

## Current Legal Developments

# Meeting of States Parties to the UN Law of the Sea Convention

---

### **The Time Limit for Making Submissions to the Commission on the Limits of the Continental Shelf—the Current State of Affairs**

Article 76(1) of the United Nations Convention on the Law of the Sea<sup>1</sup> defines the outer limit of the continental shelf by reference to either a distance of 200 nautical miles from the baselines of the coastal State or to the outer edge of the continental margin, where that outer edge extends beyond 200 nautical miles. In the latter case, Article 76 sets out the criteria a coastal State is to apply to establish the outer limits of its continental shelf. Article 76 also requires the coastal State to submit information on those outer limits to the Commission on the Limits of the Continental Shelf (CLCS or the Commission).<sup>2</sup> Following the submission of such information, the Commission is required to make recommendations to the coastal State.<sup>3</sup> The outer limits of the continental shelf established by the coastal State on the basis of the recommendations of the Commission shall be final and binding.<sup>4</sup> The significance of this process lies in the fact that it will create certainty about the limits of national jurisdiction and of the seabed area beyond national jurisdiction (the Area), to which an international regime for mining applies.<sup>5</sup>

In order to ensure that the establishment of the outer limits of the continental shelf is not indefinitely postponed by coastal States, Annex II to the LOS Convention, which is concerned with the functions and tasks of the

---

<sup>1</sup> 1833 UNTS 396. Hereinafter LOS Convention.

<sup>2</sup> LOS Convention, Article 76(8).

<sup>3</sup> *Ibid.*, Article 76(8) and Annex II, Article 6.

<sup>4</sup> *Ibid.*, Article 76(8).

<sup>5</sup> See also 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* pp. 211–256, at p. 230. The limits of the Area are defined by reference to Part VI of the Convention (LOS Convention, Article 134(3)), which includes Article 76.

CLCS, requires a coastal State 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”.<sup>6</sup> For many coastal States the 10-year period originally would have expired on 16 November 2004, 10 years after the entry into force of the LOS Convention. The problems of coastal States, especially of developing States, in meeting this deadline have been considered a number of times by the Meeting of States Parties of the LOS Convention.<sup>7</sup> The present note discusses the solutions which have been adopted by the Meeting of States Parties in this respect, focusing in particular on the recent decision of the 18th Meeting of States Parties of June 2008.

### **Decisions of the Meeting of States Parties concerning Article 4 of Annex II to the LOS Convention**

The first decision of the Meeting of States Parties concerning the time limit for the making of submissions to the Commission by coastal States was taken at the 11th Meeting in May 2001.<sup>8</sup> One of the most important issues to be considered, apart from agreeing on a new time limit for making submissions, was what means should be used to achieve this objective. Formal amendment of the LOS Convention was not an option for various reasons.<sup>9</sup> A decision of the Meeting of States Parties that entailed a *de facto* amendment of the LOS Convention could raise questions concerning the competence of the Meeting to take such an action and might set an unwelcome precedent. On the one hand, it could be used by States to justify further decisions of the Meeting on matters of substance. On the other hand, States opposing such an approach might become reluctant to agree even to a minor adjustment by this means.<sup>10</sup>

<sup>6</sup> LOS Convention, Annex II, Article 4.

<sup>7</sup> One overview from 2001, which identified 30 States as possibly having a continental shelf beyond 200 nautical miles, indicates that 14 of those States, 12 of which were developing States, would have had to make a submission in 2004 (*Issues with respect to article 4 of Annex II to the United Nations Convention on the Law of the Sea; Background paper prepared by the Secretariat* (SPLOS/64 of 12 May 2001, para. 7). As the document indicates, and is confirmed by later figures (see *infra*), the figure of about 30 countries might be a conservative estimate (SPLOS/64, *supra* note 7 at para. 8).

<sup>8</sup> *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* (SPLOS/72 of 29 May 2001).

<sup>9</sup> See SPLOS/64, *supra* note 7 at paras. 21 and 23.

<sup>10</sup> For a further discussion of the different views of States Parties on the role of the Meeting in relation to the Convention see, e.g., T. Treves, “The General Assembly and the Meeting of

A background paper, prepared by the Secretariat to the Meeting, discussed the possibility of a decision by the Meeting of States Parties in the light of an earlier decision of the Meeting on the one-time deferment of the election of the members of the International Tribunal for the Law of the Sea in accordance with Article 4 of Annex VI of the LOS Convention.<sup>11</sup> According to the background paper, the deferment of that election by the Meeting “was a substantive issue requiring consensus, but not requiring a formal amendment to the Convention in accordance with its article 312”.<sup>12</sup> The background paper further noted that if the States Parties were willing to reconsider the 10-year time limit, there would be various options available to achieve that objective: the date of election of the members of the Commission (13 March 1997); the first day of actual functioning of the Commission (16 June 1997); the date of the provisional adoption of the Scientific and Technical Guidelines of the Commission (4 September 1998); or the date of final adoption of the Guidelines (13 May 1999).<sup>13</sup> The use of the latter two dates could be justified on the ground that they marked the completion of the basic documents of the Commission that give coastal States clear indications of the information the Commission would expect to be included in submissions.<sup>14</sup> Apart from the background paper prepared by the Secretariat, the Meeting also had before it comments from Seychelles and the Pacific Island Forum States, which also suggested alternative dates for commencing the time limit mentioned in Article 4 of Annex II.<sup>15</sup> Those documents referred to some of the dates which

---

States Parties in the Implementation of the LOS Convention” in A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden: 2005), pp. 55–74, esp. at pp. 61–65 and 68–73; and A.G. Oude Elferink, “Reviewing the Implementation of the LOS Convention: the Role of the United Nations General Assembly and the Meeting of States Parties”, in A.G. Oude Elferink and D.R. Rothwell (eds.) *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff Publishers, Leiden: 2004) pp. 295–312 at pp. 306–310.

<sup>11</sup> SPLOS/64, *supra* note 7 at paras. 17–18.

<sup>12</sup> *Ibid.*, para. 18. A similar decision had been taken in respect of the election of the members of the CLCS. In its conclusions the background paper did indicate that States Parties in considering this option for the deferral of the 10-year time limit should recall that the earlier precedents were on matters of an organizational nature, before the Tribunal and the Commission had been fully established and operational (*ibid.*, para. 72).

<sup>13</sup> *Ibid.*, para. 31.

<sup>14</sup> *Ibid.*, para. 32. The Scientific and Technical Guidelines of the Commission (CLCS/11 of 13 May 1999; CLCS/11/Add.1 of 3 September 1999; CLCS/11/Corr.1 of 24 February 2000) explain how the Commission understands the relevant provisions of Article 76 and the consequences this may have for the scope and depth of admissible scientific and technical evidence submitted by coastal States.

<sup>15</sup> *Notes verbales from the Government of Seychelles regarding the extension of the time period for submission to the Commission on the Limits of the Continental Shelf; Note by the Secretariat*

were mentioned in the background paper as alternative starting dates, and also suggested the possibility of an extension of the 10-year time limit.<sup>16</sup> Both suggestions were considered by the Meeting, which generally supported a step-by-step approach:

The first step was to address the issue of selecting the date for calculating the 10-year time limit, which could be done at the present Meeting of States Parties. The second step was to deal with the issue of a possible extension of the 10-year time limit, which required a sound legal solution on the substance of the matter and on the procedures to be followed.<sup>17</sup>

In other words, the Meeting considered that an extension of the 10-year time limit could not be achieved simply by a decision of the Meeting. Admittedly, that possibility is not excluded explicitly, but the language used in the Report of the Meeting regarding the first step (“selecting the date for calculating the 10-year time limit”) indicates a factual and legal differentiation between the two steps. The first step is an understanding of the interpretation of Article 4 of Annex II. That understanding was based on the particular circumstances in relation to the establishment of the Commission and the adoption of its basic documents.<sup>18</sup> Those circumstances could not credibly be invoked to justify a subsequent extension of the 10-year time limit.

The agreement of the 11th Meeting on the understanding concerning the interpretation of Article 4 of Annex II is recorded in a decision of the Meeting. The decision provides that for States Parties for which the LOS Convention entered into force before 13 May 1999 (the date the Scientific and Technical Guidelines were adopted by the Commission), the 10-year time period referred to in Article 4 of Annex II to the LOS Convention shall be taken to have commenced on that date.<sup>19</sup> It was further decided to keep the general ability of States, particularly developing States, to fulfill the requirements of Article 4 of Annex II under review.<sup>20</sup>

The time limit for making submissions to the Commission was again considered by the 16th Meeting of States Parties in 2006 in connection with the workload of the Commission. The expected number of submissions and their

---

(SPLOS/66 of 10 May 2001); *Position paper on the time frame for submissions to the Commission on the Limits of the Continental Shelf; Submitted by Australia, Fiji, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu* (SPLOS/67 of 10 May 2001).

<sup>16</sup> SPLOS/66, *supra* note 15 at Annex I; SPLOS/67, *supra* note 15 at paras. 4 and 8.

<sup>17</sup> *Report of the eleventh Meeting of States Parties* (SPLOS/73 of 14 June 2001), para. 73.

<sup>18</sup> See also SPLOS/73, *supra* note 17 at para. 74.

<sup>19</sup> SPLOS/72, *supra* note 8 at para. (a).

<sup>20</sup> *Ibid.*, para. (b).

timing indicated that the Commission would face considerable difficulties in dealing expeditiously with submissions.<sup>21</sup> Several delegations suggested, in view also of the difficulties many developing States might encounter in the preparation of their submissions, that the Meeting might revisit the 10-year time limit, and in particular the time limit of 2009 as it applied to individual States.<sup>22</sup> However, other delegations were not prepared to consider further adjustments of the time limit.<sup>23</sup> The suggestion to revisit the time limit was again made during the 17th Meeting.<sup>24</sup> During the 16th and 17th Meetings it was also argued that a possible solution to problems with meeting the time limit might be the submission of partial data, so as to satisfy the 10-year time limit but allowing the submission of additional data at a later time.<sup>25</sup> This suggestion became a central element of the decision of the 18th Meeting of States Parties concerning Article 4 of Annex II to the LOS Convention.

At the 18th Meeting there were again calls to extend the 2009 time limit, but this was opposed by other delegations.<sup>26</sup> To what extent the 2009 time limit really poses a problem to States actually remains somewhat unclear. Information assembled by the Secretariat suggests that most States facing that time limit, including developing States, expect to be able to meet it.<sup>27</sup> Of the 51 States on which information is included, only three indicated that they did not expect to meet the time limit applicable to them and four States had not indicated the tentative date of their submission. At the 18th Meeting, delegates of 14 States indicated that they had encountered difficulties in preparing submissions, though some of them thought they might meet the time limit applicable to them.<sup>28</sup> The fact that most States apparently considered that they

<sup>21</sup> See further *Report of the sixteenth Meeting of States Parties* (SPLOS/148 of 28 July 2006), paras. 65–78; see also *Report of the seventeenth Meeting of States Parties* (SPLOS/164 of 16 July 2007), paras. 56–78; D.R. Rothwell, “Issues and Strategies for Outer Continental Shelf Claims”, (2008) 23 *International Journal of Marine and Coastal Law*, pp. 185–211 at pp. 196–200.

<sup>22</sup> SPLOS/148, *supra* note 21 at para. 72.

<sup>23</sup> *Ibid.*, para. 73.

<sup>24</sup> SPLOS/164, *supra* note 21 at para. 71.

<sup>25</sup> SPLOS/148, *supra* note 21 at para. 73; SPLOS/164, *supra* note 21 at para. 74.

<sup>26</sup> See the Press Release *States Parties to Law of Sea Convention indicate flexibility towards countries facing difficulty meeting deadline for requests to delimit continental shelves* (SEA/1903 of 17 June 2008).

<sup>27</sup> This concerns the document *Issues related to the workload of the Commission on the Limits of the Continental Shelf—tentative dates of submissions; Note by the Secretariat* (SPLOS/INF/20 of 16 January 2008; supplemented by SPLOS/INF/20/Add.1 and Add. 2 of 7 May and 6 June 2008).

<sup>28</sup> See the SEA/1903, *supra* note 26. Of the States concerned, seven had indicated earlier that they expected to meet the applicable time limit (SPLOS/INF/20, *supra* note 27). Three others had not specified whether or not they expected to meet their time limit (*ibid.*; SPLOS/INF/20/Add.1, *supra* note 27).

would be able to meet the time limit for making a submission is likely to have contributed to reaching a solution that did not include a blanket extension of the time limit.

The main element of the decision of the 18th Meeting of States Parties concerning the time limit for making submissions is a procedure for submitting preliminary information.<sup>29</sup> The decision provides that a coastal State may satisfy its obligations in respect of the time limit under Article 4 of Annex II “by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission”.<sup>30</sup> The cumulative listing of the requirements necessary to meet the obligation contained in Article 4 of Annex II can be expected to contribute to successfully addressing difficulties that States may encounter in implementing Article 76. The information a coastal State is required to submit under the decision should in such cases allow a meaningful dialogue to assist that State in meeting its obligations.

Preliminary information submitted by a coastal State shall not be considered by the Commission pending a later submission in accordance with Article 76.<sup>31</sup> The decision may thus also contribute to lightening the workload of the Commission. Apart from not having to consider such preliminary information, there also is a lesser risk that the Commission will have to consider hastily assembled and incomplete submissions by coastal States, which would require it to recommend to those coastal States to make a new or revised submission containing further information, which the Commission then would have to consider anew.

Paragraph 1(c) of the decision specifies that preliminary information submitted by a coastal State is without prejudice to the submission a coastal State will later make. This implies among other things that the outer limit lines of the continental shelf contained in the preliminary information may be different from the outer limit lines included in a subsequent submission. It is in any case possible for a coastal State to change its outer limit lines under the procedure involving the coastal State and the CLCS.<sup>32</sup>

---

<sup>29</sup> *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a)* (SPLOS/183 of 20 June 2008).

<sup>30</sup> *Ibid.*, para. 1(a).

<sup>31</sup> *Ibid.*, para. 1(b).

<sup>32</sup> See LOS Convention, Annex II, Article 8. Brazil submitted new information including different outer limit lines while its original submission was still being considered by the Commission. In a legal opinion requested by the Chairman of the Commission, the Legal Counsel

Should the decision of the 18th Meeting be viewed as an understanding of Article 4 to Annex II to the LOS Convention or rather as an amendment? The decision would seem to leave room for both views. On the one hand, the obligation concerning the time limit contained in Article 4 is also met if the information that is submitted is insufficient to allow the Commission to issue recommendations on the basis of which a coastal State can establish final and binding outer limits. In addition, in interpreting Article 4 in this respect, it would be relevant to take into account all relevant considerations, such as the difficulties certain States have met in preparing their submission and the workload of the Commission. On the other hand, the LOS Convention in principle requires the Commission to consider information which is submitted in accordance with Article 4 and issue recommendations on it. The decision of the 18th meeting requests the Commission to refrain from taking any action on preliminary information pending the receipt of the submission of the State concerned in accordance with Article 76. That language also seems to suggest that the submission of preliminary information is something different from submitting information in accordance with Article 76.

The decision does not indicate the status of outer limit lines contained in preliminary information. For instance, could a coastal State rely on those outer limit lines in connection with the exploitation of its continental shelf? Although the decision is silent on that point, it does indicate a number of relevant considerations. The second preambular recital of the decision recalls that the rights of the continental shelf do not depend on occupation or any express proclamation.<sup>33</sup> However, although the rights to exploit the continental shelf do not depend on the delineation of its outer limits by the coastal State, the absence of outer limits is bound to leave uncertainty over the exact extent of the continental shelf. In any event, a coastal State does not have the right under Article 76 to extend the outer limits of its continental shelf beyond

---

of the United Nations concluded that nothing in the LOS Convention precludes a coastal State from submitting, in the course of the examination of a submission, revised or new particulars of the outer limits of its continental shelf (*Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf; Legal opinion on whether it is permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission (CLCS/46 of 7 September 2005)*, pp. 12–13)).

<sup>33</sup> This language reflects Article 77(3) of the LOS Convention.

the limits provided for in paragraphs 4 to 6 of Article 76.<sup>34</sup> That obligation also applies before the coastal State has implemented its obligations under paragraphs 7 to 9 of Article 76.<sup>35</sup>

As the operative paragraph 1(b) of the decision indicates, preliminary information submitted in accordance with subparagraph 1(a) will not be considered by the Commission pending the receipt of a submission in accordance with Article 76 of the LOS Convention and the Rules of Procedure and Scientific and Technical Guidelines of the Commission. The fact that the Commission is excluded from considering and consequently from adopting recommendations in respect of such preliminary information in any case prevents a coastal State from claiming that it has established final and binding limits on the basis of recommendations of the Commission. The Secretary-General of the United Nations is requested to notify Member States of the receipt of preliminary information and make such information publicly available.<sup>36</sup> This allows other States to indicate their views on the outer limit lines contained in the preliminary information. It might be easier for a coastal State to rely on outer limit lines contained in preliminary information which have not attracted any observations from other States. In assessing the status of outer limit lines contained in preliminary information it also would seem to be relevant whether the coastal State has complied with the other requirements contained in paragraph 1(a) of the decision and is making good faith efforts to implement its obligation to establish its outer limit lines in accordance with Article 76 of the LOS Convention.

## Conclusion

The difficulties that certain coastal States face in meeting the time limit for making their submission to the CLCS has been a matter of concern for a considerable time. Initially, that concern was addressed by selecting a different starting date for the 10-year time limit applicable to many coastal States, shift-

<sup>34</sup> LOS Convention, Article 76(2).

<sup>35</sup> See further Committee on Legal Issues of the Outer Continental Shelf, “Second Report”, International Law Association, *Report of the Seventy-Second Conference* (ILA, London, 2006), pp. 215–249 at p. 217.

<sup>36</sup> SPLOS/183, *supra* note 29 at para. 1(d). Rule 50 of the Rules of Procedure of the Commission (CLCS/40/Rev.1 of 17 April 2008), containing a similar obligation in respect of the executive summary of submissions, refers to Member States, “including States Parties to the Convention”. Three parties to the LOS Convention (Cook Islands, the European Communities and Niue) as a matter of fact are not Member States of the United Nations. It is not known if the variation in language is intentional.

ing it from 16 November 1994 to 13 May 1999. However, that decision of the Meeting of States Parties did not provide a precedent for a further decision to extend the time limit. When the Meeting took its decision in 2001 there were specific reasons to justify selecting 13 May 1999 as the date of commencement for the time limit. Those reasons did not, however, justify an extension of the time limit. One can argue about whether the 2001 decision constituted an amendment of the LOS Convention or not.<sup>37</sup> A further decision of the Meeting to extend the time limit almost certainly would have been considered to be an amendment. That view seems also to be implied in the opinions expressed at the 11th Meeting of States Parties which adopted the 2001 decision. A new decision of the Meeting of States Parties extending the time limit for making submissions would almost certainly have created the impression that the Meeting has a discretionary power to amend the LOS Convention. A blanket extension probably would also have had a negative impact on the implementation of Article 76 by coastal States.<sup>38</sup> It would have created the impression that the time limit might be pushed back indefinitely, possibly leading to continued inaction by certain coastal States. The preparation of submissions by coastal States might also have run into difficulties because political support and funding for a project surrounded by uncertainty concerning its time frame and eventual implementation by other States would have been more difficult to secure. On the other hand, the 2008 decision allows for different views as to its classification as either an amendment or understanding of Article 4 of Annex II to the LOS Convention.

The 2008 decision of the Meeting of States Parties seeks to accommodate the concerns of coastal States having difficulties with implementing Article 76, while at the same time maintaining the integrity of the Article 76 process. For States that will make use of the possibility of submitting preliminary information, the further requirements attaching to that option should lead to a road map for fully implementing Article 76. In addition, apart from devising

---

<sup>37</sup> See also D. Freestone and A.G. Oude Elferink, “Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?” in A.G. Oude Elferink, *op. cit.*, *supra* note 10, pp. 169–221 at pp. 208–209. The arguments contained in the background paper prepared by the Secretariat (see *supra*) to support the view that no amendment would be involved, relied in particular on secondary rules, which have been adopted in the implementation of the LOS Convention. A similar approach can also be discerned in a discussion paper concerning the recommendations of the Commission (*The legal nature and purpose of the recommendations of the Commission on the Limits of the Continental Shelf; Discussion paper prepared by the Secretariat* (CLCS/2003/CRP.3 of 17 April 2003), paras. 5 and 9 and following). The background paper in its conclusions suggests that earlier decisions of the Meeting possibly did not provide an appropriate precedent (see further *supra*, note 12).

<sup>38</sup> See also A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge: 2000), p. 193.

a mechanism for submitting preliminary information, the decision seeks to enhance the possibilities for international cooperation and to provide support for the work of the Commission.<sup>39</sup> The decision is not the final answer to overcoming the difficulties involved in the implementation of Article 76 and might even lead to further controversy over such issues as the status of outer limit lines indicated in preliminary information. However, if the commitments contained in the decision are implemented and given effective follow-up, they can be expected to contribute to the successful implementation of Article 76.

**Alex G. Oude Elferink**

Netherlands Institute for the Law of the Sea  
School of Law, Utrecht University  
The Netherlands

---

<sup>39</sup> SPLOS/183, *supra* note 29 at paras. 2–5.