

Chapter 6

THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: THE RELATIONSHIP BETWEEN THE CLCS AND THIRD PARTY DISPUTE SETTLEMENT

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INTRODUCTION

The Commission on the Limits of the Continental Shelf (CLCS) has an essential role in the process of establishing the outer limits of the continental shelf beyond 200 nautical miles from the coast under the LOS Convention.¹ Article 76(8) of the Convention requires a State to submit information on these limits to the Commission. Following a submission, the CLCS shall make recommendations to the coastal State and the limits established by the coastal State on the basis of these recommendations shall be final and binding.²

Part XV of the LOS Convention is concerned with the settlement of disputes concerning the interpretation or application of the Convention. In principle, all such disputes can be submitted to compulsory third party dispute settlement entailing a binding decision at the request of one of the parties to the dispute. A number of limitations and optional exceptions applies to this general rule. No such limitation or exception is included in Part XV in respect of article 76 of the LOS Convention. However, the existence of the procedure for establishing the outer

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¹ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 396).

² Ibid, art 76(8).

limits of the continental shelf may limit the recourse of States to compulsory dispute settlement under Part XV.³ The LOS Convention does not provide that the recommendations of the CLCS are subject to judicial review. This raises the question of how a court or tribunal has to deal with the existence of the procedure involving the CLCS in a litigation between States parties to the LOS Convention concerning the interpretation or application of article 76 of the Convention.

An answer to this question first of all requires an analysis of the function and competence of the CLCS under the Convention. This is followed by a section which looks at how the CLCS can deal with issues in respect of the interpretation of article 76 in the consideration of submissions. Next, the relationship between the procedure involving the CLCS and dispute settlement mechanisms under Part XV of the Convention is considered. This includes the questions of what issues in respect of article 76 can be submitted to dispute settlement, who can be a party to proceedings, and how the case law has dealt with the relationship between the CLCS procedure and dispute settlement mechanisms. Some observations will also be made on the consequences of a judgment concerning the application or interpretation of article 76 for the procedure of establishing the outer limits of the continental shelf beyond 200 nautical miles. The chapter concludes with some final remarks.

THE FUNCTION OF THE CLCS UNDER ARTICLE 76 OF THE LOS CONVENTION

The role of the CLCS has recently been defined as being that of “a technical body in a political world”.⁴ The Commission can just as much be defined as a technical body in a legal world. Principal tasks of the CLCS are to consider the scientific and technical data and other material submitted by coastal States concerning the outer limits of the continental shelf beyond 200 nautical miles and to make recommendations to coastal States on matters related to the establishment of the outer limits of the continental shelf.⁵ Exactly what kind of scientific and technical data have to

³ This chapter does not look at disputes concerning the outer limit of the continental shelf at 200 nautical miles. In this case, the CLCS is not involved in the establishment of the outer limit and Part XV of the Convention is applicable unabridged.

⁴ T.L. McDorman “The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World” (2002) 17 *IJMCL* 301-324.

⁵ LOS Convention, art 76(8) and Annex II, art 3(1)(a).

be submitted to the CLCS follows from the provisions of article 76 of the LOS Convention. Although many of the terms included in this article are derived from science, their inclusion in a treaty instrument makes that their interpretation and application is governed by the rules of international law on treaty interpretation.

The impression that the consideration of submissions by the CLCS is basically a process involving scientific and technical questions, which does not require the consideration of legal issues, is suggested by the composition of the CLCS. It consists of 21 members who shall be experts in the fields of geology, geophysics or hydrography.⁶ In view of the complex legal issues that are involved in applying article 76 of the Convention, this approach has been questioned.⁷ However, as will be argued below, this “weakness” of the CLCS may rather be considered its strength, as it makes it possible to keep the consideration of legal and technical issues apart in dealing with the interpretation and application of article 76.

The type of information a coastal State is required to include in its submission to the CLCS indicates the technical focus of the work of the Commission. Article 76(8) of the LOS Convention requires the coastal State to submit *information on the limits* beyond 200 nautical miles from the baselines. Article 4 of Annex II to the Convention specifies that this concerns particulars of the outer limits of the continental shelf along with supporting scientific and technical data.⁸ The Scientific and Technical Guidelines⁹ adopted by the Commission indicate how the Commission itself views its role. The Guidelines provide that they aim to clarify the scope and depth of admissible scientific and technical evidence to be examined by the Commission during its consideration of submissions.¹⁰

⁶ LOS Convention, Annex II, art 2(1). For information on the current membership of the Commission see <www.un.org/Depts/los/clcs_new/commission_members.htm> (20 May 2003) and Doc. SPLOS/81 of 20 March 2002.

⁷ See eg E.D. Brown *Sea-Bed Energy and Minerals: The International Legal Regime; Volume 1 The Continental Shelf* (1992) 31; S. Karagiannis “Observations sur la Commission des Limites du Plateau Continental” (1994) 8 *Espaces et Ressources Maritimes* 163-194, at 167-168. On this issue 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* (2002) 1235-1253 at 1238.

⁸ See also LOS Convention, Annex II, art 3(1)(a) and art 3(2).

⁹ Doc. CLCS/11 of 13 May 1999; Doc. CLCS/11/Add.1 of 3 September 1999; Doc. CLCS/11/Corr.1 of 24 February 2000.

¹⁰ Scientific and Technical Guidelines, par 1.2; but see also the text at note 11.

The above indicates that the consideration of scientific and technical data, and not of legal matters, is at the heart of the process involving the coastal State and the CLCS. As is also apparent, especially from article 4 of Annex II to the Convention, the focus of this process is on the outer limit of the continental shelf. At the same time, this process is not solely concerned with the definition of the outer limit of the continental shelf in technically precise terms, that is, defining the outer limit in accordance with article 76(7) of the Convention. To accomplish such a technically precise definition it is necessary to take into account the other paragraphs of article 76, which indicate how the coastal State is to arrive at the definition of these outer limit lines. While one interpretation of a provision of article 76 may lead to the conclusion that specific data proves that the requirements of the article are met, under another interpretation the same data would not provide sufficient proof in this respect. This point is illustrated by the Scientific and Technical Guidelines of the Commission, which discuss the depth of admissible scientific and technical evidence in the context of the relevant provisions of article 76 of the LOS Convention. The Guidelines explain how the Commission understands the relevant provisions of article 76 and the consequences this may have for the data to be submitted by coastal States.¹¹

THE COMPETENCE OF THE CLCS

The CLCS is an organ that has been assigned specific functions under the LOS Convention, including the task of making an independent evaluation of the submissions of coastal States in respect of the outer limits of the continental shelf. The CLCS has to be presumed to have the competence that is required to carry out these functions.¹² The Convention indicates some limitations upon this

¹¹ See also the examples given in Nelson, note 7 at 1242-1247.

¹² In the *Reparation for Injuries* case the International Court of Justice (ICJ) observed in respect of the United Nations that

the rights and duties of an entity such as the Organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice. [...] Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties [*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949; [1949] *Reports of Judgments, Advisory Opinions and Orders; The International Court of Justice* (ICJ Reports) 174 at 180 and 182].

competence. The recommendations of the Commission shall be made “in accordance with article 76 of the Convention”.¹³ This wording indicates that the CLCS is bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State. In addition, the Commission is instructed that its actions shall not prejudice matters relating to the delimitation of boundaries between States.¹⁴

Otherwise, the Commission has to be assumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent that it is required to carry out the tasks assigned to it. This also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This includes the question of whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met for the specific outer limit lines proposed by a coastal State. At times, this may require the interpretation of specific provisions of article 76.¹⁵ The Commission will have to make its own assessment of whether the interpretation the coastal State has adopted in its submission is in accordance with article 76.

It has been suggested that the CLCS should refrain from making an independent assessment of provisions of the Convention. For instance, the United States has indicated that it is of the view that

while the Commission has no competence over questions of baselines from which the breadth of the territorial sea is measured, it should not be perceived as endorsing particular baselines. In any event, the Commission should ensure that it does not, on a global basis, endorse baselines, whether or not they may be inconsistent with international law. It might, for example, indicate in all recommendations regarding all submissions, that it is not taking a position regarding baselines.¹⁶

¹³ LOS Convention, Annex II, art 3(1)(a). In addition, the Commission, in making recommendations, shall also do this in accordance with the Statement of Understanding adopted on 29 August 1980 by the third United Nations Conference on the Law of the Sea (UNCLOS III) (*ibid.*).

¹⁴ LOS Convention, Annex II, art 9.

¹⁵ As a matter of fact, every submission will be based on an interpretation of art 76, but in some cases this may not include any controversial issues.

¹⁶ Attachment to a letter of the Permanent Representative of the United States to the Under-Secretary of for Legal Affairs, United Nations, 28 February 2002 (reproduced in Doc. CLCS.01.2001.LOS/USA of 18 March 2002).

The problem with such an approach would seem to be that there may be cases in which the location of the baseline is directly relevant to the outer limit of the continental shelf. For instance, when the 350 nautical miles constraint line is relevant for establishing the outer limit of the continental shelf, a recommendation accepting such an outer limit endorses the baseline from which it is established. Likewise, recommendations on the outer limits may also (be required to) endorse – either explicitly or implicitly – a specific interpretation of a provision of article 76.

ISSUES OF INTERPRETATION IN RELATION TO SUBMISSIONS

The Interaction between the Commission and the Submitting State

The procedure to consider a submission involving the coastal State and the CLCS leaves room for the exchange of views.¹⁷ In the consideration of a submission, the subcommission of the CLCS can request the coastal State to submit additional information.¹⁸ This might also concern questions related to the interpretation of article 76. The CLCS also has the possibility to seek advice before making its recommendations to a coastal State.¹⁹

When the CLCS makes recommendations in respect of a submission, the coastal State can either agree or disagree with them. When it agrees, it can establish the outer limits of its continental shelf on the basis of the recommendations. In cases where the coastal State disagrees with the recommendations of the CLCS, it shall make a new or revised submission within a reasonable time.²⁰ The rules generally applicable to submissions are also applicable to a new or revised submission. The CLCS will again make recommendations to the coastal State, which can either agree with these recommendations or still be in disagreement. In the latter case,

¹⁷ See LOS Convention, Annex II, art 5; Rules of Procedure of the Commission on the Limits of the Continental Shelf (Doc. CLCS/3/Rev.3 of 6 February 2001 and Doc. CLCS /3/Rev.3/ Corr.1 of 22 May 2001) (Rules of Procedure), rule 51. See also Nelson, note 7 at 1250; B.H. Oxman “The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)” (1981) 75 AJIL 211-256 at 231.

¹⁸ See Internal Procedure of the Subcommission of the Commission on the Limits of the Continental Shelf (Doc. CLCS/L.12 of 25 May 2001), pars 10 and 13.

¹⁹ LOS Convention, Annex II, art 3(2); Rules of Procedure, rule 56.

²⁰ LOS Convention, Annex II, art 8.

the coastal State can again avail itself of its right to make a new or revised submission. Although this process can in theory continue indefinitely, it is to be expected that possibly even after the first revised or new submission a stalemate between the coastal State and the CLCS will emerge.

Land and Maritime Disputes in relation to Submissions

The Rules of Procedure of the CLCS recognize that a submission by a coastal State may be complicated by the existence of land or maritime disputes with other States. The general rule in this respect is contained in rule 45 of the Rules of Procedure, which is elaborated upon in Annex I to the Rules of Procedure. This Annex is applicable to submissions in cases of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes. Annex I to the Rules of Procedure is applicable to “all land and maritime disputes” in relation to a submission. Annex I makes it possible to bring disputes concerning the interpretation or application of article 76 to the attention of the Commission. A dispute over the interpretation or application of article 76 of the LOS Convention has to be assumed to be included in this category, as such a dispute is relevant to the consideration of a submission.

When a dispute exists in relation to a submission, Annex I to the Rules of Procedure allows for a number of approaches, depending on the nature of the dispute and the views of the States involved on how to deal with the submission. Paragraph 5 of Annex I, which is applicable to all land and maritime disputes, provides that the Commission may examine one or more submissions in the area under dispute with the prior consent of all the States that are parties to the dispute. Otherwise, the Commission shall not examine and qualify any submission concerned. A State is allowed to make a partial submission, in order not to prejudice questions relating to the delimitation of boundaries between States.²¹

Annex I achieves that, if another State raises an issue of interpretation concerning article 76, the CLCS will only be required to rule on this issue in cases where all States concerned agree to the consideration of the submission. The settlement of such an issue of interpretation would be up to the States involved, including by recourse to the dispute settlement mechanisms at their disposal.

²¹ Rules of Procedure, Annex I, par 3. States may, by agreement, also make separate or joint submission in cases involving continental shelf boundaries (ibid, par 4).

Thus far one State, the Russian Federation, has made a submission on the outer limits of its continental shelf to the Commission. Five States, Canada, Denmark, Japan, Norway and the United States have indicated their position in respect of certain aspects of the submission.²² The observations of the United States included comments on the part of the submission dealing with the continental shelf in the Arctic Ocean. These comments discuss the characteristics of two ridges included in the outer limit lines, as defined in the Russian submission. Although the focus is on scientific and technical data, the United States also refers to articles 76(3) and 76(6) of the Convention.²³ The observations of Canada, Denmark and Norway were inter alia concerned with the possible impact of a consideration of the submission on the delimitation of the continental shelf. Japan also pointed to the existence of a territorial dispute in relation to the submission in the Sea of Okhotsk. The summary of the recommendations of the CLCS to the Russian Federation suggest that the Commission will be careful not to take a position on issues in disputes between States. For the Sea of Okhotsk, the Commission recommended a partial submission. In respect of the Arctic Ocean, the Russian Federation was recommended to make a revised submission based on the findings contained in the recommendations of the Commission. The summary of the recommendations does not shed any light on the question of whether the recommendations addressed the interpretation of provisions of the Convention.²⁴

²² Rule 49 of the Rules of Procedure of the CLCS provides that the Secretary-General of the United Nations shall notify all members of the United Nations, including States parties to the LOS Convention, of the receipt of a submission and shall make public the proposed outer limits of the continental shelf pursuant to the submission.

²³ Attachment to a letter of the Permanent Representative of the United States, note 16.

²⁴ A summary of the recommendations is given in *Oceans and Law of the Sea; Report of the Secretary General; Addendum (A/57/57/Add.1 of 8 October 2002)* pars 38-41. For a further discussion of this issue see A.G. Oude Elferink "Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes" (to be published in the proceedings of the Conference on Legal and Scientific Aspects of Continental Shelf Limits, Reykjavik, 25-27 June 2003, Center for Oceans Law and Policy and Law of the Sea Institute of Iceland).

THE SETTLEMENT OF DISPUTES CONCERNING THE CONTINENTAL SHELF UNDER PART XV OF THE LOS CONVENTION

Part XV of the LOS Convention provides that any dispute concerning the interpretation or application of the Convention can be submitted at the request of any party to the dispute to compulsory dispute settlement.²⁵ Section 3 of Part XV establishes certain limitations on and exceptions to the applicability of compulsory dispute settlement procedures. This includes disputes in respect of articles 15, 74 and 83 of the Convention,²⁶ but not article 76 on the outer limits of the continental shelf or, for that matter, any other provision of the Convention on the outer limits of maritime zones.²⁷

Some publications have expressed doubt about whether States have the right to challenge the outer continental shelf limits of another State within the framework of the procedures established in Part XV of the Convention.²⁸ The position of Karagiannis seems to be based mainly on the assumption that such a step would serve to protect the collective interest in the Area and that this kind of *actio popularis* has not been provided for by the Convention or any other instrument.²⁹ However, although the Area and its resources are the common heritage of mankind as a whole, on whose behalf the International Sea-Bed Authority (ISBA) shall act,³⁰ States individually have rights in the seabed and subsoil beyond the limits of national jurisdiction as specified in article 87 of the Convention. In addition, a State may consider that outer limit lines have not been established in accordance with the substantive or procedural requirements of article 76. This in itself would constitute a dispute as defined *infra* by the ICJ. Other authors hold that article 76 is in principle not excluded from the procedures of Part XV of the Convention.³¹

²⁵ LOS Convention, art 286. This provision only applies in cases where no settlement has been reached by recourse to section 1 of Part XV of the Convention (*ibid*).

²⁶ *Ibid*, art 298(1)(a).

²⁷ See also McDorman, note 4 at 318.

²⁸ See eg Karagiannis, note 7 at 189; *The Law of the Sea; Definition of the Continental Shelf: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1993) 29, par 87. For a discussion of this issue see also McDorman, note 4 at 317-318.

²⁹ Karagiannis, note 7 at 189.

³⁰ LOS Convention, art 137(2).

³¹ See eg D.H. Anderson *Maritime Boundaries and Limits: Some Basic Legal Principles* (paper presented at the ABLOS 2001 Conference “Accuracies and Uncertainties in Maritime Boundaries and Outer Limits”, Monaco 18 and 19 October 2001) 8; Brown, note 7 at 32.

Article 76 and Annex II limit the availability of compulsory dispute settlement mechanisms to some extent.³² For instance, a coastal State cannot have recourse to these mechanisms to resolve a difference between itself and the Commission concerning the recommendations that have been made in respect of its submission. The compulsory dispute settlement mechanisms of the LOS Convention are open to States Parties to the Convention.³³ These procedures are only open to other entities as specifically provided for in the Convention.³⁴ No provision is made for the CLCS in this respect.³⁵ The fact that in cases where the coastal State disagrees with the recommendations of the Commission it has to make a revised or new submission indicates that the Convention envisages that this is the method to resolve “disputes” between the CLCS and the submitting State.

In order to be able to submit a dispute to compulsory dispute settlement, a State has to be a party to the dispute. The question of what constitutes a dispute has been considered on a number of occasions by the ICJ. In the *East Timor* case the Court recalled that

in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties [...]. In order to establish the existence of a dispute, “It must be shown that the claim of one party is positively opposed by the other”.³⁶

³² The *travaux préparatoires* of article 76 do not indicate that the relationship between the CLCS procedure and dispute settlement mechanisms was addressed in any detail at UNCLOS III. One text prepared by the so-called Evensen group during UNCLOS III indicated that the scope of the powers of a Commission dealing with continental shelf limits, questions concerning a possible appeal procedure and the relationship with the proposed dispute settlement procedures under the Convention remained to be discussed (*The Continental Shelf*, 6 May 1975; reproduced in R. Platzöder *Third United Nations Conference on the Law of the Sea: Documents* Vol XI (1987) 501). This matter does not seem to have been considered further at the Conference (see Nelson, note 7 at 1239).

³³ LOS Convention, art 291(1).

³⁴ *Ibid*, art 291(2).

³⁵ See also Nelson, note 7 at 1239. There is nothing in the *travaux préparatoires* of the Convention to suggest that it was considered that the CLCS could become a party to the dispute settlement procedures under Part XV of the Convention.

³⁶ Case concerning East Timor (Portugal v Australia), Judgment of 30 June 1995; [1995] ICJ Reports 99-100, par 22.

This indicates that any State that disagrees with the coastal State on any of these points in respect of article 76 of the LOS Convention can in principle submit the resulting dispute to compulsory dispute settlement.

Case Law on Article 76 and Dispute Settlement Mechanisms

The *Canada/France Maritime Delimitation* case³⁷ suggests that the delimitation of the continental shelf beyond 200 nautical miles in certain instances cannot be addressed through compulsory dispute settlement. The Court of Arbitration declined to address the delimitation of the continental shelf beyond 200 nautical miles, indicating a number of reasons. First of all, the Court observed that this concerned a pronouncement not only between the parties, but between each of them and the international community, represented by organs entrusted with the administration and protection of the Area. The Court found that it was not competent to carry out a delimitation which affected the rights of a party which was not before it.³⁸ Secondly, it was noted that Canada and France differed over whether at the relevant location the geological and geomorphological data made article 76(4) of the LOS Convention applicable, and the fact that they had not provided the Court with sufficient information on this point.³⁹ Finally, the Court observed that it had been requested to draw a single maritime boundary for the exclusive economic zone and the continental shelf. In limiting the boundary it established to a distance of 200 nautical miles from the coast it strictly complied with this request.⁴⁰

The Arbitration Tribunal in an arbitration between the Canadian provinces of Newfoundland and Labrador and Nova Scotia did delimit offshore areas beyond 200 nautical miles from the coast.⁴¹ The Tribunal, referring to the decision in the *Canada/France Maritime Delimitation* case, found itself to be in quite a different

³⁷ *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* ((1992) 31 ILM 1148).

³⁸ *Ibid.*, 1172, pars 78-79.

³⁹ *Ibid.*, par 80.

⁴⁰ *Ibid.*, 1173, par 82.

⁴¹ *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada/Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act; Award of the Tribunal in the Second Phase*, 26 March 2002 (<<http://www.boundary-dispute.ca/>> (20 May 2003)).

position.⁴² First, it was a national tribunal so there was no question of any decision which might be opposable to any international processes for the determination of the outer edge of the Canadian continental shelf. Secondly, it was called upon only to specify the offshore areas of the two parties *inter se*, which the Tribunal could do by providing that their boundary shall not extend beyond the point of intersection with the outer limit of the continental margin as determined in accordance with international law.⁴³

Whether the approach of the Court in the *Canada/France Maritime Delimitation* case or the approach of the Tribunal in the case involving the Canadian provinces will be adopted by other courts in the future remains to be seen. The first reason indicated by the Court for refraining from pronouncing itself on the delimitation beyond 200 nautical miles concerned the interests of the international community. Whether there is a community interest that prevents the determination of a continental shelf boundary between States is doubtful. The ISBA, representing the collective interest in the Area and its resources, does not have a competence in respect of the definition of the extent of the continental shelf (or the Area).⁴⁴ This implies that it cannot be a party to proceedings dealing with this issue.⁴⁵ Neither does there exist an obligation for States to first determine the outer limits of their continental shelf under article 76 of the LOS Convention before they can proceed to a delimitation with neighboring States. In this respect, the second observation of the Tribunal in the arbitration between the Canadian provinces is pertinent.

Neither is the existence of a continental shelf boundary between neighboring States an impediment to the consideration of a submission by the CLCS. Such a boundary provides the outer limit lines of the continental shelf in the area concerned. A coastal State will have to submit information for such outer limit lines to the CLCS and it will be up to the Commission to establish whether these outer limits lines meet the requirements set out in article 76 of the Convention.

⁴² Ibid, par 2.31.

⁴³ Ibid.

⁴⁴ See eg L.D.M. Nelson "Claims to the Continental Shelf beyond the 200-Mile Limit" in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber Amicorum Günther Jaenicke – Zum 85 Geburtstag* (1998) 573-588 at 575.

⁴⁵ See also the dissenting opinion of Weil on this point in the *Canada/France Maritime Delimitation* case ((1992) 31 ILM 1215, par 42).

Interpretation of Article 76 of the LOS Convention through Compulsory Dispute Settlement

Two issues of interpretation or application of article 76 do not raise the question of the relationship between the procedure involving the CLCS and compulsory dispute settlement. The CLCS has no role in respect of the process of establishing the outer limits of the continental shelf once it has issued its recommendations and the coastal State has not made a new or revised submission. The Commission is not competent to indicate whether a coastal State has established the outer limits of the continental shelf *on the basis* of its recommendations.⁴⁶ Similarly, the CLCS has no role in establishing what is meant by the phrase “final and binding” in article 76(8). This provision does not indicate whether the outer limits established on the basis of the recommendations of the CLCS are final and binding for the coastal State, other States Parties or both. It has been argued that this provision implies that the limits “will become obligatory *erga omnes*”.⁴⁷ It can be appreciated that the term “will become” is ambiguous and suggests that the limits do not become binding *ipso facto* on their establishment.⁴⁸ This is an issue concerning the interpretation of the Convention falling within the scope of its Part XV.

A dispute between States concerning the outer limits of the continental shelf can arise either before or after the CLCS has made its recommendations to the coastal State. The LOS Convention does not require States to make a submission on the outer limits of the continental shelf immediately upon becoming a party to the Convention, implying that for a certain period of time the limits of the continental shelf will remain undefined.⁴⁹ Moreover, the Rules of the Procedure of the CLCS envisage a number of situations in which: a) a submission will not have been made for part of the outer limit of the continental shelf of a State; or b) the Commission is not in a position to consider (part of) a submission of a coastal

⁴⁶ Recently, the CLCS addressed the issue of how it could achieve that interested States could establish that the coastal State had in fact applied the recommendations of the Commission (see Doc. CLCS/36 of 2 May 2003, pars 9-10). This only involves providing more detailed information on the recommendations. It remains up to other States to establish if they consider the coastal State has established its outer limits on the basis of the recommendations.

⁴⁷ See *The Law of the Sea; Definition of the Continental Shelf*, note 28 at 29, par 86; see also L.D.M. Nelson, note 44, at 585.

⁴⁸ In this respect, the most important factor would seem to be whether other States will object to or acquiesce in the outer limit lines established by the coastal State.

⁴⁹ See LOS Convention, Annex II, art 4.

State.⁵⁰ In this case, a dispute may arise over activities carried out by the coastal State or another State in a specific area. The coastal State may hold that these activities take place on its continental shelf whereas another State may consider that they take place beyond the outer limit of the continental shelf. Such a dispute may be submitted to third party dispute settlement.

This type of dispute is primarily concerned with the question of entitlement to the continental shelf of the coastal State. However, a ruling on this question also has implications for the outer limits of the continental shelf. Where a tribunal establishes that an area beyond 200 nautical miles is included in the continental shelf of the coastal State, the outer limit by definition is situated beyond this area.

A tribunal may also be requested to pronounce on the interpretation or application of article 76 in instances where the CLCS has considered such matters in connection with a recommendation on a submission by a coastal State. As far as questions of interpretation of article 76 or other relevant provisions of the Convention are concerned, a court or tribunal is not bound by the interpretation provided by or implicit in the recommendations of the Commission. This follows from the fact that the Commission is bound to make recommendations in accordance with article 76 of the LOS Convention. In other words, article 76 forms a frame of reference which cannot be altered at the discretion of the Commission.⁵¹

On the other hand, the Convention charges the Commission specifically with evaluating the scientific and technical data submitted to it. The Commission must be assumed to have a discretionary power to carry out this task. Moreover, the

⁵⁰ See further *supra*.

⁵¹ A similar issue was considered in the *Constitution of the Maritime Safety Committee of the IMCO* case. In this advisory opinion, the ICJ was requested to interpret art 28 of the Constitution of the Intergovernmental Maritime Consultative Organization. The Court observed that

The Argument based on discretion would permit the Assembly, in use only of its discretion, to decide through its vote which nations have or do not have an important interest in maritime safety and to deny membership on the Committee to any State regardless of the size of its tonnage or any other qualification. The effect of such an interpretation would be to render superfluous the greater part of Article 28 (a) and to erect the discretion of the Assembly as the supreme rule for the constitution of the Maritime Safety Committee. This would in the opinion of the Court be incompatible with the principle underlying the Article.

The underlying principle of article 28(a) is that the largest ship-owning nations shall be in predominance on the Committee. No interpretation of the article which is not consonant with this principle is admissible ([1960] ICJ Reports 150, at 160-161).

Convention provides for a process involving the Commission and the submitting State to address any disagreement they may have concerning the evaluation made by the Commission.⁵²

The only issue that can be addressed by a court or tribunal in this case is whether the Commission has overstepped the bounds of its competence as defined in the Convention.⁵³ To establish whether this is the case, a test of reasonableness is to be applied. This test may lead to the conclusion that the Commission has acted within the limits of its competence or *ultra vires* or that its recommendations are invalid for other reasons.⁵⁴

CONSEQUENCES OF A JUDGMENT ON ISSUES RELATED TO ARTICLE 76

One issue of interpretation in respect of article 76 does not have consequences for the procedure involving the CLCS. A court or tribunal can find that a State has not established its limits “on the basis of” the recommendations of the Commission and it can indicate how this term has to be interpreted. Following a judgment, the coastal State will have to comply with it if it wishes to establish the outer limits of its continental shelf in accordance with article 76(8) of the Convention.

A court or tribunal can also make a number of findings that have consequences for the procedure involving the CLCS. A judgment may find that an outer limit line is not final binding on another State because it has not been established in accordance with article 76 of the LOS Convention. Depending on the reasons for this finding, the coastal State may either have to redefine its outer limits or make a new or revised submission to the CLCS.⁵⁵ A court or tribunal may also find that a recommendation of the CLCS is invalid. The consequences of such a finding are not altogether clear. The CLCS will not have been a party to the proceedings

⁵² See *supra* text at note 35.

⁵³ See eg M. Bos, “The Interpretation of Decisions of International Organizations” (1981) 28 NILR 1-13, at 7. On the role of the international judiciary in reviewing decisions of international bodies generally see K.H. Kaikobad *The International Court of Justice and Judicial Review* (2000).

⁵⁴ See eg R. Bernhardt “*Ultra Vires* Activities of International Organizations” in J. Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 599-609, at 602; and Kaikobad, note 53, at 36 who also refers to inter alia procedural irregularities and material error.

⁵⁵ On this latter point see further *infra*.

before the court or tribunal and will not be bound by its judgment.⁵⁶ The Commission cannot revise its recommendations *proprio motu*. On the other hand, the outer limits of the continental shelf established by the coastal State on the basis of such invalid recommendations will not be opposable to other States. One way to deal with this issue would be for the coastal State to make a new or revised submission to the CLCS. A tribunal that has ruled on an issue will indicate the reasons for its decision. In making its recommendations on the new or revised submission the Commission should take into consideration the reasons indicated by the Court.

Although the CLCS is not formally bound by a judgment, it will have to take it into account in future submissions it will be considering. Otherwise, the outer limits established on the basis of the recommendations of the Commission are open to challenge on the same grounds as those indicated in an earlier judgment. Under Part XV, a court or tribunal is to apply the Convention and other rules of international law not incompatible with it.⁵⁷ An issue of interpretation will not vary between cases when it concerns the same points of law.

CONCLUSIONS

The CLCS and the dispute settlement mechanisms established under Part XV have separate roles under the Convention and the procedure involving the CLCS does not replace the dispute settlement mechanisms in their totality.

The procedure involving the CLCS and the coastal State under article 76 of the LOS Convention can have significant implications for other States. Other States may disagree with the outer limit line established by the coastal State, either because it is considered that this has not been done “on the basis” of the recommendations of the CLCS or that the provisions of article 76 have not been interpreted or applied correctly.

Other States can give their opinion in respect of a submission by a coastal State to the CLCS. In its Rules of Procedure, the CLCS has provided for detailed rules in cases in which land or maritime disputes exist. This allows the States concerned to opt for one of a number of approaches in such cases. This can contribute to not putting the CLCS in a position where it has to issue its recommendations in cases

⁵⁶ See also Kaikobad, note 53 at 45.

⁵⁷ LOS Convention, art 293(1).

where there is a dispute between States concerning issues of interpretation or application of article 76 or, for that matter, concerning other issues of fact or law.

Notwithstanding this approach, it cannot be excluded that a dispute between States over the interpretation or application of article 76 which also involves a recommendation of the CLCS may be submitted to third party dispute settlement. As far as questions of interpretation of article 76 or other relevant provisions of the Convention are concerned, a court or tribunal is not bound by the interpretation provided by or implicit in the recommendations of the Commission. On the other hand, the Convention charges the Commission specifically to review the scientific and technical information submitted to it by the coastal State and provides for a process involving the Commission and the submitting State to address any disagreement they may have in this respect. The only issue that can be addressed by a court or tribunal, where States disagree over the Commission's evaluation of scientific and technical data, is whether the Commission has overstepped the bounds of its competence as defined in the Convention.

Taking into account this distinction, a perceived "weakness" of the CLCS, in the sense that it is a body that does not include legal expertise, may rather be considered its strength. This "weakness" makes it possible to insulate the CLCS to a large extent from (the resolution of) legal disputes and have it focus on the tasks which have been entrusted to it under the Convention, which primarily involve the evaluation of scientific and technical data.

Apart from having separate functions, the CLCS and the judiciary may also complement each other. The judiciary may have the possibility to clarify the legal framework in which the CLCS has to function. The technical and scientific expertise of the Commission and its specific role under the Convention imply that the judiciary can focus on the legal issues involved in the interpretation and application of article 76 and need not go over all the related scientific and technical data.

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