 44-47.

²⁹ LOS Convention, Annex II, article 4. The requirement that a coastal State has to make a submission within 10 years of the entry into force of the LOS Convention for that State has been considered by the Meeting of States parties to the Convention. Since 1994, there had been a gradual realization of the problems faced by especially developing States in complying with this requirement (see e.g. *Decision regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea* (Doc. SPLOS/72 of 29 May 2001), preamble). To address this issue, the Meeting took a decision on 29 May 2001, which provides that for States parties for which the Convention entered into force before 13 May 1999, the 10-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on that date (*ibid.*, para. (a)). It was furthermore decided to keep the general ability of States to fulfill the requirements of article 4 of Annex II under review (*ibid.*, para. (b)).

³⁰ See also L.D.M. Nelson “The Continental Shelf: Interplay of Law and Science” in N. Ando et al. (eds) *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, The Hague: 2002) pp. 1235-1253 at pp. 1248-1249; R.W. Smith and G. Taft “Legal Aspects of the Continental Shelf” in P.J. Cook and C.M. Carleton (eds) *Continental Shelf Limits; The Scientific and Legal Interface* (Oxford University Press, Oxford: 2000) pp. 17-24 at pp. 21-22.

³¹ LOS Convention, article 300. Article 300 reflects the fundamental rule of *pacta sunt servanda*.

³² Paragraph 3 of Annex I to the Rules of Procedure of the CLCS (the current version of the Rules of Procedure is contained in Doc. CLCS/40 of 2 July 2004) implies that in certain instances the 10-year time limit becomes inoperative.



considerable doubt about the exact extent of the continental shelf in certain specific cases. This concerns for instance those cases in which the application of article 76(6) on submarine ridge is involved.

As was said before, outer limit lines established by the coastal State on the basis of the recommendations of the CLCS are final and binding. This provision raises two questions. First, to what extent is the coastal State allowed to diverge from the recommendations of the CLCS. Secondly, do outer limits established on the basis of recommendations become immediately final and binding on other States.

The drafting history of the Convention sheds some light on the meaning of the term 'on the basis of'. During the Ninth Session of UNCLOS III, the words 'on the basis of' replaced the words 'taking into account'. This change, proposed by the Chairman of the Second Committee of the Conference, was supported by geographically disadvantaged States, whereas a number of broad margin States opposed it or expressed their reservations.³³ This circumstance indicates that the change was considered to limit the freedom of action of the coastal State. However, in itself, this change to the text of article 76(8) tells us little about the exact implications of the term 'on the basis of'.³⁴

A consideration of the possible content of recommendations of the CLCS can assist in establishing the meaning of the term 'on the basis of'. Two cases would seem to be most relevant.³⁵ First, the Commission may find that the information submitted by the coastal State is not sufficient to prove that the outer limit lines are in accordance with the relevant provisions of article 76. The CLCS has indicated that in such a case it will recommend the

³³ See J. Pulvenis "The Continental Shelf Definition and Rules Applicable to Resources" in R. Dupuy and D. Vignes (eds) *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht: 1991) pp. 315-382 at p. 360, note 87.

³⁴ One comment on the provision still including the term 'taking into account' suggests an explanation for replacing it by the term 'on the basis' of :

That sentence cannot conceivably mean what it seems to say, namely, that the coastal state can establish final limits binding on the rest of the world simply by "taking into account", but possibly in significant respects rejecting the Commission's recommendations (B.H. Oxman "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)" (1980) 74 *American Journal of International Law* pp. 1-47 at p. 22).

³⁵ The recommendations of the Commission may also endorse the outer limit lines submitted by the coastal State. In this case, the coastal State can be expected to establish the outer limits of its continental shelf as originally defined in its submission. There will be no doubt that in this case the outer limits of the continental shelf have been established on the basis of the recommendations of the Commission.



coastal State to provide it with additional information.³⁶ If the coastal State would then still proceed to establish the outer limits of its continental shelf, it can in principle not be considered that this has been done on the basis of the recommendations of the CLCS.³⁷

The second case would concern that in which the CLCS finds that the information submitted by the coastal State according to the Commission should result in different outer limit lines than those contained in the submission. The Commission has indicated that:

If the submission contains sufficient data and other material supporting outer limits of the continental shelf which would be different from those proposed in the submission, the recommendations shall contain the rationale on which the recommended outer limits are based.³⁸

Should the coastal State in this case adopt the outer limit lines contained in the recommendations to meet the 'on the basis' requirement? Probably not. Arguably, a coastal State may establish other outer limit lines, as long as these are in accordance with the reasons indicated by the CLCS for recommending outer limit lines different from those included in the submission.³⁹

The Commission has not been given the power to indicate if a coastal State has acted on the basis of its recommendations. Other States can raise this matter with a coastal State.⁴⁰

A consequence of establishing limits on the basis of the recommendations of the CLCS is that these limits become 'final and binding'. Before looking at the implications of this term its scope of application should be clarified. It does not apply in a case in which an outer limit would be located in an area where there also exists a continental shelf claim of another State. The operation of article 76(10) of the Convention, on which later more, precludes such

³⁶ See Rules of Procedure of the CLCS, Annex III, section 12.6.

³⁷ Such an approach would also seem to breach the obligation of the coastal State under article 8 of Annex II to the Convention to make a new or revised submission in case of disagreement with the recommendations of the Commission.

³⁸ Rules of Procedure of the CLCS, Annex III, section 12.5

³⁹ For instance, in a case where the recommendations indicate that the foot of the slope is situated at a different location to that submitted by the coastal State, the coastal State can establish any outer limit line it considers appropriate, as long as this respects the recommendation in respect of the foot of the slope. In this case, the coastal State could also choose to first submit further information to the Commission to explain its approach. The fact that the term 'on the basis of' allows the coastal State a certain flexibility is indicated by a number of authors (De Marffy Mantuano, note **Fehler! Textmarke nicht definiert.** at p. 417; Smith and Taft, note 30 at p. 20).

⁴⁰ For a discussion of the implications of not meeting the 'on the basis of' requirements see e.g. Report of the Committee Legal Issues of the Outer Continental Shelf, in International Law Association *Report of the Seventy-First Conference* (ILA, London: 2004) (hereinafter Berlin Report) pp. 773-819, at pp. 802-804.



an effect.⁴¹ The Rules of Procedure of the Commission and the way the Commission has dealt with the submission of the Russian Federation suggest that the Commission generally will refrain from indicating outer limit lines in the absence of an agreement on the delimitation of the continental shelf between the States concerned which has entered into force.⁴² This would seem to be a sensible approach.

But what about the meaning of the words 'final and binding' where the continental shelf borders on the Area? A key question is at what point in time the outer limit lines become final and binding on other States. Only the coastal State is competent to establish the outer limits of its continental shelf and the outer limit lines can only become final and binding on the coastal State after that State has established these outer limit lines. The coastal State is under an obligation to deposit charts and information describing the outer limits of its continental shelf with the Secretary-General of the United Nations.⁴³ This deposit signifies the completion of the process of establishment of the outer limits of the outer continental shelf by the coastal State under article 76. This would seem to be the point in time at which outer limit lines will become final and binding on the other States, unless they challenge them within a reasonable period of time. Such a challenge might argue that the outer limits of the continental shelf have not been established in accordance with the substantive and procedural requirements of article 76. Another State may hold that the coastal State has not acted on the basis of the recommendations of the Commission, or that the Commission, in making its recommendations, has not acted within the limits of its competence.⁴⁴ A successfully challenged outer limit line is not final and binding in the sense of article 76(8).⁴⁵

Article 76(9) requires the coastal State to deposit information on the outer limits of the continental shelf with the Secretary-General of the United Nations. Unlike other paragraphs of article 76 reference is to 'the outer limits' without specifying that it applies only to the outer limits beyond 200 nautical miles. Does this mean that article 76(9) also applies to the outer limit at 200 nautical miles, and that this limit also becomes permanently established? The ILA

⁴¹ Article 83 of the Convention is applicable to the delimitation of such continental shelf areas.

⁴² See *Oceans and Law of the Sea; Report of the Secretary General; Addendum* (Doc. A/57/57/Add.1 of 8 October 2002) at p. 9, para. 39.

⁴³ LOS Convention, article 76(9).

⁴⁴ See Berlin Report, note 40 at p. 806, note 116.

⁴⁵ The considerations set out here in respect of the term 'final and binding' apply in similar fashion to the term permanently contained in article 76(9) of the Convention (see further *ibid.*, pp. 806-807).



Committee on Legal Issues of the Outer Continental Shelf was divided on this question.⁴⁶ Instead of repeating the arguments considered by the Committee here, let me just point to one implication of the two different interpretations. If article 76(9) also applies to the 200 nautical mile limit it might protect especially small island developing States from one of the potential impacts of sea level rise, namely the loss of extensive areas of continental shelf. This indicates the huge impact different interpretations of the term ‘permanently’ in article 76(9) may have.

Finally, let me shortly refer to article 76(10) of the Convention, which provides that the provisions of article 76 are without prejudice to the question of delimitation of the continental shelf.⁴⁷ Inclusion of this clause is probably mostly explained by the fact that paragraphs 8 and 9 of article 76 indicate that outer limits of the continental shelf may become respectively “final and binding” and “permanent”. These provisions would seem to have the potential to create controversy in cases in which the outer limit of the continental shelf thus established extends into an area which is the subject of overlapping claims of two or more coastal States. As was noted above, most areas of continental shelf beyond 200 nautical miles involve more than one coastal State. This issue has been addressed by the CLCS in its Rules of Procedure. The essence of the procedure set up by the CLCS in Annex I to the Rules is that it will only consider submissions involving areas where more than one State has a continental shelf if all States concerned agree.⁴⁸ Thus, the Commission’s Rules of Procedure might seem to introduce new factors that impact on the making of a submission by a coastal State and in certain circumstances would seem to give other States control over whether the submission is considered at all. However, the Rules of Procedure should not be viewed in isolation from the relevant provisions of the LOS Convention, especially article 76(10). In the light of these provisions, other States should in principle not object to the consideration of a submission by a coastal State, which raises issues of delimitation of the continental shelf. As is indicated by article 76(10) the consideration of a submission and subsequent recommendations will not prejudice their rights. In general, State practice confirms this conclusion. The delimitation of

⁴⁶ See further *ibid.*, pp. 807-809.

⁴⁷ For a fuller discussion see *ibid.*, pp. 809-813 and C. Johnson and A.G. Oude Elferink *Submissions to the CLCS in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the LOS Convention* (Paper presented at SLS and BIICL Symposium on the Law of the Sea, London, 22 and 23 March 2005, to be published in the proceedings of the Symposium).

⁴⁸ Section 5 of Annex I to the Rules of Procedure of the Commission provides “the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute”.



maritime boundaries between States thus far has not led to objections to the consideration of a submission by the Commission.

Concluding Remarks

What does the future hold in store for article 76? Coastal States are preparing submissions and four States have lodged a submission with the CLCS. No better proof of the impact of article 76 is possible. At the same time, the difficulties involved in implementing article 76 are widely recognized. For one thing, developing States wishing to implement article 76 are faced with significant expenditures for a task which requires a high level of expert knowledge. These matters have been brought to the attention of the international community and certain steps have been taken to address them. However, these matters will require continued attention in the future.

The implementation of article 76 also shows that both the interpretation of its provisions and their application to the specific case may raise controversy. In this sense, article 76 is in no way unique. The relevant question is whether such controversy may seriously threaten the effective implementation of article 76. Although it is too early to give a final answer to this question a number of observations are possible. First, major controversy over the implementation of article 76 can be expected to arise in a limited number of instances. Secondly, the Convention provides a number of mechanisms to address such matters. The Rules of Procedure of the Commission, adopted in implementation of the Convention, contribute to both identifying and addressing potentially controversial issues in submissions.⁴⁹ In addition, if certain conditions are met, the dispute settlement mechanisms contained in Part XV of the Convention are available to States parties to deal with disputes concerning the interpretation or application of article 76. Moreover, in most areas there is no pressing need to come to a final and binding outer limit of the continental shelf. This suggests that in controversial cases one approach may be to let the matter rest after the initial submission to the CLCS has been made.⁵⁰ Also, article 76 does not exist as a separate

⁴⁹ This not only concerns Rule 46 and Annex I to the Rules of Procedure dealing with submissions on land and maritime disputes, but also, for instance, Rule 50 concerning the notification of the receipt of a submission and publication of the proposed outer limits of the continental shelf related to the submission to all members of the United Nations including States parties to the Convention.

⁵⁰ An example is provided by the Australian submission in respect of the Australian Antarctic Territory. The note from the Permanent Mission of Australia to the Secretary-General of the United Nations accompanying the



regime, or as part of a convention only dealing with the continental shelf, but is part of a convention dealing with all major law of the sea issues. This factor should not be underestimated in assessing the stability of article 76.

Article 76 did fulfill the mandate that had been given to the Third Conference, notwithstanding the complexity of the issue and the interests involved. Before the Third Conference started there was no certainty about the extent of the legal continental shelf. Article 76 provides a formula to arrive at precisely defined outer limits. However, as should be clear from the earlier discussion, it is no more than that. The exact extent of the continental shelf of a coastal State requires the application of this formula to the specific case.

Once article 76 will have been implemented by all the present States parties to the Convention, most of the outer limits of the continental shelf vis-à-vis the Area will be defined in precise terms. It would seem that this involves a process that is at least as daunting as the negotiation of article 76 itself.

lodgment of Australia's submission requests the CLCS "not to take any action for the time being" in relation to the information in the submission that "relates to continental shelf appurtenant to Antarctica". Six States (the United States, the Russian Federation, Japan, France, the Netherlands, Germany and India) submitted observations on the part of the submission dealing with the Antarctic region. All these comments welcomed the Australian request to the CLCS not to consider the information submitted in respect of the Antarctic region (the Australian note and those of the other States concerned are available at <www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm>). The Commission has not yet issued recommendations in respect of the Australian submission.