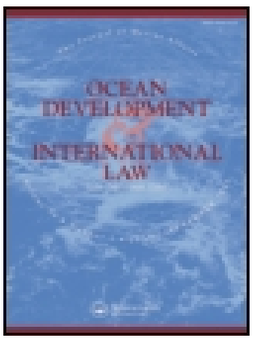

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"Openness" and Article 76 of the Law of the Sea Convention: The Process Does Not Need to Be Adjusted

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The establishment of the outer limits of the continental shelf beyond 200 nautical miles under Article 76 of the United Nations Convention on the Law of the Sea, which requires states to submit information to the Commission on the Limits of the Continental Shelf (CLCS), is a complex and costly process. States have an interest in being aware of the kind of information that the Commission is expecting to receive. States also have an interest in being able to assess whether the coastal state in establishing these outer limits has acted on the basis of the recommendations of the Commission, as is required by the Convention. Both these issues have led to calls for greater "openness" with respect to the consideration of submissions by the CLCS. This article takes a close look at the proposals that have been advanced to accomplish greater openness and concludes that there is no need to change the current process, which offers sufficient opportunities to deal with the above-mentioned concerns. It is further concluded that the proposed changes in any case do not stand any chance of being adopted.

Keywords Commission on the Limits of the Continental Shelf, continental shelf, law and science

Introduction

Article 76(1) of the United Nations Convention on the Law of the Sea[1] defines the continental shelf by reference to either a distance of 200 nautical miles from the baselines of the coastal state or the outer edge of the continental margin, where that outer edge extends beyond 200 nautical miles. Article 76 sets out the criteria a coastal state is to apply to establish the outer limits of its continental shelf where the outer edge of the continental margin extends beyond 200 nautical miles. Article 76 requires the coastal State to submit information on those outer limits to the Commission on the Limits of the Continental Shelf (CLCS), a body of independent experts set up under the Convention. Following the submission of information, the Commission is to make recommendations to the coastal

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state. Outer limits of the continental shelf established by the coastal state on the basis of the recommendations of the Commission are to be final and binding.[2]

The establishment of outer limits of the continental shelf beyond 200 nautical miles under Article 76 of the Convention is a complex and costly process. This suggests that states have a strong interest in being aware of the kind of information the Commission is expecting to receive. States also have an interest in being able to assess whether the coastal state in establishing its outer limits has acted on the basis of the recommendations of the Commission. Both these issues have led to calls for greater "openness" with respect to the consideration of submissions by the CLCS.[3] These issues have been considered by the Commission.

Any assessment of the need for changes to the current Article 76 process first of all requires an assessment of the existing process. Moreover, in order to properly assess whether reform is actually necessary and feasible, it has to be kept in mind that the procedure involving the CLCS and coastal states is contained in a legal instrument. Any proposal to change this procedure has to be in accordance with the LOS Convention. Otherwise, a proposal would require the amendment of the Convention, which poses an almost insurmountable hurdle. After the current Article 76 process and the relevant rules of the Convention have been assessed, this article will take a closer look at the proposals that have been advanced to accomplish greater openness of that process. Finally, the article offers some concluding observations.

The Openness of the Current Article 76 Process

Before looking at the options that have been suggested to accomplish greater openness of the Article 76 process, it is necessary to consider what this process entails. This review is useful for two purposes. First, it informs us about the existing possibilities that third states have to influence the establishment of outer limits by the coastal state and to obtain information relevant to the establishment of the outer limits of their own continental shelf. Secondly, the rules contained in the LOS Convention set limits on the kind of change that can be introduced to the Article 76 process. Proposed changes that are not in accordance with the provisions of Convention would require an amendment of the Convention.

The LOS Convention indicates that the procedure to establish the outer limits involves the coastal state and the Commission. Article 76(8) requires a coastal state to make a submission, which the Commission is to consider and on which it is to make recommendations. The submitting state may send its representatives to participate in the relevant proceedings.[4] The Convention does not envisage any role for other states in the consideration of a submission of a coastal state. The Convention also does not require that the recommendations of the Commission be made public.[5] Following the adoption by the Commission of recommendations, it is the coastal state that either is to establish its outer limits on the basis of those recommendations or, if it does not agree with the Commission, make a new or revised submission, which the Commission is again to consider.[6]

Article 9 of Annex II to the Convention is directly concerned with the impact of the process of establishing outer limits by the coastal state on other states. The Article provides that the actions of the Commission are not to prejudice matters relating to the delimitation of boundaries between states. This is an instructive illustration of the thinking of the drafters of the Convention with respect to the openness of the Article 76 process. Article 9 indicates that matters related to the delimitation of boundaries between states are first of all the

concern of the states involved. In other words, rather than involving third states in the consideration of a submission, the Commission is to insulate itself—and, by implication, the consideration of a submission—from such matters.[7]

Although the Convention sets the general framework for the establishment of the outer limits of the continental shelf, its provisions do not contain a definitive answer on many specific questions that have come up in the implementation of Article 76.[8] This does not mean that the Convention does not set any limits in that respect, but that it allows for different solutions to implement its provisions. Before looking at the specific solutions that have been adopted, some general considerations in relation to the establishment of outer limits and the role of the Commission under the Convention are appropriate, as they circumscribe the options available to address issues in the implementation of Article 76.

The establishment of the outer limits of the maritime zones of a coastal state is a two-stage process. This is expressed as follows in a well-known observation of the International Court of Justice in the *Anglo-Norwegian Fisheries* case concerning straight baselines that Norway had established along its coast:

> 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.[9]

In other words, other states have a right to reject the limits of maritime zones established by the coastal state. They do not, however, have any right to be involved beforehand. The procedure to establish the outer limit lines of the continental shelf beyond 200 nautical miles under Article 76 places certain limitations on the freedom of the coastal state to unilaterally establish those outer limits. As such, those limitations have to be interpreted restrictively.[10] The Convention in any case does not confer a right to third states to participate in the process involving the CLCS and the coastal state[11] and such a right should not be read into the Convention.

The fact that the Convention defines the rights and obligations of states with respect to the establishment of the outer limits of the continental shelf also has implications for the CLCS. A recent report of a Committee of the International Law Association dealing with various aspects of Article 76 of the Convention observed in this respect:

> There are limits to the means the CLCS may employ to make additional information on a submission, its consideration or recommendations available. In imposing requirements on a submitting State, care should be taken to balance the rights and obligations of that State and other States. Additional requirements imposed on the coastal State have to meet the principle of proportionality. The requirements have to be proportionate to the end they intend to accomplish in the light of the interests involved. In addition, the Commission has to act in accordance with the provisions of the Convention and any requirement it imposes on a coastal State [that] has to meet this obligation.[12]

The Commission has adopted a number of basic documents setting out, among other things, the procedures it is to follow and the kind of data it is expecting coastal states to submit. These documents provide an elaboration of the provisions of the Convention defining the

functions of the Commission and are essential to establishing the current openness of the Article 76 process.

In Rule 46 and Annex I to the Rules of Procedure, the Commission has implemented Article 9 of Annex II to the Convention.[13] The Rules of Procedure are based on the understanding contained in that Article that matters related to the delimitation of boundaries between states are first of all the concern of the states involved.[14] Annex I to the Rules takes as its starting point that the Commission recognizes that the competence with respect to matters regarding disputes that may arise in connection with the establishment of the outer limits of the continental shelf rests with states.[15] Annex I further indicates that the Commission will 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.[16]

To allow other states to make an assessment of potential land and maritime disputes that may be related to a submission, coastal states are required to include an Executive Summary in their submission, which is made public.[17] This approach provides a balance between the right of the coastal state to keep the data it submits outside of the public domain and the rights of other states and the need for the Commission to act in accordance with its mandate.[18]

The Executive Summary of submissions in general contains limited information. However, the comments of the United States on the Executive Summary of the Brazilian submission suggest that even that limited information makes it possible to make a detailed assessment.[19] If such an assessment were not possible, a state could indicate that the information contained in the Executive Summary does not allow it to make that assessment and that it reserves its rights.[20]

The Scientific and Technical Guidelines of the Commission provide important information to coastal states in the preparation of their submission.[21] The Guidelines explain how the Commission understands the relevant provisions of Article 76 and the consequences this may have for the data to be submitted by coastal states.[22] The Guidelines provide that they aim to clarify the scope and depth of admissible scientific and technical evidence to be examined by the Commission during its consideration of submissions.[23] The Guidelines provide states with a much more detailed understanding of the kind of information the CLCS expects to be included in a submission than the generally worded provisions of the Convention.[24] The Guidelines can contribute to preventing the collection of unnecessary data or the need to gather additional information after a submission has been made. In addition to relying on the Guidelines, a coastal state can also seek guidance from the Commission to obtain scientific and technical advice during the preparation of its submission.[25]

Information related to the consideration of submissions can also become available through other means. An example is the legal opinion of the legal counsel of the United Nations on the lodging of additional data by Brazil after it had made its submission and the Executive Summary had been circulated.[26] The opinion is relevant to all states facing a similar issue. The Statements of the Chairman of the Commission on the progress of work of the Commission, which are issued after each session of the Commission, may also include relevant information. An example concerns joint submissions. After a question had arisen in relation to the joint submission of France, Ireland, Spain, and the United Kingdom, the Commission considered the general implications of that question for submissions. The Statement of the Chairman contains the outcome of that consideration.[27] Another example is the Commission's consideration of the question of connecting the line of the outer limit of the continental shelf beyond 200 nautical miles to the 200-nautical-mile limit.[28] There is no requirement to publish the recommendations of the Commission.[29] If the coastal state

does not make information on the recommendations available, other states will not be in a position to assess whether the coastal state, in establishing its outer limits, has acted "on the basis of" the recommendations. Originally, the Rules of Procedure of the Commission did not deal with this matter. Following questions about whether publicity should be given to the recommendations of the Commission, the Commission considered the matter. In this connection, the legal framework that applies to recommendations was analyzed in a Discussion Paper prepared by the Secretariat.[30] The Paper indicated that a fundamental issue in this respect is:

> to assess the balance between the confidentiality of the recommendations (sent only to the submitting coastal State and the Secretary-General) and the rights of various parties to understand on what basis the Commission has applied the scientific principles contained in the Convention.[31]

After setting out the arguments supporting the confidential nature of the recommendations,[32] the Discussion Paper pointed out that the recommendations would contain data and information contained in the submission, and concluded that "[t]he publicity of such data and information is a coastal State's prerogative which derives from its proprietary rights."[33] A solution put forward in the Discussion Paper to address the concerns of other states about whether the submitting state has acted on the basis of the recommendations of the Commission would be to include an Executive Summary in the recommendations containing general information on the continental shelf and the coordinates of the fixed points of the outer limit line.[34] The Executive Summary could then be made public by the Secretary-General at the time that the coastal state complies with Article 76(9) of the Convention or upon the request of any other state.[35] This suggestion formed the basis for a revision of the Rules of Procedure by the Commission. Rule 54(3) now provides that, upon giving due publicity to the charts and relevant information permanently describing the outer limits of the continental shelf deposited by the coastal state, the Secretary-General is also to give due publicity to the recommendations of the Commission which, in the view of the Commission, are related to those limits.[36] It would seem to be inappropriate to give due publicity to the recommendations before the coastal state has acted on Article 76(9) of the Convention, as has for instance been suggested at the Meeting of States Parties to the Convention.[37] Until that time, the coastal state might also opt to make a new or revised submission to the Commission in accordance with Article 8 of Annex II to the Convention. A new or revised submission may result in different recommendations. The previously issued recommendations in that case no longer are relevant to the establishment of the outer limits of the continental shelf and their publication would not seem to respect the balance between the rights of the coastal state and other states regarding the information included in the recommendations.

If a state concluded that the Executive Summary of the recommendations does not contain sufficient information, it could raise this issue with the coastal state arguing that it cannot accept the validity of such outer limit lines because it cannot assess whether the coastal state has established the outer limits of its continental shelf in accordance with Article 76(8) of the Convention. It would then be up to the coastal state to decide whether or not to provide the other states concerned with the data necessary to make that assessment. A refusal of the coastal state could imply that the outer limit lines are not to become final and binding for at least the state that raised the matter with the coastal state.[38]

Proposals to Enhance the Openness of the Article 76 Process

There have been a number of proposals to enhance the openness of the Article 76 process.[39] Macnab has suggested three options. First, submitting states could adopt a policy of openness before their final submission is made to the CLCS.[40] Under this approach, a coastal state could, for instance, engage in dialogues with other states that share common interests or could be potentially affected, or a coastal state could issue regular progress reports, either informally or in peer-reviewed publications.[41] The importance of peer review, implying the involvement of the scientific community, to reach consensus on scientific aspects of Article 76 has also been suggested by Taft.[42] A second (complementary) approach would be to make the deliberations of the Commission more accessible to interested states.[43] Access would assist states in the development of their own submissions and also should help to promote broad acceptance of outer limits established by coastal states on the basis of the recommendations of the Commission.[44] Contentious issues that would remain despite the first two approaches could be resolved through the institution of:

> a mechanism whereby affected states with legitimate, pre-existing interests in the new zones of extended continental shelf jurisdiction could request clarification or additional substantiation concerning the more debatable aspects of a coastal state's submission and/or the associated CLCS recommendations. To be effective, this process would need to be interposed between the delivery of the CLCS recommendations and the deposition of the coastal state's final outer limit (at which point it becomes "final and binding"). This would be an improvement over the existing arrangement, whereby the legitimation of an outer continental shelf limit is a closed process that engages just two parties, the submitting state and the CLCS, with no provision for third-party objections or challenges.[45]

These suggestions raise a number of questions, which need to be answered in order to assess if it might be worthwhile to pursue them:

1. Is the existing arrangement under Article 76 really a closed process, as is posited by Macnab?
2. Should there be a role for the scientific community beyond the membership of the Commission; for instance, through processes of peer review?
3. Is there any chance that such proposals would be adopted?

As far as the first question is concerned, the analysis in the previous section clearly indicates that the Article 76 process as has been elaborated through the Rules of Procedure of the CLCS is not "a closed process that engages just two parties." Other states have the possibility to raise questions concerning the interpretation or application of the LOS Convention both before the Commission starts it consideration of a submission and after the coastal state has established outer limit lines under Articles 76(8) and 76(9). In the former case, the observations of another state may lead the Commission to refrain from considering the submission. In the latter case, protests from other states will have the result that the outer limits will not become automatically final and binding.[46] In both instances, the coastal state and the other states involved will have to engage in a dialogue to resolve those matters, or, alternatively, let the matter rest.

The suggestion that coastal states should engage in a policy of openness before they make their submission to the CLCS already seems to have been adopted in practice to a

certain extent. Especially in the case of neighboring states, who have a continental shelf entitlement in the same area, collaboration in the preparatory phase of a submission is taking place. It would seem that this collaboration has been facilitated by the procedures for dealing with land and maritime disputes designed by the Commission. A clear example of such collaboration is provided by the trilateral approach of Denmark/Faroe Islands, Iceland, and Norway with respect to their overlapping continental shelf entitlements in the Banana Hole in the North Atlantic Ocean.[47] In Agreed Minutes concluded in 2006, they have defined mutual bilateral continental shelf boundaries.[48] Bilateral agreements will be concluded only after the parties have finalized the procedure under Article 76(8) of the Convention.[49] Whether or not states want to engage in enhanced collaboration in preparing their submissions to the CLCS will have to be decided by the states concerned. However, as the LOS Convention and the Rules of Procedure of the CLCS indicate, a refusal to engage in collaboration does not imply that other states are excluded from impacting on the further consideration of outer limit lines.[50]

The consideration of the submission of the coastal state by the Commission can be described as "a closed process that engages just two parties." However, this nature of the process is in accordance with the LOS Convention. It has been suggested that the limited access to information for those states that are not a party to the submission process is at odds with the movement toward greater transparency in other international fora.[51] In this connection, reference is made to the International Tribunal for the Law of the Sea (ITLOS) and World Trade Organization (WTO) dispute panels and appellate bodies.[52] These are, however, different types of bodies, which have been entrusted with other tasks under their constitutive instruments, than the CLCS under the Convention. The reference to ITLOS underlines that the LOS Convention envisages different procedures for the different institutions set up under it.

Allowing third states to submit information to be taken into account in the consideration of a submission would be a major departure from the intent and wording in the LOS Convention. The observations by the United States on the Commission's refusal to take into account U.S. comments on the Executive Summary of the submission of Brazil seem an attempt to play down this problem, placing such observations at the same level as scientific literature.[53] However, this comparison rather highlights the differences that are involved. It is for the Commission to establish which scientific information it reviews in connection with the consideration of a submission. On the other hand, it is for third states to decide which observations to submit. In the case of the United States, its observations were quite general in nature, but there is nothing to prevent a third state from submitting detailed comments, which might even require further communications between the CLCS and the third state, changing the very nature of the process for considering submissions.

The fact that the consideration of a submission is a closed process does not imply that information that is relevant for third states cannot be made available. If the consideration of a submission would raise such issues, the Commission could further elaborate its Scientific and Technical Guidelines. As was pointed out above, information that is relevant to the preparation and consideration of a submission may also become available through other means.

The second question concerning the suggestions to enhance the openness of the Article 76 procedure is whether there should be peer review by the scientific community of scientific aspects of continental shelf submissions. Such a procedure is not envisaged by the LOS Convention. However, the Commission may cooperate, to the extent it considers this necessary and useful, with competent international organizations with a view to exchanging scientific and technical information that might be of assistance to the Commission in

discharging its responsibilities.[54] Like Article 9 of Annex II to the Convention, this provides an example of the views of the drafters of the Convention that contrast with the current proposals for changing the Article 76 process. The Convention entrusts the Commission with deciding when it considers cooperation required and the focus of such cooperation is on the exchange of information and does not envisage a review of the Commission's work.

In support of peer review, it has been submitted that it is important that there is an acceptable consensus in the scientific community.[55] Open scrutiny of submissions would prevent the Commission from issuing recommendations "on risky scientific grounds"[56] and prevent the awkward situation that "the scientists on the Commission recommend a certain result in a particular part of the continental shelf and science later indicates or establishes a significantly different result in a similar continental shelf of another State."[57] One option to deal with such concerns could be the deferral of a recommendation containing outer limit lines in the face of scientific uncertainty.[58] These observations raise some important questions. Should the Commission defer a decision on scientific grounds? Secondly, would the process of establishing outer limits of the continental shelf be compromised if an advance in scientific understanding indicates a different outcome than that contained in the recommendations of the Commission? To answer these questions, it is essential to understand the role of the Commission as set out in the LOS Convention.

The Commission is not a scientific body that is operating in a scientific setting and is charged with assessing the consensus in the scientific community concerning the scientific aspects of Article 76. If that were the case, peer review and deferring decisions until a sufficient consensus is reached might be acceptable and commendable approaches. But, the Commission is quite a different body. It has been established in accordance with an international legal text and its main function is to contribute to the process of finally establishing the outer limits of national jurisdiction. The presumption is that the Commission will issue recommendations that will allow the coastal state to finalize that process.[59] If the data and other material submitted by the coastal state allow the Commission to conclude that the coastal state proposes to establish the outer limits of its continental shelf in accordance with Article 76 of the Convention, the Commission should issue recommendations accordingly.[60] The position of the Commission is not unique in this respect. The comparison with the judge or arbitrator, who often has to act in the face of scientific uncertainty either because of diverging views in the scientific community or insufficient data, is an obvious one. Such uncertainty does not release the judge or arbitrator from his or her obligation to decide the case under consideration.

The conclusion that the Commission cannot defer recommendations until the scientific community has come up with an acceptable consensus does raise the question of whether the possibility of different outcomes in cases in which the same or similar circumstances prevail threatens the credibility and acceptability of the outcomes of the Article 76 process. Treating states in the same situation differently would be perceived to be unjust. However, the case under consideration does not concern the situation in which two states are in the same situation. This would be the case if two states made their submissions at the same time and the factual situation was identical. In that case, recommendations treating the two states differently would not be justified. However, if two submissions were made at different times and there existed a change in scientific understanding, it would become more difficult to argue that the difference in treatment would be unjustified. Again, this is a situation that is not uncommon. For instance, scientific understanding of the impact of pollution on the environment and human health or the impact of fishing on fish stocks and ecosystems has changed considerably, leading to different approaches today than was the case 20 or 30

years ago. The delimitation of maritime boundaries between neighboring states provides an example in an area that is more directly relevant to the Article 76 process. In recent years, there has been a clear trend in the case law to accord the equidistance method a greater role in the determination of the boundaries of the exclusive economic zone and the continental shelf between neighboring states.[61] This development does not affect existing boundaries, which were established at a time when equidistance had a more limited role. To the contrary, international law in the case of boundaries places particular significance on stability and finality.[62] Those considerations are also relevant to the process for the establishment of the outer limits of the continental shelf beyond 200 nautical miles, which is intended to result in permanent limits.

Article 76 does not provide for any exception to the "final and binding" nature of the outer limits of the continental shelf established on the basis of the recommendations of the Commission. Thus, changed circumstances or new data cannot be invoked to make a new or revised submission with respect to outer limit lines that have become final and binding. As has been observed by one commentator:

> One can surmise that it is not overly critical where the Article 76 outer limit is located, assuming the outer limit is not based on an exaggerated claim, provided that the limit is defined. Put another way, technical virtuosity respecting the location of the outer limit of the continental shelf may be less important than the political feature of the outer limit being "final and binding."[63]

A further question to assess with respect to the suggestions to enhance the openness of the Article 76 procedure is whether the suggestions are in line with the LOS Convention or whether an amendment of the Convention would be required. However, even changes to the Article 76 process that could be accomplished without amendment of the Convention should be carefully considered before being implemented. As of July 2008, 12 submissions have been made to the CLCS and the Commission has already submitted recommendations to a number of the states involved. In these circumstances, introducing new elements to the Article 76 process would risk compromising its integrity, something which would be the opposite of what is intended to be achieved. That same observation is *a fortiori* applicable to changes to the Article 76 process that would require an amendment of the Convention.

It has been submitted that the far-reaching proposal of creating a mechanism giving third states the right to "request clarification or additional substantiation concerning the more debatable aspects of a coastal State's submission and/or the associated CLCS recommendations" is not specifically precluded by the Convention.[64] However, the fact that this option is not explicitly precluded under the Convention does not mean that the Convention allows its introduction. As was set out earlier, the Convention places certain limitations on the freedom of the coastal state to unilaterally establish the outer limits of the continental shelf beyond 200 nautical miles and, as such, those limitations have to be interpreted restrictively. The proposed mechanism would go even further and impose new limitations on the rights of the coastal state to act unilaterally.

The fact that the review mechanism suggested by Macnab is not in accordance with the Convention, virtually excludes the pathways he suggests for introducing it (i.e., the CLCS and/or the Meeting of States Parties).[65] Some of the actions to which reference is made to justify those options concern matters that are related to operation of the Commission and fall within the Commission's competence.[66] The only action that could possibly be considered as a precedent is a decision by the Meeting of States Parties concerning the time limit for making submissions to the CLCS contained in Article 4 of Annex II to

the Convention.[67] However, this decision concerned only a procedural matter and did not change the substantive rights and obligations of states. Moreover, there were specific grounds that allowed for the framing of the decision in terms of an interpretation of Article 4, suggesting that it was intended to avoid the impression of an amendment.[68] Even if a decision were to be tabled at the Meeting of States Parties, it would not stand a chance of adoption because such a decision would require the general agreement of the Meeting[69] and many states would oppose such a decision on procedural and substantive grounds.

The legal and political complexities of a formal amendment of the Convention are such that it is not an option.[70] For one thing, would any coastal state be willing to accept additional limitations on its sovereign power to establish the limits of its maritime zones?

A final consideration to assess with respect to the need for greater openness is whether there actually is any indication that the absence of information is seriously hampering the process of preparing submissions. The fact that most states seem to be well under way in the preparation of their submission points to the conclusion that this is not the case. Delays in the implementation of Article 76 by individual states seem to be due to other factors, such as a lack of funding and technical expertise,[71] which in certain cases may be exacerbated by the fact that the process is not high on the political agenda.

Conclusion

The impression existing in certain quarters that the establishment of the outer limits of the continental shelf beyond 200 nautical miles is a closed process involving only the coastal state and the CLCS is a misconception. Other states have the possibility for input on the process at various stages—before a submission is taken up by the Commission for consideration and after the coastal state has established its outer limits under Article 76(9) of the Convention. True, other states are not allowed to participate in the consideration of the submission by the Commission. However, such participation would not be in accordance with the LOS Convention. The Commission's actions in the implementation of its mandate under the Convention have been faithful to this basic tenet of the Convention. At the same time, the Commission has sought to balance the rights of the submitting state and the rights of other states. Examples are Annex I to the Rules of Procedure of the Commission and the introduction of the procedure for making public certain information on the recommendations of the CLCS to the coastal state.

It is possible to have different views about the procedure to establish the outer limits of the continental shelf contained in Article 76 of the LOS Convention, but it is the Convention that provides the relevant legal framework. The Convention, including its Article 76, was adopted after long and difficult negotiations and reflects the balance of interest of different states. Article 76 imposes certain limitations on the power that the coastal state normally has to unilaterally establish the outer limits of its maritime zones. It is unrealistic to assume that coastal states would be willing to accept further limitations. Moreover, the existing Article 76 process contains sufficient checks and balances,[72] especially if the process of establishing the outer limits of the continental shelf beyond 200 nautical miles is compared to the process that applies in the case of other outer limits. Those checks and balances also indicate that the drafters of the Convention did consider the issues raised by the current pleas for openness of the Article 76 process, but came up with different solutions.

Other considerations also suggest that the openness of the examination of submissions by the Commission should not be a major concern. As was set out, there already exist means to inform other states about the relevant aspects of a submission. Secondly, major amendments to the Article 76 process are not desirable because that would change the

rules of the game while it is in progress. Finally, if there is a problem with respect to monitoring excessive coastal state claims, that is not so much attributable to the absence of effective mechanisms—one need only point to Annex I of the Rules of Procedures of the Commission—but rather would seem to be the result of a lack of interest on the part of the international community. States may have good grounds not to protest the outer limits of other states.[73] As far as the Article 76 process is concerned, it appears to be the case that most states, including major developed states, do not seem to be engaged in a detailed analysis of the information that is available concerning submissions. That matter obviously cannot be addressed by a greater openness of the Article 76 process.

The suggestions for a greater involvement of the scientific community in the Article 76 process seem to be based on a misconception of the function of the Commission, which as a treaty body is required to assist in the implementation of the Convention. The Commission is not intended to function as a scientific body that may defer decisions until the scientific community reaches sufficient agreement. It is essential to realize that the implementation of Article 76 is primarily a legal process. Policy and law dictate the margins within which states and the Commission have to operate. Although science plays an important role in that process, it cannot set aside the applicable law.

Rather than reinforcing the Article 76 process, suggestions for significant change risk to discredit it. Some of the discussion tends to create the impression that the existing process is secretive and excludes any possibility for third states to influence its outcome.[74] That impression is far from the truth. In conclusion, suggestions to significantly change the Article 76 process, which would require amendments to the Convention, are neither necessary nor feasible. In view of the reluctance of states to go down that road, it also seems unlikely that any suggestions in this respect will receive much attention.

Notes

1. 1833 *U.N.T.S*. 396. Hereinafter, LOS Convention.
2. *Ibid.*, art. 76(8).
3. See, especially, R. Macnab, "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76," *Ocean Development and International Law* 35 (2004): 1–17; and G. Taft, "Applying the Law of the Sea Convention and the Role of the Scientific Community Relating to Establishing the Outer Limit of the Continental Shelf Where It Extends Beyond the 200 Mile Limit," in *Law, Science and Ocean Management*, ed. M. H. Nordquist, R. Long, T. H. Heidar, and J. N. Moore (Leiden: Martinus Nijhoff, 2007), 469–476.
4. LOS Convention, supra note 1, Annex II, art. 5.
5. *Ibid.*, art. 76(8) and Annex II, art. 6(3). It has been observed that the fact that Article 76(8) refers only to the coastal state in this respect and Article 6(3) of Annex II adds only the Secretary-General of the United Nations as a recipient "illustrates that no other entity was envisaged to receive the recommendations." *The Legal Nature and Purpose of the Recommendations of the Commission on the Limits of the Continental Shelf: Discussion Paper Prepared by the Secretariat*, (CLCS/2003/CRP.3 of 17 April 2003), para. 11.
6. LOS Convention, supra note 1, art.76(8) and Annex II, art. 8.
7. See also *Statement by the Chairman of the CLCS on the Progress of the Work in the Commission* (CLCS/42 of 14 September 2004), para. 17.
8. See also *Discussion Paper*, supra note 5, para. 5.
9. [1951] *I.C.J. Reports*, 132.
10. See, for example, R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (London: Longman, 1992), 1278–1279. T. L. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World," *International Journal of*

Marine and Coastal Law 17 (2002): 301–324, at 309, observes specifically with respect to Article 76 of the Convention:

> The political reality of boundary-making also establishes an important perspective regarding the interpretation of the wording of Article 76. That perspective is that ambiguity in the wording of Article 76(8) should be interpreted in a manner which results in as little interference as possible with the political prerogatives of coastal state boundary-making.

11. As was argued above, LOS Convention, supra note 1, art. 9 of Annex II, which is the provision most directly concerned with the rights of third states in relation to the actions of the Commission, results in the opposite conclusion.

12. Committee on Legal Issues of the Outer Continental Shelf, "Second Report" (International Law Association, *Report of the Seventy-second Conference*, London, 2006), at 245. See also D. R. Rothwell, "Issues and Strategies for Outer Continental Shelf Claims," *International Journal of Marine and Coastal Law* 23 (2008): 185–211, at 192.

13. *Rules of Procedure of the Commission on the Limits of the Continental Shelf* (CLCS/40/Rev.1 of 17 April 2008). To the extent that these procedures are not based on Article 9 of Annex II to the Convention, the competence of the CLCS to deal with this matter can be considered to be implied under the LOS Convention. See, further, A. G. Oude Elferink, "Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes," in *Legal and Scientific Aspects of Continental Shelf Limits*, ed. M. H. Nordquist, J. Norton Moore, and T. H. Heidar (Leiden: Martinus Nijhoff, 2004), 263–285, at 264–265.

14. The reference to "matters relating to delimitation" seems to be broad enough to cover any question concerning the interpretation or application of the Convention that may come up in connection with the establishment of the outer limits of the continental shelf by the coastal state. For instance, it would cover questions concerning the validity of baselines or the interpretation or application of Article 76 to the extent that those issues would relate to the delimitation of boundaries between states.

15. *Rules of Procedure*, supra note 3, Annex I, para. 1.

16. *Ibid*., para. 5.

17. *Ibid.*, Rule 50.

18. See also *Discussion Paper*, supra note 5, paras. 15–19 and 26; and Rothwell, note 12, at 192.

19. See *Letter of the Deputy Representative of the United States of America to the United Nations to the Legal Counsel of the United Nations*, 25 August 2004. All Executive Summaries of submissions and diplomatic Notes and other documents reacting to those Summaries are available at the Web site of the CLCS at www.un.org/Depts/los/clcs_new/clcs_home.htm (accessed on 15 July 2008).

20. See, for example, the Notes Verbale of Canada and Denmark in reaction to the Executive Summary of the submission of the Russian Federation, which both refer to the lack of specific data that would allow a qualified assessment of the Russian Federation's submission and indicate that the absence of comments does not imply agreement to or acquiescence in the submission and that it is considered that the submission and any recommendations of the Commission are without prejudice to the delimitation of the continental shelf between the Russian Federation and the state concerned. Note Verbale No. 119.N.8 of the Permanent Mission of Denmark to the United Nations to the Secretary General of the United Nations, 4 February 2002; Note Verbale No. 0145 of the Permanent Mission of Canada to the Secretary-General, the United Nations, 18 January 2002. Canada and Denmark (with respect to Greenland) have a continental shelf in the Arctic Ocean that may overlap with the continental shelf of the Russian Federation.

21. *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* (CLCS/11 of 13 May 1999; CLCS/11/Add.1 of 3 September 1999; CLCS/11/Corr.1 of 24 February 2000).

22. *Ibid*., paras. 1.2 and 1.3.

23. *Ibid*., para. 1.2.

24. Whereas Article 76 is less than one page in length, the main body of the Guidelines is more than 90 pages.

25. LOS Convention, supra note 1, Annex II, art. 3(b).

26. *Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf—Legal Opinion on Whether It Is permissible, Under the United Nations Convention on the Law of the Sea and the Rules of Procedure of the Commission, for a Coastal State, Which Has Made a Submission to the Commission in Accordance with Article 76 of the Convention, to Provide to the Commission in the Course of the Examination By It of the Submission, Additional Material and Information Relating to the Limits of Its Continental Shelf or Substantial Part Thereof, Which Constitute a Significant Departure from the Original Limits and Formulae Lines that Were Given Due Publicity by the Secretary-General of the United Nations in Accordance with Rule 50 of the Rules of Procedure of the Commission* (CLCS/46 of 7 September 2005).

27. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission* (CLCS/56 of 4 October 2007), paras. 26–29.

28. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission* (CLCS/50 of 10 May 2006), para. 29. On this issue, see also ILA Committee, supra note 12, at 223–225.

29. See further below.

30. See *Discussion Paper*, supra note 5, para. 6.

31. *Ibid*., para. 5. See also Rothwell, supra note 12, at 192.

32. *Ibid.*, paras. 15–19.

33. *Ibid.*, para. 25.

34. *Ibid.*, para. 26.

35. *Ibid*. Paragraph 26 refers to this solution as being *de lege ferenda*. Presumably, this concerns a reference to the *Rules of Procedure*, supra note 13. Paragraph 26 concludes by observing that the details of the proposed regime would require a revision of the *Rules of Procedure*.

36. See also *Rules of Procedure*, supra note 13, Annex III, sec.V.11.3 and *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission* (CLCS/36 of 2 May 2003), para. 10.

37. See the Press Release, *Law of Sea Convention States Parties Debate Whether Substantive Reviews Belonged in General Assembly or States Parties Meetings, as Eighteenth Session Continues* (SEA/1904 of 18 June 2008).

38. On this latter point cf. B. H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)," *American Journal of International Law* 75 (1981): 211–256, at 239.

39. See, in particular, Macnab, supra note 3; Taft, supra note 3; and also T. Potts and C. Schofield, "The Arctic," *International Journal of Marine and Coastal Law* 23 (2008): 151–176, at 166–167.

40. Macnab, supra note 3, at 14.

41. *Ibid*. See also Potts and Schofield, supra note 39, at 166–167.

42. Taft, supra note 3, at 472–473; and see also Macnab, supra note 3, at 15.

43. Macnab, supra note 3, at 14.

44. *Ibid*.

45. *Ibid*., at 15.

46. See ILA Committee, supra note 12, at 232–233.

47. Two of these states, Denmark/Faroe Islands and Iceland, are faced with a similar situation of overlapping entitlements in the Hatton Rockall area, which also involves Ireland and the United Kingdom. These discussions started in 2001 and are still ongoing. See "Hatton Rockall Talks," in *News from the Embassy of Iceland in London* (October 2007), available at www.iceland.org/media/Rusl/Newsletter_-_October_2007.pdf (accessed 15 July 2008); and Ingibjörg Sólrún Gísladóttir, Minister for Foreign Affairs of Iceland, *Legal Status of the Arctic Ocean*, address given to at the Symposium of the Law of the Sea Institute of Iceland on the Legal Status of the Arctic

Ocean, 9 November 2007, available at www.mfa.is/speeches-and-articles/nr/3983 (accessed 15 July 2008). The remarks of the minister suggest that the parties may have diverging views on how to deal with this matter. She commented: "the solution to the issue must include that all States concerned will get a fair share of the area considered most prospective with regard to exploitation of hydrocarbons."

48. Agreed Minutes on the Delimitation of the Continental Shelf Beyond 200 Nautical Miles Between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic of 20 September 2006, para. 2.

49. *Ibid*., para. 9.

50. See further below.

51. B. Baker, "States Parties and the Commission on the Limits of the Continental Shelf," in *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, ed. T. M. Ndiaye and R. Wolfrum (Leiden: Martinus Nijhoff, 2007), 669–686, at 679.

52. *Ibid.*

53. See *Letter of the Deputy Representative of the United States of America to the United Nations to the Legal Counsel of the United Nations*, 25 October 2004, which observed: "[i]f the Commission can review scientific literature, we see no reason why it cannot at least consider the views of other States."

54. LOS Convention, supra note 1, Annex II, art. 3(2).

55. Macnab, supra note 3, at 15; and Taft, supra note 3, at 472–473.

56. Macnab, supra note 3, at 15.

57. Taft, supra note 3, at 472.

58. Macnab, supra note 3, at 15; Taft, supra note 3 at 472–473; and R. Macnab and L. Parson, "Continental Shelf Submissions: The Record to Date," *International Journal of Marine and Coastal Law* 21 (2006): 309–322, at 322.

59. As McDorman, supra note 10, at 322, has observed:

> The approach of the Commission must be one of reasonableness and educated guess not absolutism and certainty. The Commission's task as legitimator and guardian must take priority over the natural tendency of technical professionals to seek precision and apply rigorous scientific standards of proof.
>
> A related issue seems to be that scientists may not fully appreciate that the terms contained in article 76 have specific legal meaning, which may not fully coincide with the meaning attributed to the same terms in the scientific community.

60. See also *ibid.*, at 307–308, where it is observed: "[h]owever difficult the wording of the Article 76 formula, there is no doubt that a limit can be ascertained and, moreover, it is the intent of Article 76 that a limit be ascertained."

61. See, for example, M. D. Evans, "Maritime Boundary Delimitation: Where Do We Go From Here?" in *The Law of the Sea; Progress and Prospects*, ed. D. Freestone, R. Barnes, and D. Ong (Oxford: Oxford University Press, 2006), 137–160, at 160; and Y. Tanaka, "Reflections on Maritime Delimitation in the *Cameroon/Nigeria* Case," *International and Comparative Law Quarterly* 53 (2004): 369–406, at 405.

62. See, for example, Vienna Convention on the Law of Treaties, 1155 *U.N.T.S.* 331, art. 62(2)(a).

63. McDorman, supra note 10, at 308 (footnote omitted). If a coastal state considers that the cost of additional data gathering does not offset the possible gains of a more seaward outer limit, it is not obliged to carry out such data gathering.

64. Macnab, supra note 3, at 15.

65. *Ibid*.

66. The two trust funds to which Macnab, supra note 3, at 15, refers actually were not set up by the Meeting of States Parties to the Convention, but by the UN General Assembly upon the recommendation of the Meeting. This suggests that it was considered that this was a matter not to be addressed under the Convention. The LOS Convention does not envisage the establishment of trust funds. On the other hand, the General Assembly obviously is not competent to amend the Convention.

67. *Decision Regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set Out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea* (SPLOS/72 of 29 May 2001).

68. It can be noted that there have been further calls to extend the time limit, which for most states parties is May 13, 2009. Instead of adopting a further deferral of the time limit, the Eighteenth Meeting of States Parties, which met in June 2008, adopted a decision to accommodate the concerns especially of developing states in meeting the time limit. *Decision Regarding the Workload of the Commission on the Limits of the Continental Shelf and the Ability of States, Particularly Developing States, to Fulfil the Requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the Decision Contained in SPLOS/72, Paragraph (a)* (SPLOS/183 of 20 June 2008).

One explanation of this approach is that it might not have been possible to present a further deferral as an interpretation of Article 4 of Annex II. See also *Report of the Eleventh Meeting of States Parties* (SPLOS/73 of 14 June 2001), para. 73. States parties probably were reluctant to create the impression that the LOS Convention could be changed by a decision of the Meeting of the States Parties rather than employing the means for amendment included in the LOS Convention.

69. See also the rules concerning decision making of the Meeting of the States Parties contained in Section XIII of the *Rules of Procedure for Meetings of States Parties* (SPLOS/2/Rev.4 of 24 January 2005).

70. For the various amendment procedures, see LOS Convention, supra note 1, arts. 312–316. For a discussion of these provisions, see D. F. Freestone and A. G. Oude Elferink, "Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?" in *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, ed. A. G. Oude Elferink (Leiden: Martinus Nijhoff, 2005), 169–221, at 173–183.

71. These difficulties are being considered in the institutions at the international level dealing with the implementation of Article 76. See, for example, the recent decision of the Meeting of States Parties to the Convention concerning the workload of the Commission and the time limit for making submissions to the Commission. *Workload Decision*, supra note 68.

72. See also Rothwell, supra note 12, at 190.

73. Most protests against unilateral maritime claims are made in the context of bilateral boundary relations. Only some major maritime powers seem to systematically evaluate and, if considered necessary, protest invalid claims that affect their wider interest.

74. See, for example, the language used by Potts and Schofield, supra note 39, at 166, in reviewing the confidentiality requirements with respect to submissions.