

Legal Order in the World's Oceans

UN Convention on the Law of the Sea

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Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution?

*Alex Oude Elferink*¹

Abstract

The United Nations Convention on the law of the sea provides that the establishment of the outer limits of the continental shelf beyond 200 nautical miles and its delimitation between neighboring States are separate processes. This is reflected in article 76(10) of the Convention, which provides that the provisions of article 76 are without prejudice to the question of delimitation of the continental shelf. Article 9 of Annex II to the Convention enjoins the Commission on the Limits of the Continental Shelf (CLCS) that its actions shall not prejudice matters relating to the delimitation of boundaries between States. The Commission has implemented the latter provision through Rule 46 of and Annex I to its Rules of Procedure. Paragraph 5(a) of Annex I implies that the consideration of a submission of a coastal State on the outer limits of the continental shelf by the Commission may be blocked by another State and this has happened in practice in a considerable number of cases. This implies that a coastal State will not be in position to establish final and binding continental shelf limits on the basis of the recommendations of the Commission, as is envisaged by article 76 of the Convention.

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Creating certainty about the extent of the continental shelf, and hence the limits of the Area, is one of the key objectives of the Convention. The Convention itself does not provide for the possibility that other States may block the consideration by the Commission of submissions of coastal States. The paper considers whether paragraph 5(a) of Annex I to the Commission's Rules of Procedure has provided the proper approach to implementing article 9 of Annex II to the Convention, what options are available to coastal States whose submission has been blocked in the CLCS and whether Annex I to the Convention might be amended by the Commission.

Introduction

The United Nations Convention on the law of the sea² provides that the establishment of the outer limits of the continental shelf beyond 200 nautical miles and its delimitation between neighboring States are separate processes. This is reflected in article 76(10) of the Convention, which provides that the provisions of article 76 are without prejudice to the question of delimitation of the continental shelf. Article 9 of Annex II to the Convention enjoins the Commission on the Limits of the Continental Shelf (CLCS) that its actions shall not prejudice matters relating to the delimitation of boundaries between States. The Commission has implemented the latter provision through Rule 46 of and Annex I to its Rules of Procedure.³ Paragraph 5(a) of Annex I implies that the consideration of a submission of a coastal State on the outer limits of the continental shelf by the Commission may be blocked by another State and this has happened in practice in a considerable number of cases. This implies that a coastal State will not be in position to establish final and binding continental shelf limits on the basis of the recommendations of the Commission, as is envisaged by article 76 of the Convention. Creating certainty about the extent of the continental shelf and hence the limits of the Area is one of the key objectives of the Convention. The Convention itself does not provide for the possibility that other States may block the consideration by the Commission of submissions of coastal States. The paper considers whether paragraph 5(a) of Annex I to the Commission's Rules of Procedure has provided the proper approach to implementing article 9 of Annex II to the Convention, what

² Concluded on 10 December 1982; entry into force 16 November 1994; 1833 UNTS 396. Hereinafter LOS Convention or Convention.

³ *Rules of Procedure of the Commission on the Limits of the Continental Shelf* (hereinafter Rules of Procedure). The current version of the Rules of Procedure is contained in CLCS/40 Rev.1 of 17 April 2008, online: http://www.un.org/depts/los/clcs_new/commission_rules.htm.

options are available to coastal States whose submission has been blocked in the Commission and whether Annex I to the Convention might be amended by the Commission.

The paper commences with a discussion of the relationship between article 76 on the definition of the continental shelf and article 83 on the delimitation of the continental shelf between neighboring States. This is followed by a section setting out the implications of paragraph 5(a) of Annex I to the Rules of Procedure of the Commission. The paper next turns to a discussion of the judgment of the International Tribunal for the Law of the Sea (ITLOS) in *Bangladesh/Myanmar*.⁴ The decision of the Tribunal indicates that if other courts or tribunals would follow the approach of the ITLOS, the absence of recommendations could lead to the judiciary refraining from exercising its jurisdiction to delimit the continental shelf beyond 200 nautical miles. It is submitted that this implies that paragraph 5(a) of Annex I to the Rules of Procedure does not ensure that the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries. The next section of the paper considers whether this conclusion also applies to land and maritime disputes other than those concerning the delimitation of the continental shelf. Two further sections deal with the options for coastal States whose submission has been deadlocked in the Commission and the options for the CLCS to deal with paragraph 5(a) of Annex I. A final section of the paper contains its conclusions.

The Relationship between Articles 76 and 83 of the LOS Convention

The determination of the extent of the continental shelf of a coastal State is governed by two articles of the LOS Convention. Article 76 of the Convention is concerned with the definition of the continental shelf. Article 76 defines the inner and outer limit of the continental shelf. As article 76(1) indicates the continental shelf extends beyond the territorial sea of the coastal State up to outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the territorial sea is measured. The remainder of article 76 is concerned with the more precise definition of the outer limits of the continental shelf where the outer edge of the continental margin extends beyond 200 nautical miles. The coastal State is required to determine these

4 *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012 (available at www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf).

outer limits in accordance with article 76 and to submit information on these outer limits to the CLCS. Article 76(8) provides that outer limits established by the coastal State on the basis of the recommendations of the Commission shall be final and binding.

The continental shelf of most coastal States overlaps with that of neighboring States. Article 76 of the Convention does not address the consequences of such overlap. This matter is governed by article 83 of the LOS Convention, which deals with the delimitation of the continental shelf between neighboring States. Article 76 does address the relationship between the process of defining the outer limits of the continental shelf and the delimitation of the shelf between neighboring States. Article 76(10) provides that “[t]he provisions of [article 76] are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.” Article 76(10) among others ensures that outer limits established on the basis of recommendations of the CLCS do not become final and binding in relation to a neighboring State that also has a continental shelf entitlement in the same area.⁵

Article 83 of the Convention dealing with the delimitation of the continental shelf between neighboring States does not address its relationship to article 76. This matter was considered by the ITLOS in *Bangladesh/Myanmar*. After noting that article 76(10) of the Convention contains a without prejudice provision in relation to continental shelf delimitation,⁶ the Tribunal observed that:

Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.⁷

5 For a further discussion of this matter see *e.g.* A.G. Oude Elferink and C. Johnson ‘Outer Limits of the Continental Shelf and “Disputed Areas”: State Practice concerning Article 76(10) of the LOS Convention’ 2006 (21) *International Journal for Marine and Coastal Law*, pp. 461–487.

6 Judgment, note 3, at para. 378.

7 *Ibid.*, para. 379. The relationship between the procedure involving the CLCS and third party dispute settlement in relation to boundary delimitation may be more complex than the statement of the ITLOS in *Bangladesh/Myanmar* might suggest. Although this matter is beyond the scope of this paper, it may for instance be noted that the Tribunal found that it had the competence to interpret article 76 of the Convention (Judgment, note 3, at para. 411).

The Tribunal did not substantiate this position. The reference to non-prejudice “to the exercise by the Commission of its functions” may be assumed to imply that a coastal State cannot invoke the existence of a bilateral boundary that has been determined by a court or tribunal or through a bilateral treaty as supporting the establishment of outer limit lines in making a submission to the CLCS. As much was implied by the International Court of Justice (ICJ) in *Nicaragua v. Honduras*. After determining a maritime boundary without specifying a specific endpoint,⁸ the Court observed that:

It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.⁹

Article 9 of Annex II and the Rules of Procedure of the CLCS¹⁰

The preceding section might suggest that articles 76 and 83 exhaustively address the relationship between the determination of the outer limits of the continental shelf and the delimitation of the continental shelf. Both processes are complementary and either process can in principle be finalized without prejudice to the other.¹¹ However, article 9 of Annex II to the LOS Convention provides that the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between neighboring States. A significant difference between article 76(10) and article 9 of Annex II is that

Although I agree with this position, it raises for instance the question how the CLCS should deal with an interpretation of article 76 of the Convention that differs from the existing practice of the Commission in making recommendations to coastal States in accordance with article 76 of the Convention.

8 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, ICJ Reports 2007, p. 659, at para. 319.

9 *Ibid.*

10 This section in part is based on a section contained in A.G. Oude Elferink, ‘Do the coastal states in the South China Sea have a continental shelf beyond 200 nautical miles?’ in S. Jayakumar, Tommy Koh, and Robert Beckman (eds.), *The South China Sea disputes and law of the sea* (Edward Elgar Publishing, 2014), pp. 164–191.

11 See, however, below for the further discussion on the approach of the ITLOS to the actual delimitation between Bangladesh and Myanmar.

article 76(10) implies that article 76 is without prejudice to the delimitation 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.

The Commission has implemented article 9 of Annex II through its Rules of Procedure. Rule 46 provides for a procedure for handling submissions by coastal States in relation to which there is a dispute concerning the delimitation of the continental shelf or other maritime or territorial disputes.¹² This procedure is contained in Annex I to the Rules of Procedure. For the purposes of the present article, paragraph 5(a) of Annex I is of particular concern. This paragraph provides that in a case in which a land or maritime dispute as defined in the Rules of Procedure exists, the Commission will only consider the submission of a coastal State with the prior consent of all States that are parties to the dispute. To offer other States the opportunity to establish whether there exists a dispute related to the submission of a coastal State, the latter is required to draw up an executive summary of its submission, which is published after the submission has been made.¹³

Paragraph 5(a) of Annex I to the Rules of Procedure has been invoked in a considerable number of submissions that have been made to the CLCS.¹⁴ According to one recent count, 17 of the submissions currently pending before the Commission cannot be considered by the Commission because one or more neighboring States have invoked the existence of a delimitation dispute to withhold their consent under paragraph 5(a).¹⁵ In cases in which the Commission will not be able to consider a submission of a coastal State due to the

12 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.

13 Rules of Procedure, Rule 50.

14 As has been argued by Serdy, the inclusion of paragraph 5(a) may be seen as an invitation to States involved in a dispute to voice their concerns (A. Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate' 2011 (26) *International Journal of Marine and Coastal Law* pp. 355–383 at p. 366). Indeed, States may have felt that not taking a position under paragraph 5(a) could be considered as weakening their position *vis-à-vis* the coastal State making the submission.

15 S. Busch 'The Delimitation of the Continental Shelf beyond 200 nm: Procedural Issues' in A.G. Oude Elferink, T. Henriksen and S. Busch (eds.), *The Case Law on Maritime Boundary*

invocation of paragraph 5(a) by another State, the Commission will not be in a position to issue recommendations to the coastal State concerned. As a consequence, the coastal State will not be in a position to establish final and binding limits on the basis of the recommendations of the Commission in accordance with article 76(8) of the LOS Convention. This deadlock could be resolved by an agreement between the States concerned that would allow them to give their prior consent to the consideration of the submission.¹⁶ Alternatively, the States concerned could seek to conclude an agreement on the delimitation of the continental shelf beyond 200 nautical miles. The conclusion of such an agreement would result in the resolution of the delimitation dispute that led to the invocation of paragraph 5(a) of Annex I to the Rules of Procedure and there would in principle no longer be a need for the consent of the other State to allow the CLCS to proceed with the consideration of the submission. Finally, where these two options are not feasible, the coastal State could consider submitting the delimitation dispute unilaterally to compulsory dispute settlement, or alternatively, jointly with the other State concerned. The determination of a boundary by a court or tribunal would have the same effect as the conclusion of a bilateral delimitation agreement. The finding of the ITLOS in *Bangladesh/Myanmar* that its exercise of jurisdiction in relation to a delimitation dispute would be without prejudice to the exercise by the CLCS to its functions under article 76 as discussed above might suggest that this will always be a viable approach. However, the consideration of the parameters of the specific dispute by the ITLOS indicates that this is not the case.

The Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Absence of Recommendations of the CLCS¹⁷

The case between Bangladesh and Myanmar that was decided by the ITLOS in 2012 contains a detailed discussion of the implications of the absence of recommendations of the CLCS for the delimitation of the continental shelf

Delimitation—Consistency and Predictability or Inconsistencies and Uncertainty? (forthcoming 2017).

- 16 For a further discussion of the options to deal with the absence of prior consent see below.
- 17 The first paragraph of this section in part is based on a section contained in A.G. Oude Elferink, 'ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties' in R. Wolfrum, M. Seršić and T. Šošić (eds.) *Contemporary Developments in International Law; Essays in Honour of Budislav Vukas* (Martinus Nijhoff Publishers, 2016), pp. 230–249.

beyond 200 nautical miles by a court or tribunal. Both parties in *Bangladesh/Myanmar* had made a submission to the CLCS. Myanmar complied with its obligation to submit information to the CLCS on 16 December 2008.¹⁸ Bangladesh, in a reaction to Myanmar's submission, indicated that it did not give its consent to the consideration of the submission by the CLCS.¹⁹ Bangladesh made a submission to the Commission in February 2011.²⁰ The entire continental shelf of Bangladesh as defined in its submission overlaps with the continental shelf of Myanmar's submission.²¹ Myanmar reacted in a similar fashion to its neighbor's submission.²² Like Bangladesh, Myanmar invoked the Rules of Procedure of the CLCS to block the consideration of the submission of its neighbor.²³ Consequently, when the case was heard by the ITLOS, the CLCS had not considered the submissions of the parties and had not made recommendations to them. In their pleadings the parties differed as regards the implications of the absence of recommendations of the CLCS. Myanmar contended that the ITLOS was not in a position to determine the continental shelf boundary beyond 200 nautical miles until the CLCS would have issued its recommendations.²⁴ Myanmar argued that recommendations of the Commission were required to create certainty about the extent of continental shelf rights, which

18 The Executive summary of Myanmar's submission and other information related to the submission are available at www.un.org/Depts/los/clcs_new/submissions_files/submission_mmr.htm.

19 Bangladesh among others indicated that it considered that Myanmar did not have a natural prolongation in the area concerned and that it had objected to the baselines Myanmar had employed in its submission (Note verbale No. PMBNY-UNCLOS/2009 of the Permanent Mission of Bangladesh to the United Nations to the Secretary General of the United Nations of 23 July 2009).

20 The Executive summary of Bangladesh's submission and other information related to the submission are available at www.un.org/Depts/los/clcs_new/submissions_files/submission_bgd_55_2011.htm.

21 Most of the continental shelf as defined in Bangladesh's submission moreover overlapped with India's continental shelf. The delimitation of this continental shelf between Bangladesh and India has been decided by a tribunal under Annex VII of the LOS Convention (In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award of 7 July 2014; available at <http://www.pcacases.com/web/sendAttach/383>).

22 Myanmar observed that it considered that Bangladesh's continental shelf did not extend beyond the 200-nautical-mile limit and "*a fortiori*, [not] beyond this limit" (Note verbale No. 146/03 20 17 of the Permanent Mission of the Republic of the Union of Myanmar to the United Nations, New York to the Secretary General of the United Nations of 31 March 2011, p. 1) and also protested the straight baselines established by Bangladesh (*ibid.*, p. 2).

23 *Ibid.*

24 Judgment, note 3 at para. 345.

it considered a “necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 [nm].”²⁵ Bangladesh held that the Tribunal had jurisdiction to deal with the delimitation of the entire continental shelf and observed that article 83 did not make a distinction between the shelf within and beyond 200 nautical miles.²⁶ Bangladesh further submitted that the Tribunal and the CLCS had complementary roles, which did not conflict with each other.²⁷ Finally, Bangladesh referred to the Catch-22 that would result if the proposition of Myanmar were to be accepted. The Commission would not be in a position to act because of the existing delimitation dispute and the Tribunal would not be in a position to resolve that dispute because the CLCS had not yet issued its recommendations to the parties.²⁸

As was observed above, the ITLOS accepted the argument of Bangladesh that the Tribunal’s role and that of the Commission were complementary and that the exercise of its jurisdiction to delimit the continental shelf beyond 200 nautical miles would be without prejudice to the exercise by the CLCS of its functions. The Tribunal also accepted Bangladesh’s argument that it would be undesirable that there would be a deadlock because both the Tribunal and the CLCS would be precluded from acting. In this connection, the Tribunal observed that:

it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.²⁹

25 *Ibid.* For a discussion of this issue see also B. Kunoy, ‘The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf’ 2010 (25) *International Journal of Marine and Coastal Law*, pp. 237–270; and B.M. Magnusson, ‘Is there really a temporal relationship between the delineation and delimitation of the continental shelf beyond 200 nautical miles?’ 2013 (28) *International Journal of Marine and Coastal Law*, pp. 465–483.

26 Judgment, note 3 at paras 345 and 350.

27 *Ibid.*, para. 356.

28 *Ibid.*, para. 358.

29 *Ibid.*, para. 392.

Whether this argument is wholly convincing may be questioned. The LOS Convention entitles States to exclude delimitation disputes from the scope of compulsory dispute settlement by making a declaration under article 298 of the Convention. It must have been clear to the negotiators of the Convention that this could result in the prolonged absence of a boundary, making that the parties would be, to use the words of the Tribunal, “unable to benefit fully from their rights over the continental shelf.”

At the same time, the Tribunal’s reasoning suggests that it considered that there was merit to Myanmar’s argument that it could not act in the face of uncertainty about the extent of the continental shelf beyond 200 nautical miles. As the Tribunal observed:

443. Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.

444. In this regard, the Tribunal notes that the Bay of Bengal presents a unique situation, as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea.

This aspect of the Tribunal’s reasoning is critical to assessing the implications of paragraph 5(a) of the Rules of Procedure of the CLCS. As the Tribunal indicates, it “would have been hesitant to proceed [...] had it concluded that there was significant uncertainty as to the existence of a continental margin.”³⁰ Although this is a high threshold before the Tribunal would not proceed with delimitation—in fact, the Tribunal left open the possibility that it would even have proceeded in the face of significant uncertainty—it implies that, if this threshold were to be applied by another court or tribunal, there may be cases in which it will not proceed with the delimitation of the continental shelf in the absence of recommendations of the CLCS. If a State has invoked paragraph 5(a) and withheld its consent, the CLCS will in such case at the same time not be in a position to issue recommendations. This would result in the deadlock that was set out by Bangladesh in its pleadings and the possibility of the absence of a continental shelf boundary for an indefinite period of time. This result is

30 It may moreover be noted the Tribunal did not have to test this threshold in the case at hand because of the unique situation of the Bay of Bengal. A court or tribunal that will be confronted with this issue in a different context may have to determine how to apply this threshold in practice.

the consequence of the paragraph 5(a) of Annex I to the Rules of Procedure of the Commission. As was noted above, article 76 itself does not envisage the Commission not making recommendations due to undelimited boundaries, but rather provides that the article is without prejudice to the question of the delimitation of the continental shelf.³¹ It is submitted that this state of affairs implies that paragraph 5(a) of Annex I to the Rules of Procedure does not ensure that the “actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”, as is required by article 9 of Annex II to the LOS Convention.

In further considering the implementation of article 9 of Annex II to the LOS Convention by paragraph 5(a), it may be noted that there are two possible interpretations of article 9.³² Paragraph 5(a) of Annex I to the Rules of Procedure seems to be based on the assumption that such prejudice might result from the consideration by the Commission of the data and other material contained in a submission. A second interpretation would be that the Commission in considering such matters should not take any actions that result in such prejudice. The latter interpretation has a number of advantages as compared to the approach contained in paragraph 5(a). It would ensure that the Commission can carry out its functions as defined in the Convention. It also ensures that the article 76 procedure involving the CLCS and coastal States may be finalized for all coastal States. Finally, this interpretation furthers one of the basic objectives of the Convention by creating certainty about the final limits between national jurisdiction and the Area.

Interestingly, the practice of the CLCS can be said to reflect both these interpretations of article 9. This may be illustrated by the recommendations of the CLCS to Japan in relation to the continental shelf of Okinotorishima.³³ On the one hand, the recommendations observe that:

31 As has been observed by Serdy, the possibility to block the consideration of a submission under paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS “is surely repugnant to [...] [article 76(8)], whose second sentence contains mandatory language (“The Commission shall make recommendations to coastal States ...”) that entitles the submitting State to expect that its submission will be examined on its technical merits” (Serdy, note 13 at p. 366.).

32 See also *ibid.*, p. 364.

33 Summary of recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Japan on 12 November 2008; Adopted by the Commission on 19 April 2012 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpno8/com_sumrec_jpn_fin.pdf).

The Commission considers that it will not be in a position to take action to make recommendations on the Southern Kyushu-Palau Ridge Region (KPR) until such time as the matters referred to in the notes verbales [of China and Korea invoking paragraph 5(a)] have been resolved.³⁴

On the other hand, in their introductory part the recommendations contain a general savings clause:

The Recommendations of the Commission only deal with issues related to article 76 and Annex II to the Convention and are without prejudice to matters relating to delimitation between States, or implementation of other parts of the Convention or any other treaties.³⁵

If the recommendations only deal with the issues listed in this general savings clause, it is unclear why the Commission at the same time should include paragraph 5(a) in Annex I to its Rules of Procedure, which gives third States a veto over the consideration of a submission because of issues which in the view of the Commission itself are not prejudiced by the issuance of recommendations on such a submission.

34 *Ibid.*, para. 20.

35 *Ibid.*, para. 5. It has been submitted that a finding of the CLCS on issues concerning the application of article 76 in recommendations to a coastal State could lead to prejudice to a neighboring State that also has a continental shelf in the same area and that this eventuality would provide a basis to withhold consent under paragraph 5(a) of Annex I to the Rules of Procedure of the Commission (see *e.g.* Note verbale Ref. No 119.N.8 of the Permanent Mission of Denmark to the United Nations to the Secretary General of the United Nations of 27 May 2009; available at https://www.un.org/depts/los/clcs_new/submissions_files/gbrog/dnk_re_gbr_clcs19_2009e.pdf). It may be doubted whether such a finding actually would lead to prejudice for the neighboring State. First, if this reasoning is carried to its logical consequence, any State should be allowed to withhold its consent to the consideration of a submission in which the CLCS could make a finding that would be relevant to the submission of that State. This would have the potential to completely paralyze the Commission, whose work necessarily involves making findings of a general nature that are applicable to a range of individual cases. Second, as long as the Commission only deals with the information submitted by the coastal State and reviews whether the outer limits of that State have been established in accordance with the relevant provisions of article 76, the submission of another State containing information on the limits of that State's continental shelf will not be prejudiced.

Other Land and Maritime Disputes Covered by Annex I to the Rules of Procedure

Article 76(10) of the Convention and Article 9 of Annex II to the Convention only refer to respectively continental shelf boundaries and boundaries between States, and do not state that they are applicable to other issues. The Rules of Procedure refer to the broader category of land and maritime disputes, of which disputes in relation to the delimitation of the continental shelf are a subcategory. This raises the question whether the above analysis in relation to paragraph 5(a) also applies to the broader category of land and maritime disputes. A number of arguments support an affirmative answer to this question. First, it may be noted that the Commission itself has taken the view that its recommendations are without prejudice to the “implementation of other parts of the [LOS] Convention or any other treaties.”³⁶ Second, the functions of the CLCS are limited to “consider[ing] the data and other material submitted by coastal States concerning the outer limits of the continental shelf [...], and to mak[ing] recommendations in accordance with article 76 [...]”³⁷ The Commission has no competence to deal with issues that fall beyond this mandate, like territorial disputes, and anything the Commission says on such matters does not have any effect of the rights and obligations of States on those matters.³⁸ In this connection it may also be noted that the competence of the CLCS differs sharply from that of international courts and tribunals. The latter can in principle deal with any issue that is relevant to deciding a dispute that has been duly submitted to them and they may interpret and apply rules of treaties and customary international law that also define the rights and obligations of third States. However, even with these potentially far-reaching implications of the decisions of courts and tribunals for third States, such States have not been given a broad mandate to block judicial proceedings comparable to paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS. In *Monetary Gold* the ICJ

36 Summary of recommendations, note 32 at para. 5. Curiously, the safeguarding clause contained in the recommendations of the Commission does not refer to customary international law, which is (part of) the governing law for many land and maritime disputes. It has to be presumed that the absence of a reference to customary law is an oversight and should not be taken to imply that recommendations of the Commission may prejudice the rights of States under customary international law.

37 LOS Convention, Annex II, article 3(1)(a).

38 For a detailed discussion of this point 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’ 2009 (28) *Australian Yearbook of International Law* pp. 181–220.

considered when it should not decide a matter between the parties before it due to the rights of a third State. The Court held that a decision would require it to rule on questions that only concerned two directly interested States—Italy and Albania—but the latter was not a party in the proceedings. The Court concluded that “[t]o go into the merits of such questions would be to decide a dispute between Italy and Albania.”³⁹ It is submitted that the CLCS, in making its recommendations, never will be in a position analogous to the Court in *Monetary Gold*.

The above arguments indicate that paragraph 5(a) of Annex I to the Rules of Procedure is not necessary to avoid prejudice to the position of parties in land or maritime disputes that are not explicitly mentioned in article 76(10) of and article 9 of Annex II to the LOS Convention.

Options for Coastal States Whose Submission Has Been Deadlocked

A coastal State that will not receive recommendations of the CLCS due to the absence of prior consent under paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS will not be in a position to finalize the implementation of article 76 of the LOS Convention. The absence of limits established in accordance article 76(8) of the Convention is not a prerequisite for the coastal State’s entitlement over its continental shelf.⁴⁰ However, the absence of such limits may in practice raise questions about the exact extent of the continental shelf. For instance, the coastal State may consider that living resources are located on its continental shelf, while other States may hold that the area concerned is beyond the continental shelf, implying that the coastal State does not have sovereign rights over the sedentary species of the seabed.

The above raises the question what steps a coastal State, which has its submission deadlocked because of paragraph 5(a) of Annex I to the Rules of Procedure, could consider to address this matter. A first option would be to do nothing and leave the matter pending. The coastal State can justify this course of action by submitting that it has complied with its obligations under article

39 *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of 15 June 1954 (ICJ Reports 1954, p. 19 at p. 32).

40 For a discussion see e.g. A.G. Oude Elferink, ‘The Regime for Marine Scientific Research in the Arctic: Implications of the Absence of Outer Limits of the Continental Shelf beyond 200 Nautical Miles’ in S. Wasum-Rainer, I. Winkelmann and K. Tiroch (eds.), *Arctic Science, International Law and Climate Change; Legal Aspects of Marine Science in the Arctic Ocean* (Springer Verlag, 2012), pp. 189–208.

76 to the extent possible.⁴¹ Obviously, this approach results in continued uncertainty about the outer limits of the continental shelf. Whether or not this is a feasible option for a coastal State will among others depend on the extent of the area over which uncertainty exists and the presence of resources that could be exploited. The absence of currently exploitable resources would likely decrease the need to create certainty about the outer limits of the continental shelf.⁴²

A coastal State whose submission is deadlocked in the Commission could also attempt to reach an understanding with the States concerned that would lead to their giving prior consent to consideration of submission by the Commission. However, that option may not always be feasible. A dispute that has led to a State withholding its prior consent under paragraph 5(a) of Annex I to the Rules of Procedure may be intractable or the other State may only be willing to agree to giving its prior consent on terms that are unacceptable to the coastal State. Alternatively, the coastal State could have resort to compulsory dispute settlement under Part XV of the LOS Convention or another instrument providing for this option to arrive at a resolution of the dispute that formed the basis for invoking paragraph 5(a) of Annex I to the Rules of Procedure. However, this option may not always be available. This is for instance the case if paragraph 5(a) has been invoked because of a delimitation dispute and the other State concerned has made a declaration under article 298 of the LOS Convention excluding delimitation disputes from compulsory dispute settlement procedures. In addition, a coastal State may not be interested in resolving a dispute through compulsory dispute settlement.

A final option for a coastal State would be to apply provisional limits on the basis of the information contained in its submission to the CLCS, or, where relevant, recommendations of a sub-commission of the CLCS.⁴³ This option could be justified with reference to the fact that it has to be assumed that the coastal State has implemented article 76 in good faith and that the outer limits it has submitted to the CLCS have been established in accordance with

41 Under this scenario, the coastal State would still have to comply with its other obligations under the LOS Convention, such as those contained in article 83 dealing with the delimitation of the continental shelf.

42 It may be noted that an interest in the development of the resources of the continental shelf is one factor that not infrequently leads to the conclusion of bilateral boundary agreements.

43 The latter would be an option where another State only invokes paragraph 5(a) of the Rules of Procedure of the CLCS after the Commission has started the consideration of a submission. An example in this respect is provided by the submission of Japan in relation to the continental shelf off Okinotorishima.

article 76.⁴⁴ A drawback of this approach is that it might create the impression of not complying with the Convention. As such, it could also contribute to triggering non-compliance of other States on other aspects of the Convention.

In conclusion, it may be noted that all of the above options have certain drawbacks as compared to establishing outer limits on the basis of the recommendations of the Commission. These options thus do not seem to offer coastal States a completely satisfactory answer to the problems posed by paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS.

Options for the CLCS to Deal with Paragraph 5(a) of Annex I

As is argued above, paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS may in certain instances lead to a deadlock. In the absence of prior consent of the States involved in a land or maritime dispute, the CLCS will not be able to make recommendations to a coastal State and a court or tribunal that has been seized to decide on the delimitation of the continental shelf will not be able to address that matter until such time that the coastal State has received recommendations of the CLCS on its outer limits. This state of affairs implies that by including paragraph 5(a) in Annex I to its Rules of Procedure, the CLCS has not acted in accordance with article 9 of Annex II to the LOS Convention, which charges the CLCS to not prejudice the delimitation of boundaries between States. Are there any actions the CLCS could take to remedy this situation?

The CLCS is competent to determine its own rules of procedure. The competence to adopt its rules of procedure includes the competence to amend the rules of procedure.⁴⁵ The CLCS could thus address the issues raised by paragraph 5(a) of Annex I to the Rules of Procedure by amending that paragraph. As was concluded above, the CLCS in carrying out the functions that have been assigned to it under the LOS Convention by its actions in principle will not prejudice land or maritime disputes as defined in Annex I to its Rules of Procedures. This indicates that it would be possible to delete paragraph 5(a) of Annex I altogether. The Commission could then consider all pending submissions in the order they have been submitted to it. However, it should be noted that such an amendment would likely lead to opposition from States Parties that have invoked paragraph 5(a) to withhold their consent. Moreover, the CLCS before

44 As I have argued elsewhere, this approach may not always be completely devoid of risk (Oude Elferink, note 39).

45 The CLCS has amended the Rules of Procedure on a number of occasions.

adopting Annex I sought the views of the Meeting of States Parties.⁴⁶ Although the CLCS is not obliged to take this step, there may be an expectation among the States Parties that the CLCS should do so in respect of a consequential amendment of Annex I. The Commission might find a justification for deleting paragraph 5(a) of Annex I (without turning first to the Meeting of States Parties) with reference to the judgment of the ITLOS in *Bangladesh/Myanmar*. The Commission could submit that the amendment would achieve avoiding an impasse involving the Commission and a court or tribunal having competence under the Convention in order to ensure the effective implementation of the provisions of the Convention. In this way, States Parties would be able “to benefit fully from their rights over the continental shelf.”⁴⁷

Conclusions

The present paper first analyzes article 76(10) of the LOS Convention and article 9 of Annex II to the Convention. Article 76(10) provides that the implementation of article 76 is without prejudice to the delimitation of the continental shelf. This paragraph guarantees that outer limits established on the basis of recommendations of the CLCS do not become final and binding in relation to a neighboring State that also has a continental shelf entitlement in the same area. On the other hand, article 9 does not indicate a result, but requires that the Commission through its actions shall not prejudice the delimitation of boundaries between States. The Commission has implemented article 9 through Rule 46 of and Annex I to its Rules of Procedure. The critical provision of Annex I in this respect is paragraph 5(a), which provides that a submission in relation to which a land or maritime dispute exists will only be considered by the CLCS with the prior consent of the parties to a dispute. One recent count indicates that in 17 cases prior consent has not been given. In the absence of consent, the CLCS will not be in a position to make recommendations to the coastal State and that State will not be able to establish the outer limits of its continental shelf in accordance with article 76.

The ITLOS in *Bangladesh/Myanmar* considered the significance of the absence of recommendations for its task to delimit the continental shelf beyond 200 nautical miles. The ITLOS accepted the argument of Bangladesh that the

46 See Report of the Eighth Meeting of States Parties (SPLOS/31 of 4 June 1998) (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/161/23/PDF/N9816123.pdf?OpenElement>).

47 Judgment, note 3 at para. 392.

Tribunal's role and that of the Commission had to be seen as complementary and that the exercise of its jurisdiction to delimit the continental shelf beyond 200 nautical miles would be without prejudice to the exercise by the CLCS of its functions and that a deadlock should be avoided. As was observed, the argument of the Tribunal to justify its acting to avoid a deadlock is not wholly convincing. Such a deadlock may also result from other rules contained in the Convention.

The Tribunal's reasoning suggests that it considered that there was merit to Myanmar's argument that it could not act in the face of uncertainty about the extent of the continental shelf beyond 200 nautical miles. The Tribunal's reasoning indicates that the absence of recommendations could in certain instances lead a court to not exercise its jurisdiction to delimit the continental shelf. It is submitted that this outcome indicates that paragraph 5(a) is contrary to the obligation of the CLCS to ensure that its actions shall not prejudice the delimitation of boundaries between States. The paper further indicates that there are two possible interpretations of article 9. Paragraph 5(a) of Annex I to the Rules of Procedure seems to be based on the assumption that such prejudice might result from the consideration by the Commission of the data and other material contained in a submission. A second interpretation would be that the Commission in considering such matters should not take any actions that result in such prejudice. The latter interpretation ensures that the Commission can carry out its functions as defined in the Convention and that the article 76 procedure involving the CLCS and coastal States may be finalized for all States concerned. Finally, this interpretation furthers one of the basic objectives of the Convention by creating certainty about the final limits between national jurisdiction and the international seabed area.

As is pointed out, the practice of the Commission in making its recommendations has combined these two approaches to article 9. On the one hand, it has included a general savings clause indicating that its recommendations are "without prejudice to matters relating to delimitation between States, or implementation of other parts of the Convention or any other treaties."⁴⁸ At the same time, it has refrained from considering submissions and adopting recommendations where prior consent has not been given under paragraph 5(a) of Annex I to its Rules of Procedure. These two approaches are difficult to reconcile. The existence of the general savings clause raises the question why the Commission at the same time has included paragraph 5(a) in Annex I to its Rules of Procedure, which gives third States a veto over the consideration of a

48 Summary of recommendations, note 32 at para. 5.

submission because of issues which in the view of the Commission itself are not prejudiced by the issuance of recommendations on such a submission.

The paper concludes that the arguments which indicate that paragraph 5(a) of Annex I to the Rules of Procedure is contrary to the obligations of the Commission under article 9 of Annex II to the LOS Convention, also apply to other land and maritime disputes which are mentioned in Rule 46 of the Rules of Procedure of the CLCS. In this connection, the paper briefly considers the necessary third party doctrine espoused by the ICJ in *Monetary Gold*. It is submitted that in light of the competence of the CLCS as compared to courts and tribunals, the analogy with *Monetary Gold* indicates that the CLCS, in making its recommendations, will never be in a position analogous to the Court in *Monetary Gold*, which precluded the Court from deciding the dispute between the parties to the case.

The paper next considers the options a coastal State, whose submission is deadlocked in the Commission, has to deal with this matter. It is concluded that, although there are a number of options in this respect, they do not seem to offer a completely satisfactory answer for coastal States to the problems posed by paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS. This indicates all the more that it would be desirable to find a solution to the problems caused by paragraph 5(a).⁴⁹

The CLCS would be competent to change its Rules of Procedure, and as is submitted above, could delete paragraph 5(a) from Annex I. Such an approach would not be without political fall-out as a considerable number of States have used this paragraph to veto the consideration of a submission of another State by the Commission. The CLCS could justify this course of action relying on the judgment of the ITLOS in *Bangladesh/Myanmar*, which argued the importance of avoiding a deadlock because two organs established by the Convention would have to wait on each other to act. In the final analysis, whichever

49 At the Fortieth Annual Conference of the Center for Oceans Law and Policy (New York, June 27–28, 2016), two other solutions to the problems caused by paragraph 5(a) of Annex I to the Rules of Procedure were suggested during the discussion on my paper. First, a court or tribunal could ask the CLCS to look at the matter with the consent of the parties to the case. However, parties may not be forthcoming in this respect as giving their prior consent was something at least one of them was not willing to do under paragraph 5(a). Second, it was suggested that a court or tribunal under the LOS Convention could make use of article 289 of the LOS Convention, entailing the use of experts. However, that approach in this case would seem to involve duplicating and thereby prejudicing the functions of the Commission under the Convention.

way the Commission decides to deal with paragraph 5(a), it can be expected to meet with opposition in certain quarters. From the perspective of the effective implementation of the Convention doing away with paragraph 5(a) would seem to be preferable. On the other hand, taking this step might complicate the working relationship of the CLCS with the Meeting of States Parties to a larger extent than maintaining the *status quo*.