

Chapter Twelve

Causes, Consequences, and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf

Alex G. Oude Elferink

1 *Introduction*

I have been studying Article 76 of the LOSC¹ for quite some time, but new questions continue to arise now that Article 76 is being implemented by coastal States all over the globe. I am pleased to have been offered this opportunity to share my views on some matters related to the absence of final and binding outer limits of the continental shelf.

I do not wish the title for my chapter to be over-ambitious. Hence, I have decided to limit myself to two specific topics related to the absence of final and binding outer limits of the continental shelf. First of all I will consider the status of the outer limit of the continental shelf in a case in which it has not yet become final and binding in accordance with the provisions of Article 76 of the Convention. Second, the existence of a land or maritime dispute may lead to a deadlock in the consideration of a submission by the Commission on the Limits of the Continental Shelf (CLCS). Such deadlock might frustrate the object of Article 76, which is the establishment of final and binding outer limits of the continental shelf beyond 200 nautical miles. What options do States in particular have to deal such a situation? To deal with my second topic, I first of all intend to briefly discuss the provisions of the Convention which have a bearing on it. This concerns Article 76(10) of the Convention and Article 9 of Annex II thereto. Next, I will look at Annex I to the Rules of Procedure

¹ United Nations Convention on the Law of the Sea (hereinafter LOSC) of 10 December 1982 (entered into force on 16 November 1994; *United Nations Treaty Series*, Vol. 1833, p. 396).

of the Commission,² which contains a set of rather detailed rules for submissions involving land and maritime disputes. After I have provided this necessary backdrop, I will by way of example discuss the submissions of Ireland and the United Kingdom in respect of the Hatton-Rockall area. Apart from Ireland and the United Kingdom, Denmark and Iceland also consider that they have a continental shelf beyond 200 nautical miles in this area. The reactions of Denmark and Iceland to the submissions imply that they submissions – at least for the time being – cannot be further considered by the Commission. After an overview of the issues involved in this case, I propose to discuss the options which are available to the Commission to deal with the existing situation. Next, I will consider what options States have to deal with a deadlock in the consideration of a submission under the LOSC. In that respect I will focus on the procedural and substantive rules in issue. How should the relevant provisions of the Convention and the Commission's Rule of Procedure be interpreted and applied and what means are available to arrive at a clarification in this respect? The latter aspect requires also a look at Part XV of the LOSC on the settlement of disputes concerning the interpretation or application of the Convention.

2 The Status of the Outer Limit of the Continental Shelf in a Case in Which It Has Not Yet Become Final and Binding

Article 76(8) of the LOSC provides that outer limits of the continental shelf beyond 200 nautical miles established by the coastal State on the basis of the recommendations of the CLCS shall be final and binding. The implication of this provision seems to be that until a State has acted on the basis of the recommendations of the Commission the outer limits of its continental shelf are not final and binding. The practice in respect of Article 76 indicates that it may still take a long time before all coastal States will be in a position to implement Article 76(8). What does this state of affairs imply for a coastal State's rights in respect of its continental shelf?

Article 76(1) of the Convention provides a general definition of the continental shelf. It refers to the distance of 200 nautical miles and the outer edge of the continental margin. Article 76 does not provide that for the continental

² Rules of Procedure of the Commission on the Limits of the Continental Shelf (the current version of the Rules of Procedure is contained in CLCS/40 Rev.1 of 17 April 2008) (hereinafter Rules of Procedure) (available at http://www.un.org/Depts/los/clcs_new/clcs_home.htm; other documents of the Commission (identified by the acronym CLCS) and information concerning the submissions of States are also available on this website).

shelf to exist a coastal State first has to establish the outer limits of that shelf. This is confirmed by Article 77(3) of the Convention, which provides that the rights of the coastal State over the continental shelf do not depend on occupation or any express proclamation. Furthermore, Article 76(2) provides that the continental shelf "shall not extend beyond the limits provided in paragraphs 4 to 6" of Article 76. Article 76(2) thus also confirms that the entitlement to continental shelf beyond 200 nautical miles exists before the implementation of Article 76 has been completed.

But what about the outer limits of the continental shelf before the implementation of Article 76 has been completed? Article 76(2) to which I have just referred implies that a coastal State is not entitled to only apply the general definition of the continental shelf contained in Article 76(1) to provisionally define the outer limit of its continental shelf. The continental shelf shall not extend beyond the limits provided in paragraphs 4 to 6 of Article 76. Outer limits extending beyond these limits would not be in accordance with the Convention and thus not be opposable to other States.

If a coastal State, in preparing a submission or otherwise, has defined the outer limits of its continental shelf with reference to the rules contained in paragraphs 4 to 7 of Article 76, the presumption is that this constitutes a good faith implementation of the Convention by that State. This, however, does not imply that these outer limits have to be accepted by other States. The process of establishing the limits of maritime zones by coastal States has been described as follows by the International Court of Justice in the *Anglo-Norwegian Fisheries* case:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.³

In other words, another State may object that outer limits established by the coastal State, in preparing a submission or otherwise, are not in accordance with the relevant provisions of the Convention. This not only concerns Article 76 itself but also, for instance, the provisions on baselines and Article 121(3) (which provides that certain islands do not have a continental shelf). In this case the outer limits of the continental shelf will not be opposable to this other State. The question whether a State has established its outer limits in accordance with Article 76 first of all has to be addressed by the CLCS, which is to make recommendations to the coastal State which has made a submission. The Commission is required to issue its recommendations in accordance with

³ Judgment of 18 December 1951, [1951] ICJ Reports, p. 116, at p. 132.

Article 76.⁴ The Commission is not competent to deal with such issues as the validity of baselines. The Commission still has to consider how it will deal with a submission in a case in which other States have objected to the validity of basepoints.⁵ Recommendations of the Commission on the outer limits of the continental shelf cannot cure any defect external to Article 76, such as the submitting State's use of specific baselines.⁶ A dispute concerning such a matter could be settled in accordance with Part XV of the LOSC.

3 The Options to Deal with a Deadlock in the Consideration of a Submission by the Commission on the Limits of the Continental Shelf

3.1 The Establishment of the Outer Limits of the Continental Shelf and Third States – The LOSC and the Rules of Procedure of the CLCS

As the LOSC indicates, the establishment of the outer limits of the continental shelf beyond 200 nautical miles primarily concerns the coastal State and the CLCS. However, Article 76 of and Annex II to the Convention do contain a specific reference to the rights and interests of third States. Paragraph 10 of Article 76 establishes that the provisions of Article 76 are without prejudice to the delimitation of the continental shelf between neighbouring States. Article 9 of Annex II to the Convention provides that the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between neighbouring States. Other matters than the delimitation of boundaries between States are not explicitly mentioned in the Convention. Thus, while the Convention provides some guidance in respect of matters related to the delimitation

⁴ LOSC, Annex II, Article 2.

⁵ China and the Republic of Korea have objected to Japan's use of the island of Okinotorishima in connection with the definition of the outer limits of the continental shelf of Japan. The Commission has constituted a sub-commission to deal with Japan's submission and instructed it to also consider the part of the submission related to Okinotorishima. However, the Commission also decided that it was not to take action on the recommendations of the sub-commission in respect of that part of the submission until it would decide to do so (CLCS/64 of 1 October 2009, paras. 23–26). The approach of the Commission indicates that it does not consider that a dispute in relation to Article 121(3) of the Convention is a dispute in the sense of Annex I to its Rules of Procedure, which is concerned with land and maritime disputes. In that case, the Commission should have refrained from considering the submission in view of the positions of China and the Republic of Korea. On the other hand, the decision not to take any action on the recommendations until it should decide to do so in general is not taken in respect of submissions which are not covered by Annex I to the Rules of Procedure.

⁶ See A. Serdy, 'Some views are more equal than others: Submissions to the Commission on the Limits of the Continental Shelf and the strange loss of confidence in Article IV of the Antarctic Treaty', 28 (2008) *Australian Year Book of International Law* (forthcoming).

of boundaries, this is not the case for those other matters. For instance, what is the implication of the existence of a difference of views between a coastal State and other States concerning the validity of territorial sea baselines or a territorial dispute for the implementation of Article 76 by the coastal State and the CLCS? I will turn to this latter matter after I will have discussed the implications of Article 76(10) and Article 9 of Annex II to the Convention.

Article 76(10) of the Convention provides:

The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

Article 76(10) confirms that Article 76 is concerned with entitlement to the continental shelf and the establishment of its outer limits and not the delimitation of overlapping entitlements between neighbouring States.⁷ Article 76(10) guarantees that the implementation of Article 76 by one State does not affect the rights of another State in a case where the delimitation of the continental shelf between the States concerned is at issue. The result of Article 76(10) is that the provisions in Article 76(8) and 76(9) concerning the final and binding and permanent nature of outer limits of the continental shelf cannot be invoked against another State where the delimitation of the continental shelf is concerned. The 'Article 76' process of defining the outer limits of the continental shelf is not intended to settle coincidentally in any way delimitations of overlapping areas of continental shelf.

The role of the CLCS in the process of establishing the outer limits of the continental shelf beyond 200 nautical miles is defined in Annex II to the LOSC.⁸ Article 9 of the Annex provides:

The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

There is a significant difference between Article 76(10) and Article 9 of Annex II. Article 76(10) implies that Article 76 is without prejudice to the delimitation

⁷ See also M.H. Nordquist (general ed.) *United Nations Convention on the Law of the Sea 1982; A Commentary* (Martinus Nijhoff Publishers: 1985–2003) (hereafter *Virginia Commentary*) Vol. II, p. 883. The *Virginia Commentary* argues this distinction is verified by other provisions of the LOSC such as Article 83 which specifically articulates the means by which continental shelf delimitation between opposite or adjacent States is to be addressed and Article 134(4) which also reinforces the distinction by providing that the provisions of Part XI are not to affect the establishment of the outer limits of the continental shelf in accordance with Part VI of the Convention or the validity of delimitation agreements between States with opposite or adjacent coasts (*ibid.*).

⁸ For further information on the Commission see e.g., T.L. McDorman 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 *International Journal of Marine and Coastal Law* pp. 301–324.

of boundaries. It does not prescribe a specific course of action for the coastal State making the submission or the Commission. On the other hand, Article 9 does not indicate that the actions of the Commission are without prejudice to matters related to boundaries, but instead instructs the Commission to ensure that no such prejudice results from its actions. In other words, it is applicable to the procedure involving the Commission.

The Commission has addressed the implications of Article 9 of Annex II to the Convention in its Rules of Procedure. The Rules of Procedure not only deal with the delimitation of boundaries between neighbouring States, but also deal with other cases of land and maritime disputes. Rule 46 of the Rules of Procedure provides:

1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.
2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.

Rule 46(2) is almost identical to Article 9 of Annex II to the LOSC. Rule 46(2) specifies that the procedures of Annex I to the Rules of Procedure are designed to assure that the Commission acts in accordance with its mandate under the Convention.

Annex I to the Rules of Procedure takes as its starting point the explicit statement that the Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States.⁹

In relation to the types of disputes described in Rule 46, Annex I provides a number of obligations and procedural options. The submitting coastal State has to inform the Commission of any disputes "related to the submission" (paragraph 2(a)). This qualification means that the coastal State is not being required to inform the Commission of all land or maritime disputes in respect of the territory generating the continental shelf. Moreover, where a dispute relates to the submission, the coastal State is requested to assure the Commission "to the extent possible" that its submission will not prejudice matters relating to boundary delimitation between States (paragraph 2(b)).

Paragraph 5 of Annex I is of particular interest for the present discussion as it sets out the procedure for submissions where a land or maritime dispute exists. As will be seen subsequently, Denmark and Iceland in their reactions to

⁹ Rules of Procedure, Annex I, para. 1.

the submissions of Ireland and the United Kingdom in respect of the Hatton-Rockall area have relied on paragraph 5 to indicate which approach they consider the CLCS should take in dealing with these submissions.

Paragraph 5(a) provides that the Commission shall not “consider and qualify” submissions where a land or maritime dispute exists unless all States that are parties to the dispute have given their prior consent. Paragraph 5(b) provides that the submission made before the Commission and its recommendations shall not prejudice the position of States which are parties to the land or maritime dispute. The relationship between paragraphs 5(a) and 5(b) deserves further consideration. The requirement of prior consent would seem to be intended to allow States to assure that their rights are not prejudiced by the consideration of a submission. The premise for allowing that approach would seem to be that such prejudice could result from the consideration of a submission and the recommendations of the Commission. However, paragraph 5(b) explicitly indicates that the recommendations of the Commission “shall not prejudice” the position of the parties to a dispute. As I will argue subsequently, in considering this matter a distinction has to be made between the position of the Commission under paragraph 5 of Annex I, and that of States which have invoked the existence of a land or maritime dispute.

3.2 The Submissions of Ireland and the United Kingdom in Respect of the Hatton-Rockall Area

The continental shelf beyond 200 nautical miles in the Hatton-Rockall area is located to the west of the 200-nautical-mile zones of Ireland and the United Kingdom and to the south of the 200-nautical-mile zones of the Faroe Islands, which forms part of Denmark, and Iceland. All four States consider that they have a continental shelf entitlement in this area. At the same time, they may consider that the other States do not have an entitlement. For instance, Denmark in the past has advanced the view that the Hatton-Rockall area is a micro-continent with its summit in the Faroe Islands, which is detached from the continental shelves of Iceland, Ireland and the United Kingdom.¹⁰

Since 2001 the four States have held discussions concerning the Hatton-Rockall area. The aim of these talks was to reach a common approach to the implementation of Article 76. At the beginning of 2009 these talks had not yet resulted in agreement on a common approach. The LOSC provides that a coastal State has, at the latest, to make a submission on the outer limits of its continental shelf to the CLCS within 10 years of entry into force of the

¹⁰ *Denmark's designation of the Faroe-Rockall Micro-Continent*: Ministry of Foreign Affairs, Press Department, Copenhagen, May 1985, pp. 1–2.

Convention for that State.¹¹ In view of a 2001 decision of the Meeting of States Parties to the Convention, this time limit in principle expired on 12 May 2009 for Iceland, Ireland and the United Kingdom. Denmark ratified the Convention on 16 December 2004 and consequently was not faced by the 2009 time limit.

Iceland, one of the three States faced with the 2009 deadline, has not made a submission to the Commission on the Hatton-Rockall area. In making a partial submission in respect of the Ægir Basin area and the Reykjanes Ridge, Iceland invoked paragraph 3 of Annex I to the Rules of Procedure of the Commission. Paragraph 3 allows a State to make a partial submission:

in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention.

Iceland has indicated that it will make a submission for the Hatton-Rockall area at a later stage, without specifying a tentative date.¹²

Ireland and the United Kingdom have not invoked paragraph 3 to the Rules of Procedure and both have made a submission in respect of the Hatton-Rockall area to the Commission. The timing of the submissions – both were made on 31 March 2009 – would seem to suggest that this was a coordinated action. The executive summary of the submission of Ireland observes that the submission is made in order to meet the deadline of submissions applicable to Ireland as understood and reflected in rule 45 of the Rules of Procedure.¹³ Rule 45 refers to Article 4 of Annex II to the Convention and the 2001 decision of the Meeting of States Parties. The United Kingdom also referred to the article and the decision to indicate that it was making the partial submission to meet the 12 May 2009 time limit.¹⁴ The position of Ireland and the United Kingdom may mean either of two things. They may consider that the Hatton-Rockall area is not covered by paragraph 3 of Annex I to the Rules of Procedure of the Commission. They may also consider that paragraph 3 does not allow a State

¹¹ LOSC, Annex II, Article 4.

¹² The Icelandic Continental Shelf; Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea in respect of the Ægir Basin area and Reykjanes Ridge, Part I, Executive Summary, p. 5.

¹³ Ireland; Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea in respect of the Hatton-Rockall Area; Part I Executive Summary (hereinafter ES submission Ireland), p. 5.

¹⁴ United Kingdom of Great Britain and Northern Ireland, Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea in respect of Hatton-Rockall Area; Part I Executive Summary (hereinafter ES submission UK), pp. 1–2.

to defer a submission beyond the time limit resulting from Article 4 of Annex II to the Convention and the decision of the Meeting of States Parties.¹⁵

The executive summaries of the submissions of Ireland and the United Kingdom address the existence of overlapping continental shelf entitlements in the Hatton-Rockall area. They both refer to the existence of the 1988 agreement between Ireland and the United Kingdom, which delimits the continental shelf between both States in this area.¹⁶ The executive summaries also indicate that the claims of Denmark and Iceland overlap with those of Ireland and the United Kingdom.¹⁷ Paragraph 2 of Annex I of the Rules of Procedure requires that the coastal State making the submission informs the Commission of any such disputes related to the submission. The executive summaries do not indicate that the existence of areas of overlap is considered to be such a dispute.¹⁸

Denmark and Iceland reacted to the submissions of Ireland and the United Kingdom through *notes verbales*.¹⁹ Both Denmark and Iceland in respect of both submissions refer to the existence of a dispute in the sense of Annex I to the Rules of Procedure. The Icelandic notes indicate that the Government of Iceland considers that the consideration of the submissions would prejudice the rights of Iceland over the area and therefore it does not give its consent to the consideration of the submission by the Commission. The Icelandic notes further suggest that Iceland would give its consent once the quadrilateral consultations between the parties in respect of the dispute regarding the delimitation of the continental shelf in the Hatton-Rockall area have led to a solution. Iceland has indicated a preference for an agreement on the division of the Hatton-Rockall Area before presenting a joint submission to the CLCS.²⁰ The Danish notes indicate that it is the position of the Governments of Denmark and the Faroe Islands that the consideration of the submissions and recommendations thereon would prejudice the forthcoming submission of Denmark in respect of the same area; and that the submissions consequently only should be considered simultaneously with the submission of Denmark. In accordance with paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS the Governments of Denmark and the Faroe Islands declared that until further notice they did not give their consent to the consideration of the submissions.

¹⁵ On this issue see also *infra* text at note 36.

¹⁶ ES submission Ireland, pp. 4–5; ES submission UK, p. 1.

¹⁷ *Ibid.*

¹⁸ Arguably, the ES submission UK might be read to include such a reference. The reference to areas of overlapping continental shelf is included in a paragraph, whose first sentence refers to paragraph 2 of Annex I to the Rules of Procedure.

¹⁹ All four notes verbales are dated 27 May 2009.

²⁰ See 'Deja-vu at the North Pole' (speech of the Minister of Justice and Human Rights of Iceland of 26 September 2009) (available at <http://eng.domsmalaraduneyti.is/minister/speeches-and-articles/nr/6307>).

Denmark furthermore specified that it intended to make a partial submission in respect of the Faroe Plateau (*i.e.* the Hatton-Rockall area) within the time limit of 16 December 2014 applicable to it.

The suggestion of simultaneous consideration of the submissions raises some interesting questions. First of all, it would seem to imply that the submissions of Ireland and the United Kingdom would move down the queue of submissions which are in line for consideration. Neither the Convention nor the Rules of Procedure of the Commission offer the possibility of letting Denmark and Iceland move ahead of States which had already made their submission. Secondly, what would simultaneous consideration imply? The Rules of Procedure of the Commission envisage the possibility of a *joint* submission by two or more coastal States,²¹ but not the option of simultaneous consideration of two or more submissions. Annex II to the LOSC indicates that the coastal State which has made a submission to the Commission may send its representatives to participate in the relevant proceedings.²² No such right is envisaged for third States. This points to the more general question how a sub-commission which has been set up to consider a submission should deal with the possible implications of a request for simultaneous submission. In short, the request for simultaneous consideration raises a number of questions,²³ which probably should be considered beforehand by the States concerned.

Ireland and the United Kingdom presented their submissions during the 24th session of the Commission on 27 August 2009. A summary of those presentations is contained in the statement by the Chairman of the Commission on the progress of work in the Commission at the 24th session.²⁴ The United Kingdom indicated that it believed that the Commission could consider its submission without prejudice to the interests of other States. The United Kingdom said it could support the position of Denmark as regards simultaneous consideration; but it regretted that Iceland had not yet made a submission or had provided a time frame within which Iceland intended to make it.²⁵ Ireland in its presentation acknowledged that the Commission might be unable to consider a submission in the presence of a dispute without the consent of all the parties to it; it regretted that Iceland had not been able to give its consent and expressed the hope that Iceland would be in a position to make its submission before or at the time of the Danish submission, as this would allow the Commission to simultaneously consider the four submissions.²⁶

²¹ Rules of Procedure, Annex I, paragraph 3.

²² LOSC, Annex II, Article 5.

²³ See also *infra* p. 270.

²⁴ See CLCS/64 of 1 October 2009, paras. 41–46 (United Kingdom) and 47–52 (Ireland).

²⁵ *Ibid.*, para. 44.

²⁶ *Ibid.*, para. 49.

Following each presentation, the Commission continued its meeting in private and addressed the modalities for consideration of the submissions. In both cases the Commission:

decided to defer further consideration of the submission[s] and the notes verbales until such time as the submission[s] [were] next in line for consideration as queued in the order in which [they were] received. The Commission took this decision in order to take into consideration any further developments that might occur throughout the intervening period during which States may wish to take advantage of the avenues available to them including provisional arrangements of a practical nature as contained in annex I to its rules of procedure.²⁷

3.3 The Options of the Commission to Deal with the Submissions of Ireland and the United Kingdom

The decisions of the Commission at its 24th session in relation to the modalities for the consideration of the submissions of Ireland and the United Kingdom are in line with its general policy in respect of submissions involving land and maritime disputes. Annex I to the Rules of Procedure indicates that the Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States.²⁸ In that light, it stands to reason to defer a decision on the modalities for further considering the two submissions for the moment. The submissions of the United Kingdom and Ireland are ranked respectively 19th and 20th in the chronological list of submissions. It has been estimated that under the current approach for dealing with submissions, sub-commissions to consider the submissions might be constituted in the second half of 2013. In other words, there is still a considerable period of time in which the States concerned may seek to work towards an arrangement that would allow all of them to give their prior consent to the consideration of the submissions. That prior consent would allow the Commission to consider the submissions in accordance with paragraph 5(a) of Annex I to its Rules of Procedure.

What would happen if the parties to the disputes still have not have given their prior consent by the time the submissions are up for consideration by a sub-commission? The reactions of Denmark and Iceland indicate that they consider that there exist disputes which should only lead to the consideration of the submissions with their prior consent. The statement of the United Kingdom indicates that it considers that it would be possible for the CLCS to consider its

²⁷ *Ibid.*, paras. 46 en 52.

²⁸ Rules of Procedure, Annex I, para. 1.

submission, while Ireland seems to acknowledge that this may not be possible for its submission without the prior consent of Denmark and Iceland.

In the absence of prior consent, the CLCS will have to take a decision on the question whether or not the disputes are related to the submissions and whether or not it can further consider the submissions. The CLCS would be competent to assess how it should interpret and apply its Rules of Procedure in this connection. I will address the possible outcome of the consideration by the Commission subsequently.

3.4 The Options for States to Deal with a Deadlock in the Consideration of a Submission under the LOSC

What are the options for States to deal with a deadlock in the consideration of a submission because a State has invoked the existence of a dispute related to the submission? In this part of my presentation I will focus on the procedural and substantive rules at issue in this respect. How should the relevant provisions of the Convention and the Commission's Rule of Procedure be interpreted and applied and what means are available to arrive at a clarification in this respect? The latter aspect requires also a look at Part XV of the LOSC on the settlement of disputes concerning the interpretation or application of the Convention.

Part XV of the Convention provides that States Parties shall settle any dispute between them concerning the interpretation or application of the Convention by peaceful means.²⁹ Section 1 of Part XV, which is concerned with dispute settlement mechanisms other than procedures entailing binding decisions, is applicable to any dispute between States Parties concerning the interpretation or application of the Convention. These mechanisms provide a first avenue for settling disputes concerning the interpretation or application of Article 76. As Article 283 indicates, when a dispute arises between States Parties concerning the interpretation or application of the Convention, "the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other means." Discussions between States in this context can also be used to work out a practical arrangement which would allow the consideration of the submissions by the Commission.

Where no settlement has been reached by recourse to section 1 of Part XV of the Convention, 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.³⁰ Section 3 of Part XV establishes certain limitations

²⁹ LOSC, Article 279.

³⁰ LOSC, Article 286.

on and exceptions to the applicability of compulsory dispute settlement procedures. Article 76 is not covered by these limitations and exceptions.³¹

A court or tribunal first of all can be expected to make a distinction between the status of the Commission and the third State which has not given its prior consent to the consideration of a submission. A case before a court or tribunal would be between the submitting State and the third State which has not given its prior consent to the consideration of the submission. The Commission would not be a party to these proceedings. The Convention does not envisage that the Commission may participate as a party to third party dispute settlement procedures under the Convention.³² This implies that the possibilities of a court or tribunal to review the actions of the Commission are limited.

As a general rule, a court or tribunal is not excluded from exercising its jurisdiction because a dispute involves a decision by an international body such as the Commission. It has been observed that:

The CLCS is competent to take decisions on such matters as its rules of procedure. In this case, the rules that generally apply to exercise of jurisdiction in a contentious case involving the incidental consideration of a decision by an international body apply. A court or tribunal is competent to establish if the Commission has overstepped the bounds of its competence as defined in the Convention, applying a test of reasonableness. This test may lead to the conclusion that the Commission has acted within the limits of its competence or *ultra vires*, or that a decision is invalid for other reasons.³³

It seems to be highly unlikely that a court or tribunal would conclude that the Commission would have overstepped the bounds of its competence if the Commission were to conclude that because of the absence of the prior consent of a State, which is a party to a land or maritime dispute, it may not consider a submission. First of all, Article 9 of Annex II to the Convention requires that the actions of the Commission shall not prejudice matters relating to the delimitation of maritime boundaries between States with opposite or adjacent coasts. The reference to "matters relating to" is certainly broad enough to cover questions concerning the entitlement of the continental shelf, to which Denmark alluded. Iceland directly invoked the matter of maritime delimitation.

If this interpretation of "matters relating to" is accepted, the consideration of a submission in an area which is affected by the dispute as framed by Denmark would also be covered by Article 9 of Annex II to the Convention. The

³¹ See further Committee on Legal Issues of the Outer Continental Shelf, "Report" (International Law Association, *Report of the Seventy-First Conference*, London, 2004), pp. 773–819 at pp. 782–783.

³² See *ibid.*, p. 784.

³³ *Ibid.*, p. 786 (footnotes omitted).

Commission is competent to decide how it is to guarantee that its actions shall not prejudice these matters. So, in certain cases it would not be unreasonable to conclude this might require not considering a submission without the prior consent of all the States concerned.

This conclusion in respect of Article 9 of Annex II to the Convention is confirmed by Rule 46 of and Annex I to the Rules of Procedure of the Commission. Rule 46 and Annex I refer to disputes concerning the delimitation of the continental shelf and other land or maritime disputes, and thus confirm a broad scope of application of Article 9 of Annex II to the Convention.

Before the Rules of Procedure were adopted by the Commission, Annex I to the Rules of Procedure was brought to the attention of the Eighth Meeting of States Parties to the Convention. The then-chairman of the Commission explained that this was done because the members of the Commission felt that certain issues dealt with in the Annex affected the interests and competences of States. The members of the Commission therefore preferred to give the Annex final approval only after the Meeting had considered it.³⁴ According to the Report of the Eighth Meeting only two delegations made observations. One delegate remarked that the Rules of Procedure should:

not appear to create new rights for States that are only defined by the Convention. The Chairman [of the Commission] agreed that editorial changes would be introduced in order to make it clear that the rules deal only with the procedure of the Commission.³⁵

There was no objection to the proposed approach contained in draft Annex I as such.

Annex I has been widely used by States Parties in the implementation of Article 76 of the Convention. Numerous States have availed themselves of the opportunity to inform the Commission of their views under Annex I to the Rules of Procedure. In this connection, no State has objected against the provision contained in Annex I. This practice can be viewed as subsequent practice in the application of the Convention which establishes the agreement regarding the interpretation of Article 9 of Annex II to the Convention.³⁶

These arguments indicate that a court or tribunal would likely find that the CLCS is competent to decide to refrain from considering a submission in the absence of the prior consent of all of the parties to the land or maritime dispute related to a submission as this is in accordance with Article 9 of Annex II to the Convention and the Rules of Procedure of the Commission.

³⁴ SPLOS/31, para. 42.

³⁵ SPLOS/31, para. 48.

³⁶ This rule of treaty interpretation is contained in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (*United Nations Treaty Series*, Vol. 1155, p. 331).

But what about the State which has not given its prior consent to the submission? What conclusion might a court or tribunal reach in respect of such a refusal?

According to paragraph 5(a), the consideration of a submission in certain circumstances is only possible with the prior consent of other States. No such limitation is included in the LOSC. In order to properly assess the consequences of paragraph 5, it has to be considered in the light of the relevant provisions of the LOSC.

The Rules of Procedure are subordinate to the LOSC.³⁷ As was discussed above, the result of Article 76(10) of the Convention is that the provisions in Article 76(8) and 76(9) concerning the final and binding and permanent nature of outer limits of the continental shelf cannot be invoked against another State where the delimitation of the continental shelf is concerned. In the light of this provision, it is submitted that other States should in principle accept the consideration of a submission by a coastal State that raises issues of delimitation of the continental shelf. That consideration and subsequent recommendations will not prejudice their rights.³⁸ This conclusion also applies to the observations of Iceland on maritime delimitation in respect of the submissions of Ireland and the United Kingdom.

The case law of the International Court of Justice and arbitrations might at first sight seem to suggest that third States might be entitled to invoke the existence of the question of maritime delimitation to withhold their consent to the consideration of a submission. For instance, the Court in the *Libya/Malta Continental Shelf* case made a link between the protection of the legal interests of third States and the area they claim. The Court observed that limiting its decision to the area not claimed by Italy:

signifies simply that the Court has not been endowed with jurisdiction to determine what principles and rules govern delimitations with third States, or whether the claims of the Parties outside that area prevail over the claims of those third States in the region.³⁹

To place this approach in its proper perspective it should be noted that the case law has never considered that the existence of overlapping entitlements of the parties and those of third States as such excluded delimitation between the parties before it. In this light, the case law rather suggests that the establishment of

³⁷ See also Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs (CLCS/46 of 7 September 2005), p. 8.

³⁸ See also C.R. Symmons 'The Irish Partial Submission to the Commission on the Limits of the Continental Shelf in 2005: A Precedent for Future Submissions in the Light of the 'Disputed Areas' Procedure of the Commission?' 37 (2006) *Ocean Development and International Law* pp. 299–317 at p. 309.

³⁹ Judgment of 3 June 1985; [1985] ICJ Reports, p. 26, para. 21.

outer limits and the delimitation between neighboring States are separate issues. As is also indicated by paragraph 76(10), Article 76 is only concerned with the entitlement to and outer limits of the continental shelf and not its delimitation between neighbouring States.

Annex I to the Rules of Procedure of the CLCS not only addresses submissions involving the delimitation of the continental shelf between neighbouring States, but also refers to other land and maritime disputes. In the latter case the rights of other States are not explicitly safeguarded by the Convention. However, other States have the possibility for indicating their views either directly to the coastal State or to the Commission in reaction to a submission. It could be argued that this would, in principle, be sufficient to safeguard their rights. That view is also expressed by paragraph 5(b) of the Rules of Procedure, which provides that the submission before the Commission and its recommendations shall not prejudice the position of States which are parties to the land or maritime dispute. In that light, it could be argued that a State in principle should not withhold its prior consent to the consideration of a submission by the Commission. A possible exception which comes to mind might be a case of the continental shelf of a disputed territory. In that case the consideration of the scientific and technical data submitted by one State by the Commission might prejudice the later consideration of scientific and technical data by another State.

What does the above imply for the Danish objections to the consideration of the submissions of Ireland and the United Kingdom? Would the consideration of the submissions of Ireland and the United Kingdom prejudice the submission of Denmark for the same area, as is submitted by Denmark? The Danish notes do not elaborate what this prejudice would consist of. Presumably, Denmark considers that the Commission in its consideration of the submissions of Ireland and the United Kingdom may reach conclusions concerning the interpretation or application of Article 76 or the submitted scientific and technical data, which would prejudice its forthcoming submission.

The Danish position raises a number of important points.⁴⁰ First of all, if the logic of the argument of prejudice to a forthcoming submission is accepted

⁴⁰ The version of the paper I presented at the Conference prior to this paragraph made reference to B. Kunoy 'Outer limits of the continental shelf and disputed areas: States' understanding and interpretation of the relevant provisions of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) and the Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS)' (paper presented at Colloquium on the Outer Limits of the Continental Shelf and Consideration of Submissions to the Commission on the Limits of the Continental Shelf, Kuala Lumpur, 10 and 11 May 2010) because it provided a further explanation for approach taken by the Danish *notes verbales*. Subsequently, I was informed by the author of the paper that the version of the paper distributed at the conference was a draft which was not intended to be quoted. A further version of the paper no longer includes the

should it not lead to a general right of States to object to the consideration of submissions? The consideration of a submission of a non-neighbouring State may also lead to interpretations as to, for instance, which seafloor highs qualify as natural components of the continental margin. And why should States without a continental shelf beyond 200 nautical miles not be accorded a similar right of intervention? An interpretation of the Commission might prejudice their rights under Parts VII and XI of the Convention.

Secondly, would the Commission necessarily reach the same conclusion in respect of specific features which are relevant to two different submissions? That need not be the case. A sea floor high may be a natural component of the continental margin of one State, but not of another State. The Commission is charged with considering the scientific and technical data submitted by a coastal State in respect of its continental shelf and whether the outer limits as submitted are in accordance with Article 76. The Commission is not charged with simultaneously considering whether that scientific and technical data has implications for the outer limits of third States. On the other hand, if the Commission should reach the same conclusions for both submissions, based on a review of the scientific and technical data of each submission, that would also be unobjectionable.

Thirdly, the Danish *notes verbales* also refer to Article 9 of Annex II to the Convention. This might suggest that the Danish notes in reality may have been prompted by the potential impact of the recommendations of the Commission on the delimitation between Ireland, the United Kingdom and Denmark. Denmark apparently considers that its views on Article 76 would lead to a different extent of the continental shelf for Ireland and the United Kingdom than that which results from the submissions of these States. This would also affect the extent of the areas of overlapping continental shelf and their eventual delimitation. Would this entitle Denmark to veto the consideration of the submissions? In my view not. Obviously, the determination of the specific outer limits of the continental shelf determines the extent to which continental shelves of different States overlap and consequently will affect the eventual delimitation of the continental shelf between neighbouring States. This does not, however, imply that third States should be allowed a say in the determination of these outer limits. The Convention does not envisage a right of third States to participate in the process of considering a submission of a coastal State. This is in no way extraordinary. In general, the initial step of determining outer limits of maritime zones is the prerogative of the coastal State. Only after that step are third States entitled to express their views as to the validity of such limits. Article 76

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remarks I referred to in Dublin. The questions which are raised in the present paragraph of my paper remain valid as regards the Danish objections.

introduces the procedure involving the Commission as a check on the coastal State's right to unilaterally determine its outer limits. It should not be assumed that the introduction of that procedure was intended to incidentally enlarge the existing rights of third States.

Finally, as I have already mentioned, what would simultaneous consideration consist of? It would seem that this would require the Commission to take into account the scientific and technical data and interpretations of a third State in considering the submission of a coastal State. As I have just argued, there is no indication in the Convention that it was envisaged that third States should have such a right.

The conclusion that paragraphs 5(a) and 5(b) are not intended to give third States a veto power in regard of the submission of a coastal State is confirmed by the consideration of Annex I at the Eighth Meeting of States Parties to the Convention. As I have mentioned, one delegate remarked that the Rules of Procedure should not appear to create new rights for States which are only defined by the Convention. The Chairman of the Commission agreed with that point of view. The Convention does not envisage that a third State may block the consideration of a submission of a coastal State.

Reference can also be made to a recent article by Andrew Serdy of the University of Southampton, who has taken a view which implies that recommendations of the Commission in general should not be considered to be prejudicial to matters falling outside the competence of the Commission. Serdy submits that:

Commission recommendations cannot cure any defect external to Article 76, such as the submitting State's use of a straight baseline not supported by Article 7, or use of an island falling within Article 121, paragraph 3 as a basepoint, or, as is potentially entailed here, its lack of title to relevant land territory.⁴¹

Further support for a narrow interpretation of the Rules of Procedure is found in an analogy of the treatment of third party rights by the International Court of Justice.⁴² Without going into this jurisprudence in detail, I would like to refer to the commentary of Christine Chinkin on the judgment of the Court in the *Nauru* case, which had been brought by Nauru against Australia:

The Court has once again made it clear that it will only in exceptional circumstances allow third party interests to prevent it from hearing a case where it considers jurisdiction to be established. While the Court will attempt to narrow the issues in a multilateral dispute to the rights and obligations of the parties before it, it recognizes that it should seek 'to give the fullest decision in the circumstances

⁴¹ A. Serdy, 'Some views are more equal than others: Submissions to the Commission on the Limits of the Continental Shelf and the strange loss of confidence in Article IV of the Antarctic Treaty', 28 (2008) *Australian Year Book of International Law* (forthcoming) (footnotes omitted).

⁴² On the specific issue of third States and maritime delimitation, see above note 39.

of the case, compatible with the principles of consent and third party rights.' [...] It must ultimately be a question of balancing the rights of parties against those of third parties.⁴³

The observations of Serdy and Chinkin suggest that a consideration of the submissions of Ireland and the United Kingdom would not lead to a disturbance of the balance of the rights and interests of the submitting State and third States. The recommendations would only pronounce on the outer limits of the continental shelf of the submitting State. This does not require a finding on the outer limits of other States or on the delimitation of maritime boundaries with third States.

4 *Conclusions*

My first topic concerned the status of the outer limits of the continental shelf beyond 200 nautical miles before the process of establishing those outer limits in accordance with Article 76 has been completed. If a coastal State has defined the outer limits of its continental shelf with reference to the rules contained in paragraphs 4 to 7 of Article 76, it has to be presumed that this constitutes a good faith implementation of the Convention by that State. This does, however, not imply that these outer limits have to be accepted by other States. Even after a coastal State has acted on the basis of the recommendations of the Commission, other States may not be bound by these outer limits. For instance, questions concerning the validity of baselines which are relevant to these outer limits will not be settled by the conclusion of the Article 76 process.

My second topic focused on the prior consent provision in paragraph 5 of Annex I to the Rules of Procedure of the Commission. The preceding discussion indicates that there are arguments to support an approach which would seek to deal to the fullest extent possible with the submissions of coastal States. That approach would allow the Commission to issue recommendations on submissions in most, if not all, cases. The fact that Article 76 is intended to create final and binding continental shelf boundaries also could be said to support such an approach. It could, moreover, be argued that recommendations of the Commission would not prejudice the rights and interests of States which are unrelated to the implementation of Article 76.

There are also, however, arguments that militate against such an approach. It might be argued that the issuance of recommendations in respect of a submission which other States perceive to affect their rights and interests would not serve the purpose of effectively implementing Article 76 of the Convention. Outer limits could be established by the submitting State, but they hardly could

⁴³ C. Chinkin *Third Parties in International Law* (Clarendon Press, Oxford: 1993), pp. 207–208.

be expected to become final and binding in the sense of Article 76(8) of the Convention.

The CLCS has adopted a cautious approach for dealing with submissions involving land and maritime disputes. Its approach as contained in Annex I to the Rules of Procedure has been endorsed by the Meeting of States Parties to the Convention. State practice in the implementation of Article 76 also points to a general acceptance of the procedures contained in Annex I to the Rules of Procedure.

As a consequence of the approach contained in Annex I to the Rules of Procedure of the CLCS, the existence of a maritime or land dispute related to a submission of a coastal State may lead to a deadlock in respect of the consideration of that submission by the CLCS. Annex I to the Rules of Procedure of the Commission provides that the Commission will only consider a submission in the case of a maritime or land dispute if all States involved have given their prior consent to such consideration.^{43a} In the case of the submissions of Ireland and the United Kingdom, Denmark and Iceland have invoked Annex I and have not given their prior consent.

The Commission has not yet taken a decision on its further approach in respect of the submissions of Ireland and the United Kingdom; and has indicated that it will only look into that matter at the time the submissions are up for consideration by a sub-commission. This leaves the States concerned a further period of time to work towards an arrangement to allow all of these States to give their prior consent to the consideration of the submissions. If it is impossible to reach such an arrangement, States Parties to the Convention could avail themselves of the dispute settlement mechanisms of Part XV of the Convention to break the resulting deadlock. It would be likely that a court or tribunal would hold that the Commission is competent to decide to refrain from considering a submission without the prior consent of all the parties to a land or maritime dispute. On the other hand, it is submitted that a State, in principle, is not entitled to withhold its prior consent to the consideration of a submission. No such right exists under the Convention; and the Rules of Procedure are not intended to change the rights of States Parties to the Convention. Moreover, as has also been argued, the rights of third States in principle are not prejudiced by the consideration of a submission and recommendations by the Commission.

To conclude, the prior consent requirement contained in paragraph 5(a) of the Rules of Procedure of the Commission is a procedural mechanism which should allow the Commission to, as far as possible, fulfill the functions entrusted to it under the Convention. Paragraph 5(a) should not be used to create a general veto power for third States, which would be contrary to the Convention.

^{43a} See the recent action of the CLCS relating to the UK/Argentinian submissions in the Falklands area: *infra*, chap. 13, pp. 276–277.