

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

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ABSTRACT

The establishment of the outer limits of the continental shelf beyond 200 nautical miles under Article 76 of the United Nations Convention on the Law of the Sea (LOSC) is a complex process, which requires a coastal state to dedicate significant resources. To understand the reasons for the inclusion of this complex provision in the LOSC, this article first looks at the origins of Article 76. Subsequently, a number of provisions of Article 76 are considered to illustrate the questions which exist in connection with its application and interpretation. It is concluded that Article 76 fulfills the mandate that had been given to the Third United Nations Conference on the Law of the Sea in respect of the definition of the limits of national jurisdiction, notwithstanding the complexity of the issue and the interests involved. Before the Third Conference started there was no certainty about the extent of the continental shelf. Article 76 provides a procedure to arrive at precisely defined outer limits. 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.

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

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¹ Adopted on 10 December 1982, 1833 UNTS 396 (hereinafter LOSC).

² Adopted on 29 April 1958, 499 UNTS 311.

in the 1958 Convention found its way into the LOSC without any major amendments.³ 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.⁴ The Convention on the Continental Shelf basically left the question of the outer limits of the continental shelf undecided. Article 76 of the LOSC 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 resources. To understand the reasons for the inclusion of this complex provision 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 in general does not look in detail at those provisions which have been discussed in the other presentations at the Symposium, such as the practice and procedures of the Commission on the Limits of the Continental Shelf (CLCS) or the Article 76 provisions on the foot of the slope and ridges. The concluding section provides some thoughts on what the future may hold in store for LOSC, Article 76.

The Origins of Article 76

In order to appreciate why Article 76 is such a complex provision, some understanding of the context in which it was negotiated 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.⁵ 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.⁶ This became a matter of urgency at the end of the 1960s, at which time it was considered that mining

³ See e.g., J.F. 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* (Dordrecht, Martinus Nijhoff Publishers, 1991), pp. 315–382 at p. 363.

⁴ 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 LOSC, Art. 82, and LOSC, Art. 83 on the delimitation of the continental shelf between neighbouring states, which differs significantly from Art. 6 of the Convention on the Continental Shelf. Art. 82 was closely related to the outcome of 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) (see also *infra*).

⁵ General Assembly Res. 3067 (XXVIII), para. 3.

⁶ See *ibid.*, Official Records of the General Assembly, 28th Session, Supplement No. 21 (A/8721), para. 23; and Official Records of the General Assembly, 26th Session, Supplement No. 21 (A/8421), para. 22.

of the mineral resources of the deep sea-bed 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.⁷ 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.⁸

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.⁹ This approach is reflected in the LOSC, which defines the Area as “the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction”.¹⁰

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.¹¹ Of course, this was not the case. The 1958 Convention on the Continental Shelf defines the continental shelf by reference to the 200-metre isobath and the so-called exploitability criterion.¹² 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.¹³ As Article 1 indicates, the exploitability criterion is only applicable to the sea-bed 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

⁷ See e.g., the overview in R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, Manchester University Press, 3rd ed., 1999), pp. 224–226.

⁸ See further, *ibid.*, pp. 227–228.

⁹ See the references in note 6 above.

¹⁰ LOSC, Art. 1(1)(1).

¹¹ 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.

¹² Art. 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 sea-bed 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 sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.

¹³ See e.g., the references in S. Oda, *International Control of Sea Resources* (Leiden, A.W. Sythoff, 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, footnote 20.

margin.¹⁴ This distinguishes the Article from LOSC, Article 76(1), which defines the continental shelf by reference to the outer edge of the continental margin.

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”.¹⁵

During the Third United Nations Conference on the Law of the Sea (1973–82), this observation of the Court became one of the bases of the broad margin states¹⁶ to argue that they had existing sovereign rights to the outer 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, recognised coastal state rights to the point of exploitability;
- the decision of the ICJ 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.¹⁷

¹⁴ For a detailed analysis of Art. 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* 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* 245–305, 445–472 and 683–723. Hutchinson concludes that by the beginning of the 1970s, Art. 1 of the Convention became part of general customary law (Hutchinson, p. 183) and that in the first half of the 1980s no rule of customary law had 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, pp. 719–720). The continental slope lies landward of the continental rise, which extends to the outer edge of the continental margin. [1969] ICJ Rep 22, para. 19.

¹⁶ The group consisted of 13 states: Argentina, Australia, Brazil, Canada, Iceland, India, Ireland, Madagascar, New Zealand, Norway, Sri Lanka, the United Kingdom and Venezuela. The common interest of the group was to ensure that a new Law of the Sea Convention would permit the exercise of continental shelf rights beyond 200 nautical miles (M.H. Nordquist (general ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (in six vols.) (Dordrecht, 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 LOSC, Art. 76. This latter group has been estimated to comprise around 40 states or more.

¹⁷ The statement is reproduced in Third United Nations Conference on the Law of the Sea; Official Records, vol. XIII, p. 102, para. 14.

The position of the broad margin states at the Third Conference as reflected in this statement warrants a number of comments. The exploitability criterion is applicable to the sea-bed 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 "submarine areas adjacent to the coast" include all of the continental margin. The judgment of the ICJ in the *North Sea Continental Shelf* cases also does not seem to give support to the position of the broad margin states at the Third Conference. The Court only dealt with the seaward limit of the natural prolongation of the land territory in passing and its judgment seems to equate the geophysical continental shelf with the legal continental shelf.¹⁸ State practice entailing a claim of sovereignty or sovereign rights in respect of areas beyond the legally defined outer limit of the continental shelf would have breached obligations under both the regimes of freedom of the high seas and the common heritage. 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 sea-bed provides that "no State may validly purport to subject any part of [the high seas] to its sovereignty".¹⁹ 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 2749.²⁰ It is unlikely that the limited practice of states in respect of oil

¹⁸ The Court in the *North Sea Continental Shelf* cases was concerned with the delimitation of the continental shelf between neighbouring 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 neighbouring states by application of equidistance (see [1969] ICJ Rep 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 of these observations makes a reference to "localities where, *physically*, the continental shelf begins to merge with the ocean depths" (*ibid.*, p. 30, para. 41; emphasis provided). The physical continental shelf is the most landward component of the continental margin, which also comprises the continental slope and rise. The other observation of the Court referred 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.

¹⁹ Convention on the High Seas (adopted on 29 April 1958, 450 UNTS 82), Art. 2.

²⁰ Para. 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 Res. 2749 (XXV), para. 2; see also *ibid.*, para. 3). The resolution was adopted by 108 to nil, with 14 abstentions.

exploration had led to the existence of rights detracting from these general principles.²¹

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 the group of 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 sea-bed area by other states at the Third Conference. For most of the Third Conference, the negotiations were concerned with finding a compromise to reconcile these positions.²² At the same time, this compromise was required to result in a formula that would both require and make it possible for states to define the outer limits of their continental shelf unequivocally in relation to the international sea-bed area.

Part of the outcome of the negotiations at the Third Conference is contained in LOSC, Article 76, 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 LOSC, Article 82, 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 completely accommodate the views of the broad margin states. 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 in certain cases result in an outer limit considerably landward of the outer edge of the continental margin. The inclusion of the procedure involving the 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.²³

How is one to judge the outcome of the negotiations on the definition 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

²¹ In any case, such rights would have been limited to the specific areas in respect of which activities had taken place.

²² 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* (Leiden, Martinus Nijhoff Publishers, 2004), pp. 403–409 at p. 403.

²³ See further *infra*.

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 seeks to accommodate all of 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.²⁴

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 order. 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 is in turn 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 in accordance with Article 76(8).

Paragraphs 4 to 6 of Article 76 provide specific formulae to establish the outer edge of the continental margin where it extends beyond 200 nautical miles. Paragraph 4 contains two formulae to define the outer edge of the continental margin. Both formulae 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 formulae. 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-metre isobath (100 nautical miles from that isobath). In the case of submarine ridges the latter restraint cannot be applied.²⁵ Paragraph 7 lays down criteria for the coastal state to delineate the outer limit of its continental shelf. Paragraph 7 provides that

²⁴ Article 76 is not the only LOSC provision displaying this characteristic. The most telling example in this respect is probably the delimitation provision contained in LOSC, Arts. 74(1) and 83(1).

²⁵ LOSC, Art. 76(6).

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 Commission's 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 provisions of the LOSC on outer limits of maritime zones. A further indication of the significance of the Commission's recommendations is provided by Article 8 of Annex II to the LOSC, 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 submission. 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.

During the Symposium, there was a discussion concerning the "openness" of the consideration of submissions by the CLCS. One view was that a greater "openness" would contribute to the dissemination of relevant information to all interested states. It was submitted that this would assist other states in assessing the legality of the outer limit lines established by the coastal state on the basis of the recommendations of the Commission and in the preparation of their own submission to the Commission.

States certainly have an interest in both these matters. However, it should be doubted if these matters should be addressed by a greater "openness" of the consideration of submissions by the CLCS. The LOSC sets out specific procedures for the consideration of submissions. These procedures do not envisage the participation in any form of third states.²⁶ Greater "openness" of the consideration of submissions would affect the balance of rights and obligations of coastal states in respect of the making of a submission as contained in the LOSC.²⁷

²⁶ Other states may express their views on the executive summary of the submission of a coastal state. This is a process that precedes that consideration of a submission by the Commission.

²⁷ The absence of information may make it difficult for other states to assess whether outer limits of the continental shelf have been established in accordance with Art. 76. The lack of information may become an issue if a dispute over the outer limits of the continental shelf would be the subject of litigation under LOSC, Part XV. In this case, LOSC, Art. 302 is relevant, which provides that:

Without prejudice to the right of a State Party to resort to the procedures for the settlement of disputes provided for in this Convention, nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.

According to one comment on Art. 302, the clause "[w]ithout prejudice to the right of a State Party to resort to the procedures for the settlement of disputes" was understood to incorporate the widely followed national practice pursuant to which, if a government chooses not

If the consideration of a submission would raise issues which are also relevant to the preparation of submissions, it would be open to the Commission to further elaborate its Scientific and Technical Guidelines, which discuss the depth of admissible scientific and technical evidence in the context of the relevant provisions of LOSC, Article 76.²⁸ A coastal state can also seek guidance from the Commission if it would like to have scientific and technical advice during the preparation of its submission.²⁹

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 neighbouring 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.³⁰ 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.³¹ 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

cont.

to contest a particular case or issue rather than reveal the information necessary to do so, it cannot require that the case be dismissed or the issue decided in its favour merely because it has a right to withhold information necessary to proper adjudication (B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", (1981) 75 *American Journal of International Law* 211–256 at 239 (footnote omitted); see also H. Caminos, "Sources of the Law of the Sea" in Dupuy and Vignes, note 3 above, pp. 29–139 at p. 90). These same considerations would also be applicable in a case involving the outer limits of the continental shelf.

²⁸ "Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf" (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).

²⁹ LOSC, Annex II, Art. 3(b).

³⁰ As was observed by the ICJ in the *Anglo-Norwegian Fisheries* case in respect of the territorial sea: "It is the land which confers upon the coastal State a right to the waters off its coasts" ([1949] ICJ Rep 133).

³¹ LOSC, Art. 76. See also *Continental Shelf* case (*Libyan Arab Jamahiriya v. Malta*), Judgment of 3 June 1985, [1985] ICJ Rep 13 at 30, para. 27 and 34–35, para. 34.

lines.³² This is confirmed by LOSC, Article 77(3), which provides that the rights 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 confirms that entitlement to the continental shelf is not dependent on the establishment of outer limits.³³ 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 2,500-metres 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 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 76.³⁴ 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 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 that 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

³² See also *Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, where the ICJ distinguishes between the definition of the continental shelf given in Art. 76, para. 1 and Art. 76, paras. 2–9 “which deal with the details of the outer limits of the continental shelf” ([1982] ICJ Rep 18 at 48, para. 47).

³³ 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* (Paris, Éditions A. Pedone, 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 IJMCL 165–188 at 167; *Report of the Eleventh Meeting of States Parties* (Doc. SPLOS/73 of 14 June 2001), p. 12, para. 75.

³⁴ 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 LOSC, Art. 137(1).

of the continental shelf, with the attendant difficulties for the coastal state to exercise its sovereign rights over such areas.³⁵

The relationship between entitlement to and the establishment of outer limits of the continental shelf is also relevant in considering the implications of 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”.³⁶ This is an obligation resting on states parties,³⁷ which they have to fulfill in good faith.³⁸ If a state intends to establish the outer limit of its continental shelf beyond 200 nautical miles in accordance with LOSC, Art. 76, it will have to comply with the 10-year time limit.³⁹

Article 4 of Annex II does not spell out what consequences attach to non-compliance with the 10-year limit contained 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. At the same time, the absence of outer limit lines could leave considerable doubt about the exact extent of the continental shelf in certain cases.

³⁵ 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), p. 12, paras. 44–47.

³⁶ LOSC, Annex II, Art. 4. The requirement that a coastal state has to make a submission within 10 years of the entry into force of the LOSC for that state has been considered by the Meeting of States Parties to the LOSC. Since 1994, there had been a gradual realisation of the problems faced by developing states in particular 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 LOSC entered into force before 13 May 1999, the 10-year time period referred to in LOSC, Annex II, Art. 4 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 Annex II, Art. 4 under review (*ibid.*, para. (b)).

³⁷ 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* (The Hague, Kluwer Law International, 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, Oxford University Press, 2000), pp. 17–24 at pp. 21–22.

³⁸ LOSC, Art. 300. Art. 300 reflects the fundamental rule of *pacta sunt servanda*.

³⁹ Para. 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.

Outer limit lines established by the coastal state on the basis of the recommendations of the CLCS are final and binding.⁴⁰ 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 LOSC 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.⁴¹ This circumstance indicates that the change was considered to limit the freedom of action of the coastal state. As has been observed by Oxman, the term "taking into account" left the coastal state a wide margin of appreciation and would have implied

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.⁴²

However, in itself, the change to the text of Article 76(8) tells us little about the exact implications of the term "on the basis of".

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.⁴³ 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 coastal state to provide it with additional information.⁴⁴ If the coastal state would then still proceed to establish the outer limits of its continental shelf, this will not have been done on the basis of the recommendations of the CLCS.⁴⁵

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:

⁴⁰ LOSC, Art. 76(8).

⁴¹ See Pulvenis, note 3 above, p. 360, footnote 87.

⁴² 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* 1-47 at 22.

⁴³ 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.

⁴⁴ See Rules of Procedure of the CLCS, Annex III, section 12.6.

⁴⁵ Such an approach would also seem to breach the obligation of the coastal state under LOSC, Annex II, Art. 8 to make a new or revised submission in case of disagreement with the recommendations of the Commission.

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.⁴⁶

Should the coastal state in this case adopt the outer limit lines contained in the recommendations to meet the “on the basis” requirement? 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.⁴⁷

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.⁴⁸

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 LOSC, Article 76(10) precludes such an effect.⁴⁹ 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 will generally 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.⁵⁰ This approach prevents that a coastal state can establish outer limit of the continental shelf that are final and binding in areas subject to delimitation between neighbouring states.⁵¹

A key question in respect of the term “final and binding” is at what point in time the outer limit lines become final and binding on other states. Only

⁴⁶ Rules of Procedure of the CLCS, Annex III, section 12.5

⁴⁷ For instance, in a case where the recommendations indicate that the foot of the slope is situated at a different location than 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 33 above, p. 417; Smith and Taft, note 37 above, p. 20).

⁴⁸ 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* (London, ILA, 2004) (hereinafter *Berlin Report*), pp. 773–819 at pp. 802–804.

⁴⁹ See further *infra*. LOSC, Art. 83 is applicable to the delimitation of such continental shelf areas.

⁵⁰ See *Oceans and Law of the Sea, Report of the Secretary-General, Addendum* (Doc. A/57/57/Add.1 of 8 October 2002), p. 9, para. 39.

⁵¹ The approach would seem to be justified by LOSC, Annex II, Art. 9, which provides that the actions of the Commission shall not prejudice matters relating to the delimitation of maritime boundaries between states.

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.⁵² 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 other states, unless they challenge them within a reasonable period of time. Another state 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, or might hold that the coastal state has not acted on the basis of the recommendations of the Commission.⁵³ A successfully challenged outer limit line is not final and binding in the sense of Article 76(8).⁵⁴

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 Committee on Legal Issues of the Outer Continental Shelf has not yet reached a conclusion on this question.⁵⁵ Instead of repeating the arguments considered by the Committee, 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 small island developing states in particular 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 which the term “permanently” in Article 76(9) may have.

LOSC, Article 76(10) provides that the provisions of Article 76 are without prejudice to the question of delimitation of the continental shelf.⁵⁶ 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

⁵² LOSC, Art. 76(9).

⁵³ See *Berlin Report*, note 48 above, p. 806, footnote 116.

⁵⁴ The considerations set out here in respect of the term “final and binding” apply in similar fashion to the term permanently contained in LOSC, Art. 76(9) (see further *ibid.*, pp. 806–807).

⁵⁵ See further *ibid.*, pp. 807–809.

⁵⁶ 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, 22–23 March 2005, to be published in the proceedings of the Symposium).

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 claim if all states concerned agree.⁵⁷ 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 LOSC, 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 need for the delimitation of maritime boundaries between states thus far has not led states to object 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 recognised. 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, if major controversy over the implementation of Article 76 arises, this will probably concern a limited number of instances. Large parts of the outer limit of the continental shelf will

⁵⁷ Section 5 of Annex I to the Rules of Procedure of the Commission provides that "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".

probably be established without leading to any observations of other states. Secondly, the LOSC provides a number of mechanisms to address any controversy that may arise in the implementation of Article 76. The Rules of Procedure of the Commission, adopted in implementation of the LOSC, contribute to both identifying and addressing potentially controversial issues in submissions.⁵⁸ In addition, if certain conditions are met, the dispute settlement mechanisms contained in Part XV of the LOSC 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.⁵⁹ Finally, Article 76 does not exist as a separate 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. Broader interests of states in the LOSC may play a role in how states deal with issues concerning the extent of the continental shelf. In any case, there is no readily available alternative to Article 76. Any formula that would seek to simplify the rules on the outer limits of the continental shelf contained in Article 76 (for instance an outer limit based on distance applicable to all states) would imply a large overall shift in the limit between areas under national jurisdiction and the Area.

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, 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.

⁵⁸ 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 LOSC.

⁵⁹ 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 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 states 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). Based on the communications of Australia and other states concerning the Antarctic region, the Commission has decided not to consider the part of the submission dealing with this region (see "Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission" (Doc. CLCS/44 of 3 May 2005), para. 23).

Once Article 76 has been implemented by all the present states parties to the LOSC, most of the outer limits of the continental shelf *vis-à-vis* the Area will be defined in precise terms. As is also evidenced by other presentations at the present Symposium, this involves a process that is at least as daunting as the negotiation of Article 76 itself.

