

Outer Limits of the Continental Shelf and “Disputed Areas”: State Practice concerning Article 76(10) of the LOS Convention*

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ABSTRACT

Article 76 of the United Nations Convention on the Law of the Sea (LOS Convention) requires a coastal State to submit information on the limits of its continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS). The Commission shall make recommendations to the coastal State on matters related to the establishment of the outer limits of the continental shelf. In a case where the coastal State establishes the outer limits on the basis of these recommendations, they are final and binding. However, Article 76(10) provides that the “The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”. The relationship between Article 76 and the delimitation of the continental shelf between neighboring States and other “unresolved land or maritime disputes” has been addressed by the CLCS in its Rules of Procedure. The present article analyzes the significance of Article 76(10) for submissions to the CLCS, looking at the Rules of Procedure of the Commission and the submissions that have been made to the Commission to date.

Introduction

At the start of the negotiations at the Third United Nations Conference on the Law of the Sea (LOSC III, 1973–1982), the law concerning the outer limits of the continental shelf was ill-defined and there was considerable uncertainty

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about its implications.¹ Article 1 of the 1958 Convention on the Continental Shelf² provided that the continental shelf comprised the seabed and subsoil of submarine areas adjacent to the coast up to the 200-meter isobath or to where the depth of the superjacent waters made the exploitation of these areas technically feasible. Developments in technology meant that exploitation in deeper and deeper waters was technically feasible, which led to a seaward expansion of coastal state jurisdiction. At the same time the attention of the world community was drawn to the fact that the deep seabed contained valuable resources which might be commercially exploitable. This in turn led in 1967 to the call for the establishment of a regime for the deep seabed, based on the principle that it constituted the common heritage of mankind. In order to define the international deep seabed area, clearly defined limits would be necessary between areas under national jurisdiction and the deep seabed beyond. Article 76 of the United Nations Convention on the Law of the Sea³ is intended to address this issue. Its intention is that the outer limits of the continental shelf should become permanently fixed so as to exclude any future expansion of national jurisdiction into the international seabed area.

Article 76 on the definition of the continental shelf is the only article in the Convention concerning the outer limits of maritime zones which states that its provisions are without prejudice to the delimitation between States.⁴ Article 76(10) provides "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". One thing that sets Article 76 apart from the other provisions concerning the outer limits of maritime zones is the complexity of the substantive rules to establish the outer limit of the continental shelf where the continental margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. However, this complexity and any resulting disputes over the location of the outer limit of the continental shelf do not explain the need for the "without prejudice" clause.⁵ Article 76

¹ See, e.g., D.N. Hutchinson "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law" 56 (1985) *British Yearbook of International Law* 111-188.

² Adopted on 29 April 1958 (499 UNTS 311).

³ Adopted on 10 December 1982; 1833 UNTS 396 (hereinafter LOS Convention).

⁴ The implementation of Article 76 should lead to greater certainty about the extent of the overlap of continental shelf areas beyond 200 nautical miles between States and can be expected to give rise to a heightened interest in the delimitation of such areas. This may break new ground for maritime delimitation law as the delimitation of this part of the continental shelf may give renewed strength to arguments based on natural prolongation. In the *Libya/Malta* case, the International Court of Justice rejected the argument that natural prolongation had any role to play in the delimitation of maritime zones within 200 nautical miles. The Court left open the possibility that this might be different for areas beyond 200 nautical miles (*Continental Shelf (Libyan Arab Jamahiriya/Malta, Judgment* [1985] ICJ Reports 13 at 35, para. 39).

⁵ It can be noted that although the other provisions on outer limits are seemingly more straightforward, they may also give rise to substantial controversy. This concerns, for instance, the case where two States differ about the applicability of Article 121(3) of the Convention.

also differs from the other provisions on outer limits in the Convention in that its paragraphs 8 and 9 indicate that these limits may become, respectively, "final and binding" and "permanent". These provisions would seem to have the potential to create controversy in cases in which the outer limit of the continental shelf thus established extends into an area which is the subject of overlapping claims of two or more coastal States. The present article discusses how that issue is addressed by Article 76(10) of the Convention.

Article 76 requires the coastal State to submit information on the limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS). The Commission shall make recommendations to the coastal State on matters related to the establishment of the outer limits of the continental shelf. In a case where the coastal State establishes the outer limits on the basis of these recommendations, they are final and binding.⁶ The relationship between Article 76 and the delimitation of the continental shelf between States has been addressed by the CLCS in its Rules of Procedure.⁷ The procedures devised by the CLCS to deal with this matter raise the question of how they relate to Article 76(10) of the Convention. The significance of this issue is illustrated by the fact that all but one of the submissions from coastal States that have been made thus far have involved input concerning other States, either by way of information included in the submission itself or communications from other States to the Commission following lodgment of the submission or both.

The present article analyzes what role other States, certainly in practice, seem to play in respect of submissions involving the delimitation of the continental shelf between neighboring States or other land and maritime disputes. To address this matter it is necessary to look at the provisions of the Convention, the approach of the Commission and the practice of States in relation to submissions.

Article 76(10) of the LOS Convention

The Convention's primary statement on the relationship between continental shelf definition or delineation by a coastal State and continental shelf delimitation with other States is to be found in Article 76(10), which expressly provides that the provisions of Article 76 are "without prejudice" to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. The significance of this provision is evident from a review of continental shelf areas beyond 200 nautical miles worldwide. There are but few

⁶ LOS Convention, Article 76(8).

⁷ Rules of Procedure of the Commission on the Limits of the Continental Shelf (hereafter Rules of Procedure). The current version of the Rules is contained in Doc. CLCS/40 of 2 July 2004. The Commission first adopted its Rules of Procedure in 1997. Since then, the Commission has introduced a number of changes to the Rules. These changes are not relevant to the present discussion.

such areas which form the natural prolongation of only one coastal State. For instance, an inventory by Prescott from 1998 identifies 29 such areas, 22 of which involve more than one State and only 7 involve just one State.⁸

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

The CLCS and Matters relating to the Delimitation of Boundaries between States

The role of the CLCS in the process of establishing the outer limits of the continental shelf beyond 200 nautical miles is defined in Annex II to the LOS Convention.¹⁰ Article 9 of the Annex specifically pronounces upon the relationship between the "actions of the Commission" and delimitation between neighboring States. In doing so, Article 9 instructs the Commission that its actions shall not prejudice "matters relating to delimitation of boundaries between States with opposite or adjacent coasts".¹¹

⁸ V. Prescott "National Rights to Hydrocarbon Resources of the Continental Margin Beyond 200 Nautical Miles" in G.H. Blake, M.A. Pratt and C.H. Schofield (eds) *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, The Hague: 1998) 51–81 at 56–58.

⁹ See also M.H. Nordquist (general ed.) *United Nations Convention on the Law of the Sea 1982; A Commentary* (Martinus Nijhoff Publishers: 1985–2003) (hereafter *Virginia Commentary*) Vol. II at 883. The *Virginia Commentary* argues that this distinction is verified by other provisions of the LOS Convention, such as Article 83, which specifically articulates the means by which continental shelf delimitation between opposite or adjacent States is to be addressed, and Article 134(4), which also reinforces the distinction by providing that the provisions of Part XI are not to affect the establishment of the outer limits of the continental shelf in accordance with Part VI of the Convention or the validity of delimitation agreements between States with opposite or adjacent coasts (*ibid.*).

¹⁰ For further information on the Commission see, e.g., T.L. McDorman "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17 *International Journal of Marine and Coastal Law* 301–324 and Report of the Committee on Legal Issues of the Outer Continental Shelf, in *International Law Association Report of the Seventy-First Conference* (International Law Association, London: 2004) 773–819 at 775–781.

¹¹ Arguably, Article 9 introduces some variation as regards what is not to be prejudiced by the actions of Commission. Article 76(10) is concerned that "questions of delimitation" are not to be prejudiced by the provisions of Article 76, whereas the actions of the Commission are not to prejudice not just questions of delimitation but "matters relating to" delimitation. The

The Commission has addressed the issue of submissions involving the matter of delimitation of continental shelf boundaries between States in its Rules of Procedure. In addition, the Rules of Procedure also deal with other cases of land and maritime disputes.

Rule 46(1) of the Rules of Procedure establishes a particular mechanism, the details of which are set out in Annex I to the Rules, in accordance with which, first, coastal States "may" make their submissions and, second, the Commission "shall" consider submissions. This mechanism applies where there is a "dispute" in the delimitation of the continental shelf between opposite or adjacent States and "other cases of unresolved land or maritime disputes". In almost identical terms to Article 9 of Annex II to the LOS Convention, Rule 46(2) provides that the actions of the Commission are not to prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. Thus, it is specified that the procedures of Annex I to the Rules of Procedure are designed to ensure that the Commission acts in accordance with its mandate under the Convention.

Annex I to the Rules of Procedure takes as its starting point the explicit statement that the Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States.¹²

In relation to the types of disputes described in Rule 46, Annex I then goes on to:

- impose requirements upon submitting States and other States which are parties to a dispute (paragraphs 2, 5(b));
- authorize submissions for a portion of a State's continental shelf (paragraph 3);
- authorize joint or separate submissions concerning the delineation of the outer limit of the continental shelf by two or more coastal States by agreement (paragraph 4); and
- clarify its approach to considering submissions involving the requisite types of disputes.

Annex I to the Rules of Procedure imposes a number of requirements affecting the coastal State making the submission:

- the submitting coastal State has to inform the Commission of any disputes "related to the submission" (paragraph 2(a)). This qualification of the relationship means that the coastal State is not being required to inform the

cont.

wording of Article 9 is more general in relation to what is not to be prejudiced compared to Article 76(10). Furthermore, the limitation of the effect of the Commission's actions is not specifically assigned to questions of delimitation "of the continental shelf" but to the more general "delimitation of boundaries between states".

¹² Rules of Procedure, Annex I, para. 1.

Commission of all land or maritime disputes in respect of the territory generating the continental shelf.

- where a dispute relates to the submission, the coastal State is requested to assure the Commission "to the extent possible" that its submission will not prejudice matters relating to boundary delimitation between States (paragraph 2(b)).

In addition a coastal State may be requested by the Commission to cooperate with it in order not to prejudice matters relating to boundary delimitation between opposite or adjacent States. Thus, although Annex I to the Rules of Procedure places some requirements on the coastal State in making a submission, it does not place any limitation on the making of a submission by the coastal State as such. However, the Rules of Procedure would seem to introduce new factors that affect the making of a submission by a coastal State and which may control whether a submission is considered at all.

First, paragraph 3 of Annex I to the Rules of Procedure provides that where questions relating to the delimitation of boundaries between States may be prejudiced, a coastal State may make submissions pertaining to a portion of its continental shelf. Submissions regarding the remaining portions can be made at a later time, including at a time falling outside the time limit for submissions set by the LOS Convention.¹³ The coastal State is therefore accorded a relaxation of the time limit for making a submission contained in the LOS Convention.

Furthermore, paragraph 5 of Annex I provides that the Commission shall not "consider and qualify" submissions where a land or maritime dispute exists unless all States that are parties to the dispute have given their prior consent. The submission before the Commission and its recommendations shall not prejudice the position of States which are parties to the land or maritime dispute.¹⁴ The consideration of a submission in certain circumstances is therefore only possible with the consent of other States. No such limitation is included in the LOS Convention. In order to assess properly the impact of these provisions, they have to be considered in the light of the relevant provisions of the LOS Convention.

¹³ Article 4 of Annex II to the Convention provides that where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles, it shall make a submission to the CLCS "as soon as possible but in any case within 10 years of the entry into force of this Convention for that State". In view of the difficulties that developing States in particular faced in preparing a submission, during its eleventh Meeting in 2001, the Meeting of States Parties to the Convention took the decision that for States Parties for which the Convention had entered into force before 13 May 1999, the ten-year time period referred to in Article 4 of Annex II to the Convention shall be taken to have commenced on that date (*Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea* (Doc. SPLOS/72 of 29 May 2001), para. (a)). It was furthermore decided to keep the general ability of States to fulfill the requirements of Article 4 of Annex II under review (*ibid.*, para. (b)).

¹⁴ Rules of Procedure, Annex I, para. 5(b).

The Rules of Procedure are subordinate to the rules contained in the LOS Convention. In acting on the provisions contained in Annex I to the Rules of Procedure, States Parties to the Convention "shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".¹⁵ As was discussed above, the result of Article 76(10) of the Convention is that the provisions in Article 76(8) and 76(9) concerning the final and binding and permanent nature of outer limits of the continental shelf cannot be invoked against another State where the delimitation of the continental shelf is concerned. In the light of this provision, other States should in principle accept the consideration by the Commission of a submission from a coastal State that raises issues of delimitation of the continental shelf, as commission's consideration and recommendations will not prejudice their rights.¹⁶ Furthermore, a coastal State should only employ paragraph 3 of Annex I to the Rules of Procedure to limit the area for which a submission is made if this is concerned with areas in which there is an overlap with the continental shelf of another State.¹⁷ Still, it remains to be seen how the Commission should deal with submissions involving the delimitation of the continental shelf between neighboring States. As will appear from the discussion below on specific submissions, it is not to be excluded that two States making a submission for the same area may include different outer limit lines. For instance, two States may rely on different data or have different views on the interpretation or application of Article 76. It could be argued that in such a case, if the CLCS finds that the outer limit lines of both submitting States are in accordance with Article 76, it would be for the coastal States to further address this matter.

Annex I to the Rules of Procedure of the CLCS not only addresses submissions involving the delimitation of the continental shelf between neighboring states, but also refers to other land and maritime disputes. In the latter case the rights of other States are not explicitly safeguarded by the Convention. Other States have the possibility to indicate their views either directly to the coastal State, or to the Commission in reaction to a submission. In general, this would be sufficient to safeguard their position. However, at least in the case in which one outcome of a dispute would lead to different outer limits

¹⁵ LOS Convention, Article 300. A number of States which are not a party to the Convention have provided observations on submissions. Although Article 300 is not directly applicable to these States, in exercising a right to comment on a submission, they must be considered to be bound by the same conditions for its exercise as States Parties to the Convention (see Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331), Article 36).

¹⁶ See also C.R. Symmons "The Irish Partial Submission to the Commission on the Limits of the Continental Shelf in 2005: A Precedent for Future Submissions in the Light of the 'Disputed Areas' Procedure of the Commission?" 37 (2006) *Ocean Development and International Law* 299–317 at 309.

¹⁷ In any case, in such a case (part of) the limits of the continental shelf of the submitting State will border on the continental shelf of another State and not on the Area.

of the continental shelf than another outcome, it would seem to be appropriate that a submission is not considered and that the Commission does not make a recommendation on the delineation of the outer limits of such a shelf area.

State Practice concerning Submissions Involving Land or Maritime Disputes

To date six submissions have been made to the CLCS pursuant to Article 76(8) of the LOS Convention with respect to the outer limits of their continental shelf. Five of these submissions (by the Russian Federation, Brazil, Australia, Ireland and New Zealand) were preceded by consultations with neighboring states and/or led to reactions of neighboring states concerning issues covered by Annex I to the Rules of Procedure of the Commission. In the case of the sixth submission, namely, the joint submission by France, Ireland, Spain and the United Kingdom in respect of the Celtic Sea and the Bay of Biscay, all of the neighboring states in the subject area elected to make a joint submission. This is the only joint submission so far submitted to the CLCS. The possibility of a joint submission is explicitly envisaged by paragraph 4 of the Annex I to the Rules of Procedure. The choice of a joint submission by these four States is explained by the existence of (potential) overlapping areas of continental shelf and unresolved maritime boundaries.

The submission of the Russian Federation, which was made on 20 December 2001, was concerned with four different areas: the Arctic Ocean, the Barents Sea, the Bering Sea, and the Sea of Okhotsk. As far as can be ascertained from the information communicated by the Secretary-General of the United Nations following the submission, the Russian Federation did not inform the CLCS of the existence of any dispute in the sense of Annex I to the Rules of Procedure.¹⁸ However, this information did indicate that in a number of areas (the Barents Sea and part of the Arctic Ocean), the limit of the Russian continental shelf was formed by a provisional boundary with neighboring States, subject to a more precise definition in negotiations.¹⁹ The executive summary of the Russian submission and map 2 attached to it suggest that the Russian Federation considered that these provisional boundaries formed part of the

¹⁸ This information was circulated in the document CLCS.01.2001.LOS (Continental Shelf Notification) of 20 December 2001, containing the executive summary of the Russian submission. Annex I to the Rules of Procedure requires the coastal State, if there is a dispute in the sense of the Annex, to inform the Commission of such disputes (para. 2(a)). Paragraph 9.1.4(d) of the Scientific and Technical Guidelines of the Commission (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)) provides that the executive summary of a submission shall contain information on any disputes as referred to in Rule 45 (at present Rule 46) of and Annex I to the Rules of Procedure.

¹⁹ See para. 1.2 of the executive summary of the Russian submission and the legend to Map 2 attached to the executive summary (reproduced in the document CLCS.01.2001.LOS, note 18).

outer limit of the continental shelf of the Russian Federation under Article 76 of the LOS Convention.²⁰ At the same time, the recognition that this concerned provisional boundaries indicates that the Russian Federation considered that these parts of the outer limits of its continental shelf would not be final and binding *vis-à-vis* the neighboring States upon their establishment following a recommendation by the CLCS. Still, the approach suggested by the submission may not be without complications. For instance, it might later transpire that there is no overlap with the continental shelf of neighboring States. Would the proposed provisional outer limit in such a case become final and binding, if it were to be endorsed by the Commission; or would the State concerned be entitled to make a new or revised submission to establish a different outer limit in the area concerned?²¹ For the Bering Sea, the executive summary of the Russian submission did not indicate that the outer limit line would be provisional, although in this case it also borders on the continental shelf of a neighboring State. The difference with the Arctic Ocean and the Barents Sea is the existence of a maritime boundary agreement with the United States.²² However, the agreement has not yet entered into force.²³

Five States reacted to the executive summary of the Russian submission: Canada, Denmark, Japan, Norway and the United States. Japan objected to the fact that maps contained in the executive summary indicated Russian base-points on the islands of Etorofu, Kunashiri, Shikotan and Habomai, and that these maps indicated the outer limit of the exclusive economic zone and continental shelf off these islands and Hokkaido.²⁴ The islands of Etorofu,

²⁰ The heading of Table 1 contained in the executive summary reads: 'Geographic coordinates of the points that define the lines of the outer limit of the continental shelf of the Russian Federation in the Arctic Ocean'. It is indicated that the lines connecting points 1 to 6 and 30 and 32 included in the table are "the boundary to be agreed upon with neighboring states".

²¹ The answer to this question depends on the content of the recommendations of the CLCS and the further actions undertaken by the coastal State. The recommendations of the CLCS in respect of the submission of the Russian Federation concerning the Barents Sea and the Bering Sea (see below, text after note 37) suggest that the CLCS in general will refrain from recommending specific outer limit lines where they define the extent of the continental shelf *vis-à-vis* a neighboring State, but will indicate whether or not a continental shelf entitlement exists. If a coastal State were to submit information on outer limit lines for such an area under Article 76(9), it would in principle be barred from making a new or revised submission to the CLCS.

²² Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary of 1 June 1990 ((1990) 29 *International Legal Materials* 941).

²³ The maritime boundary agreement also applies to the Arctic Ocean. The difference in approach in these two cases may be explained by the fact that in the Arctic Ocean a continental shelf boundary between the Russian Federation and the United States might require the establishment of a trijunction point with Canada. In the Bering Sea, there are no other coastal States.

²⁴ *Japan's position on the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf* (Annex to *Note Verbale* dated 25 February 2002 from the Permanent Representative of Japan to the United Nations addressed to the Secretary-General of the United Nations, regarding the submission made by the Russian Federation on 20 December 2001 to the Commission on the Limits of the Continental Shelf (contained in SPLOS/82 of 21 March 2002)), para. 1.

Kunashiri, Shikotan and Habomai have been in dispute between Japan and the Russian Federation since the end of World War II, when they were occupied by the Soviet Union. Japan considered that the maps concerned were not appropriate for consideration by the Commission.²⁵ Japan also considered that the submission of the Russian Federation was not in conformity with Rule 45 (at present Rule 46) of the Rules of Procedure of the Commission, Annex I to the Rules, and paragraph 9.1.4 of the Commission's Scientific and Technical Guidelines, as the submission did not contain any reference to disputes in relation to the submission.²⁶ Japan *inter alia* requested that the Commission not take any action that would prejudice the territorial dispute between itself and the Russian Federation or the delimitation of the continental shelf between both States.²⁷

The *Notes Verbales* of Canada and Denmark 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.²⁸ The *Notes* indicate that it is considered that any recommendations by the CLCS are without prejudice to the delimitation of the continental shelf of the Russian Federation with, respectively, Canada and Denmark.²⁹

The United States indicated that it believed that the submission had major flaws as it related to the continental shelf in the Arctic Ocean.³⁰ The comments of the United States *inter alia* discuss the characteristics of two ridges included in the outer limit lines as defined in the Russian submission, suggesting that these do not form a natural prolongation in the sense of Article 76(1) of the LOS Convention.³¹ It was also noted that while the Commission has no competence over questions of baselines, it should not be perceived as endorsing particular baselines.³² The United States concluded that the recommendations

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 2(b).

²⁷ *Ibid.*, para. 3.

²⁸ *Note Verbale* No. 119.N.8 of the Permanent Mission of Denmark to the United Nations to the Secretary-General of the United Nations of 4 February 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/DNK of 26 February 2002); *Note Verbale* No. 0145 of the Permanent Mission of Canada to the United Nations to the Secretary-General of the United Nations of 18 January 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/CAN of 26 February 2002). Canada and Denmark (in respect of Greenland) have a continental shelf in the Arctic Ocean that may overlap with the continental shelf of the Russian Federation.

²⁹ On these delimitations see A.G. Oude Elferink "Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes" in M.H. Nordquist, J. Norton Moore and T.H. Heidar (eds) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff Publishers, Leiden: 2004) 263-285 at 195-197.

³⁰ Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, 28 February 2002 (reproduced in CLCS.01.2001.LOS/USA of 18 March 2002).

³¹ Attachment to the Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, 28 February 2002 (reproduced in *ibid.*).

³² *Ibid.*

of the Commission had to be based on a high degree of confidence: "If the Commission is unsure, it should not make a recommendation but should announce that it needs further data, analysis and debate."³³

Norway's reaction to the submission of the Russian Federation concerned the limit of the continental shelf in the Barents Sea and the Arctic Ocean to the north of it. In this area both States have been negotiating the delimitation of a continental shelf boundary since 1969.³⁴ Norway subscribed to the view that the part of the Barents Sea beyond 200 nautical miles from the baselines formed part of the legal continental shelf. The Russian Federation had defined the limit of its continental shelf in this area in its submission by a number of parallels and meridians, which reflect its position in the negotiations with Norway that the boundary has to be a sector line. Norway's reaction indicates that its position in those negotiations is that the continental shelf boundary has to be a median line, and that the unresolved delimitation issue in the Barents Sea has to be considered a "maritime dispute" for the purposes of paragraph 5(a) of Annex I to the Rules of Procedure of the Commission. Accordingly, the actions of the Commission shall be without prejudice to matters relating to the delimitation of the continental shelf between both States. Norway indicated its consent to an examination by the Commission of the Russian submission with regard to the area under dispute.³⁵

In a statement during the presentation of the Russian submission to the CLCS, the Russian representative observed that it was considered that the reactions of other States did not constitute an obstacle to the consideration of the submission by the Commission.³⁶ The establishment of the outer limit of the continental shelf did not have any effect on the negotiations with Norway over the delimitation of maritime zones in the Barents Sea.³⁷ The *Notes* from Canada and Denmark did not indicate the existence of disputes concerning the delimitation of maritime zones or territorial disputes.³⁸ Similarly, the *Note* from the United States did not indicate a dispute concerning the delimitation of maritime zones with the Russian Federation.³⁹ The statement is silent on the

³³ *Ibid.*

³⁴ For further background information on this issue see, e.g., R.R. Churchill and G. Ulfstein *Marine Management in Disputed Areas; The Case of the Barents Sea* (Routledge, London: 1992) 54–90; A.G. Oude Elferink "The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 2" 12 (1997) *International Journal of Marine and Coastal Law* 5–35 at 5–16.

³⁵ *Note Verbale* of 20 March 2002 of the Permanent Mission of Norway to the United Nations to the Secretary-General of the United Nations (reproduced in CLCS.01.2001.LOS/NOR of 2 April 2002).

³⁶ See *Oceans and Law of the Sea; Report of the Secretary-General; Addendum (A/57/57/ Add.1 of 8 October 2002)*, para. 29.

³⁷ Statement made by the Deputy Minister for Natural Resources of the Russian Federation during the presentation of the submission made by the Russian Federation to the Commission, made on 28 March 2002 (Doc. CLCS/ 31 of 5 April 2002) at 6.

³⁸ *Ibid.*

³⁹ *Ibid.* As was noted above, the Russian submission employed the maritime boundary agreed upon with the United States as the eastern limit of its continental shelf in the Bering Sea,

other points raised by the United States. These other points do suggest the existence of a dispute in the sense of Annex I to the Rules of Procedure of the CLCS. The Russian representative considered that the territorial dispute with Japan did not affect the submission in relation to the continental shelf in the Sea of Okhotsk. The islands in dispute were not used as basepoints for establishing the 200-nautical-mile limit in this case.⁴⁰

The CLCS recommended the Russian Federation, in the case of the Barents Sea and the Bering Sea, upon entry into force of delimitation agreements with Norway and the United States, respectively, transmit the charts and coordinates of the delimitation lines as they would represent the outer limits of the continental shelf beyond 200 nautical miles in these areas.⁴¹ With respect to the Sea of Okhotsk, the Russian Federation was recommended "to make a well-documented partial submission for its extended continental shelf in the northern part of that sea".⁴² In order to make this submission, the Commission also recommended that the Russian Federation make its best efforts to effect an agreement with Japan in accordance with paragraph 4 of Annex I to the Rules of Procedure of the Commission.⁴³ This latter recommendation raises the question whether such an agreement did not already exist. The Japanese *Note* requests the Commission to act in a certain way in considering the submission.⁴⁴ Moreover, a recommendation indicating that all of the seabed of the Sea of Okhotsk is part of the legal continental shelf can hardly be considered to be prejudicial to the position of Japan with respect to the territorial dispute or the delimitation of the continental shelf with the Russian Federation.⁴⁵

cont.

the Chukchi Sea and the Arctic Ocean. The United States noted this and indicated this to be in conformity with Article 9 of Annex II to the LOS Convention (Attachment, note 31).

⁴⁰ Statement made by the Deputy Minister for Natural Resources of the Russian Federation, note 37 at 6.

⁴¹ *Oceans and Law of the Sea; Report of the Secretary-General; Addendum*, note 36, para. 39. The recommendations of the Commission have been submitted in writing to the Russian Federation and the Secretary-General of the United Nations. A summary of the recommendations is given in *ibid.*, paras 38–41.

⁴² *Ibid.*, para. 40.

⁴³ *Ibid.*

⁴⁴ The Annex to the Japanese *Note Verbale* reads in relevant part:

For the above-mentioned reasons, the Government of Japan strongly requests the Commission, in its consideration of the submission by the Russian Federation, not to take any action that would prejudice the territorial issue of the Four Islands or the delimitation of the continental shelf and the exclusive economic zone between Japan and the Russian Federation, nor to attach to or make reference to the portions of the maps/charts the Russian Federation has submitted or will submit in the future which are relevant to the above-mentioned issues of territory and delimitation between Japan and the Russian Federation in any recommendations or any other documents created by the Commission. Japan also requests all States Members of the United Nations to fully note Japan's position on the submission by the Russian Federation (*Japan's position on the submission made by the Russian Federation*, note 24, para. 3).

⁴⁵ Admittedly, the Japanese *Note* only refers to delimitation of the continental shelf and EEZ in general terms. However, this approach would seem to be consistent with paragraph 4(a) of Annex I to the Rules of Procedure. The summary of the recommendations to the Russian

For the Arctic Ocean, the Commission recommended the Russian Federation make a revised submission based on the findings contained in the recommendations.⁴⁶ The absence of any reference to other States in the summary of this part of the recommendation suggests that the recommendation to make a revised submission was not directly linked to the existence of a territorial or maritime dispute under Annex I to the Rules of Procedure.

Brazil lodged its submission with the CLCS on 17 May 2004. In the executive summary of its submission, the Brazilian Government "testifies that it is not involved in any territorial dispute concerning maritime areas with another state".⁴⁷ Brazil shares maritime boundaries with two other States, France in the north and Uruguay in the south. Brazil has concluded maritime boundary treaties with both these States.⁴⁸ The treaty with France, which also delimits the continental shelf, does not define a seaward terminus and thus also delimits the continental shelf between both States beyond 200 nautical miles. On the other hand, the text of a 1972 Exchange of Notes between Brazil and Uruguay would seem only to establish a maritime boundary up to the 200-nautical-mile limit.⁴⁹ The maps included in the executive summary of Brazil suggest that the lateral limit between the 200-nautical-mile zones of Brazil and Uruguay has been extended seaward to provide the lateral limit of the continental shelf of Brazil beyond 200 nautical miles.

As part of its presentation to the Commission and in response to a request for clarification from the Commission's Chairman, Brazil advised that it was not aware of any communication from any State regarding the submission.⁵⁰ On 1 March 2006, Brazil transmitted an addendum to the executive summary of its submission to the CLCS. The addendum complements the information previously provided for examination to the Commission.⁵¹ The addendum is slightly more specific on the issue of maritime boundaries than the original summary, as it states that "Brazil assures that there are no maritime boundary disputes with the adjacent coastal States, France (French Guyana) and Uruguay".⁵²

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Federation suggests that the Commission would like to see that the two States explicitly agree on the applicability of paragraph 4 in order for the Russian Federation to make its revised submission.

⁴⁶ *Oceans and Law of the Sea; Report of the Secretary-General; Addendum*, note 36, para. 41.

⁴⁷ Continental Shelf and UNCLOS Article 76; Brazilian Submission; Executive Summary at 5.

⁴⁸ Maritime Delimitation Treaty between the Federative Republic of Brazil and the French Republic of 30 January 1981 (*The Law of the Sea; Maritime Boundary Agreements (1970-1984)* (United Nations, New York: 1987) 87); Exchange of Notes constituting an Agreement between the Government of Brazil and the Government of Uruguay on the Definitive Demarcation of the Sea Outlet of the Arroyo Chui and the Lateral Maritime Border of 21 July 1972 (*The Law of the Sea; Maritime Boundary Agreements (1970-1984)* (United Nations, New York: 1987) 103).

⁴⁹ The Notes refer to the outer limit of the territorial sea. At the time of the exchange of Notes both States claimed a 200-nautical-mile territorial sea.

⁵⁰ Statement by the Chairman of the CLCS on the progress of the work in the Commission (Doc. CLCS/42 of 14 September 2004), para. 11.

⁵¹ See *Note Verbale* CLCS. 02. 2004. Add.1. LOS (Continental Shelf Notification) of 1 March 2006.

⁵² It is not known what inspired the inclusion of this more specific language.

Only the United States has reacted officially to the Brazilian submission.⁵³ In its communication the US suggested that the Commission might wish to pay attention to certain issues in the Brazilian submission related to sediment thickness and the Vitoria-Trindade feature. In response the Commission observed that under Annex II to the LOS Convention and the Commission's own Rules of Procedure, "other states" can play "only one role" with regard to the consideration of the data and other material submitted by a coastal State concerning the outer limits of the continental shelf beyond 200 nautical miles, namely, in the case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.⁵⁴ By concluding that the letter from the US should not be taken into its consideration, the Commission identifies the US as being neither a State with an opposite or adjacent coast with Brazil nor a State having an unresolved land or maritime dispute presumably in relation to the Brazilian submission. The subcommission charged with examining the Brazilian submission was also instructed to disregard the US comments during its examination.

The US expressed disagreement with this view in a subsequent letter to the Commission.⁵⁵ The US argued that the Commission and subcommission are both required to consider its comments as they constitute comments "from . . . other states regarding the data reflected in the executive summary" as referred to in paragraph 2(a)(v) of Annex III to the Rules of Procedure. As such, the US argues that Annex III distinguishes comments on data from "information regarding and disputes related to the submission" under paragraph 2(a)(iv) and contemplates both the making of such comments and their consideration.⁵⁶ The US also notes that neither Annex II to the LOS Convention nor the Rules of Procedure specifically prohibit the Commission from considering communications such as it has made. Just as the Commission can review scientific literature, the US argues that the Commission can therefore "at least consider the views of other states".

Australia lodged its submission with the CLCS on 15 November 2004.⁵⁷ The Australian submission involves ten discrete areas, namely, the Argo, Australian Antarctic Territory (AAT), Kerguelen Plateau, Lord Howe Rise, Macquarie Ridge,

⁵³ Letter of the Deputy Representative of the United States of America to the United Nations to the Legal Counsel of the United Nations of 25 August 2004.

⁵⁴ Statement by the Chairman of the CLCS, note 50 at para 17.

⁵⁵ Letter of the Deputy Representative of the United States of America to the United Nations to the Legal Counsel of the United Nations of 25 October 2004.

⁵⁶ Paragraph 2(a) of Annex III requires a coastal State to include in the presentation of its submission as subjects comments from other States regarding data, as well as information regarding disputes. Paragraph 2(b) might seem to suggest that the Commission only will consider the information regarding disputes.

⁵⁷ For a discussion of this submission see also A. Serdy "Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf" 36 (2005) *Ocean Development and International Law* 201-217.

Naturaliste Plateau, South Tasman Rise, Three Kings Ridge and Wallaby and Exmouth Plateaus regions.

In relation to matters concerning other States, the executive summary of the Australian submission⁵⁸ informs the Commission that three of the ten regions are affected by outstanding delimitations of the continental shelf between Australia and another State with an opposite or adjacent coast. The submission also advises that Australia's entire submission is made without prejudice to outstanding delimitations consistent with Article 76(10) of the LOS Convention and Article 9 of its Annex II.

The three regions affected by outstanding continental shelf delimitations with another State with an opposite or adjacent coast are stated to be the AAT, the Kerguelen Plateau and the Three Kings Ridge. In relation to the Three Kings Ridge this concerns France and New Zealand.⁵⁹ Australia and New Zealand delimited all of their continental shelf in this area in 2004.⁶⁰ There is a potential outstanding delimitation with France in relation to the eastern end of a boundary under a 1982 delimitation treaty.⁶¹ France has indicated that it has no objection to the Commission considering and making recommendations on this part of Australia's submission without prejudice to any eventual delimitation between the two States.⁶² The executive summary of Australia's submission does not refer to Vanuatu. As the executive summary indicates, part of the outer limit of Australia's continental shelf in the Three Kings Ridge region "is defined by the 200 [nautical mile] line constructed from certain non-Australian islands".⁶³ Most of this 200-nautical-mile limit is generated by Matthew Island and Hunter Island. These islands are in dispute between France and Vanuatu. The absence of a reference in the executive summary to Vanuatu may be explained by the fact that Matthew Island and Hunter Island do not have a continental margin beyond 200 nautical miles.⁶⁴

⁵⁸ Continental Shelf Submission of Australia; Executive Summary (AUS-DOC-ES).

⁵⁹ *Ibid.*, at 34.

⁶⁰ Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries of 25 July 2004 ([2004] *Australian Treaty Series* (not yet in force) 1 (available at <www.austlii.edu.au/au/other/dfat/treaties/notinforce/2004/1.html>).

⁶¹ See Executive Summary, note 58 at 35. This concerns the Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic of 4 January 1982 (*The Law of the Sea; Maritime Boundary Agreements* (1970–1984) (United Nations, New York: 1987) 259).

⁶² *Note Verbale* de la Mission Permanente de la France auprès des Nations Unies au Secrétariat général de l'Organisation (Bureau des Affaires juridiques) No. 163 of 28 March 2005; Executive Summary, note 58 at 35.

⁶³ Executive Summary, note 58 at 34.

⁶⁴ See also Serdy, note 57 at 212. The Australian approach of using the 200-nautical-mile limit of another State to define the outer limit of Australia's continental shelf raises an interesting question, especially if the other State's continental margin does not extend beyond 200 nautical miles. What recommendations should the CLCS make in such a case and how should the coastal State define the outer limits of its continental shelf following such recommendations? The coastal State through its actions is not entitled to incidentally fix the 200-nautical-mile

In relation to the Kerguelen Plateau (Heard and MacDonald Islands), the executive summary informs the Commission of a potential outstanding delimitation with France involving an extension of the western end of the maritime boundary between Australia and France.⁶⁵ France has indicated that it has no objection to the Commission considering and making recommendations on this part of Australia's submission without prejudice to the eventual delimitation between the two States.⁶⁶ As the executive summary indicates, the continental shelf of Heard and MacDonald Islands extends up to the 200-nautical-mile limit off Antarctica. Although this is not apparent from the figure included in the section of the summary on the Kerguelen Plateau, figure 1 at page 7 of the executive summary shows that the continental shelf of Heard and MacDonald Islands overlaps with the continental shelf beyond 200 nautical miles of the AAT.⁶⁷ As will be discussed below, Australia has requested the Commission not to take any action with regard to the information contained in the submission in relation to the continental shelf appurtenant to Antarctica. In this light, it should be observed that the executive summary does not comment on the fact that the continental shelf of Heard and MacDonald Islands extends up to 200 nautical miles from Antarctica. The approach in respect of Heard and MacDonald Islands in relation to Antarctica does not seem to contradict the obligations of Australia under either the Antarctic Treaty⁶⁸ or the LOS Convention.⁶⁹ It can be noted that none of the States which submitted observations on the Australian request concerning the continental shelf of Antarctica commented on the submission in relation to Heard and MacDonald Islands.

Well before Australia made its submission to the CLCS, the matter of submissions in respect of the continental shelf of Antarctica had attracted considerable attention. This is explained by the legal regime applicable to this continent. Article IV(2) of the Antarctic Treaty provides *inter alia* that "[n]o

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limit of another State. However, the deposit of information under Article 76(9) on an outer limit at 200 nautical miles from the baselines of another State would have that result.

⁶⁵ Agreement on Maritime Delimitation, note 61. The western terminus of this boundary is located at 200 nautical miles from the baselines. The eastern terminus of the boundary extends for some 240 nautical miles from the baselines. The outer limit of the continental shelf contained in the Australian submission links up with the maritime boundary landward of this latter point.

⁶⁶ *Note Verbale* de la Mission Permanente de la France auprès des Nations Unies No. 163, note 62; Executive Summary, note 58 at 18.

⁶⁷ See also Serdy, note 57 at 210.

⁶⁸ Concluded on 1 December 1959 (402 UNTS 71).

⁶⁹ Instruments applicable to Antarctica and the waters off its coasts in general do not apply to the maritime zones of islands lying to the north of the northern limit (60° S) of the Antarctic Treaty (for a discussion see, e.g., A.G. Oude Elferink "The Continental Shelf of Antarctica: Implications of the Requirement to Make a Submission to the CLCS under the LOS Convention" (2002) 17 *International Journal of Marine and Coastal Law* 485-520 at 491-494. The establishment of outer limits of the continental shelf of Heard and MacDonald Islands is covered by Article 76(10) of the LOS Convention (see also Executive Summary, note 58 at 6).

new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force". States differ over the question whether this provision allows States which have a claim to Antarctic territory to assert the existence of maritime zones, at least to the extent that these did not already exist by the time the Antarctic Treaty entered into force in 1961. Subsequent instruments adopted in the framework of the Antarctic Treaty System have always sought to accommodate the different views on this matter. Some States consider that the establishment of outer limits of the continental shelf off Antarctic territories in accordance with Article 76 of the LOS Convention would contradict this approach under the Antarctic Treaty System.

To deal with this matter, Australia, in the Note from the Permanent Mission of Australia to the Secretary-General of the UN accompanying the lodgment of Australia's submission, requests the CLCS "not to take any action for the time being" in relation to the information in the submission that "relates to continental shelf appurtenant to Antarctica". The factors Australia relates to this request are: "the circumstances" of the Antarctic treaty area, the "special legal and political status" of Antarctica under the provisions of the Antarctic Treaty, including its Article IV, and the importance of harmony between the Antarctic Treaty System and the LOS Convention to "continuing peaceful cooperation, security and stability" in the Antarctic area". At the same time Australia notes that there exist continental shelf areas appurtenant to Antarctica whose extent remains to be defined.

The executive summary advises that in relation to the AAT there are outstanding delimitations with France and Norway concerning overlapping areas of continental shelf. It is observed that France and Norway do not object to the inclusion of such areas in the Australian submission but that the inclusion is without prejudice to the eventual delimitations between Australia and each of the two States.⁷⁰ In relation to both States, the executive summary indicates that a part of the 200-nautical-mile limit and the outer limit of the continental shelf beyond 200 nautical miles contained in the Australian submission are in "areas of potential delimitation".⁷¹ In the case of France, this concerns all of the 200-nautical-mile limit and all of the outer limit of the continental shelf beyond 200 nautical miles of Terre Adélie. It is pointed out that maritime boundaries have not been negotiated with the adjacent States and that the

⁷⁰ Executive Summary, note 58 at 11. No reference is made to New Zealand, which also has coasts adjacent and opposite to the AAT. The absence of such a reference may be explained by the fact that the outer limit of the continental shelf beyond 200 nautical miles of the AAT links up with the 200-nautical-mile limit of the AAT at a point which is also at 200 nautical miles from the baseline of New Zealand's Antarctic territory. See also Serdy, note 57 at 207, who notes that there is no continental shelf beyond 200 nautical miles for the part of the AAT adjacent to New Zealand's Ross Dependency.

⁷¹ Executive Summary, note 58 at 13.

extent of the marking does not reflect any view with regard to the merits of any delimitation methodology.⁷²

Six States Parties to the LOS Convention (the Russian Federation, Japan, France, the Netherlands, Germany and India) and two States which are not a party (the US and Timor-Leste) have formally commented on Australia's submission.⁷³ All of these States, with the exception of France and Timor-Leste, comment on the part of the submission dealing with the Antarctic region. All six States reacting to the part of the submission in respect of Antarctica, indicated that they considered that the CLCS should not consider that part of the submission, pointing, *inter alia*, to Article IV of the Antarctic Treaty. Five of these states explicitly acknowledged with appreciation the Australian request to the CLCS to not consider the information submitted in respect of the Antarctic region. Based on the communications of Australia and other States concerning the Antarctic region, the Commission has decided not to consider the part of the submission dealing with this region.⁷⁴ It would seem that in this way any difficulties resulting from the implementation of Article 76 of the LOS Convention in respect of Antarctica have been defused.

The *Note Verbale* of Timor-Leste and an attached position paper address the delimitation of its maritime boundary with Australia in the Timor Sea. After independence, Timor-Leste concluded an agreement with Australia on a joint development zone, which replaces earlier arrangements between Australia and Indonesia. That agreement did not settle any maritime boundary between Timor Leste and Australia.⁷⁵ In its position paper concerning the Australian

⁷² *Ibid.*, 41.

⁷³ Note of the Permanent Representative of Japan to the United Nations to the Secretary-General of the United Nations (SC/05/039) of 19 January 2005; *Note Verbale* of the Permanent Mission of the Russian Federation to the United Nations to the Secretary-General of the United Nations (No. 739/n) of 9 December 2004; Diplomatic Note of the Deputy Representative of the United States of America to the United Nations to the Secretary-General of the United Nations (POL 10/4) of 3 December 2004; *Note Verbale* of the Permanent Mission of the Democratic Republic of Timor-Leste to the United Nations to the Secretary-General of the United Nations (NV/UN/71/2005) of 11 February 2005; *Note Verbale* de la Mission Permanente de la France auprès des Nations Unies No. 163, note 62; *Note Verbale* of the Permanent Mission of the Netherlands to the United Nations to the United Nations Division for Ocean Affairs and the Law of the Sea (No. NYV/2005/690) of 31 March 2005; *Note Verbale* of the Permanent Mission of Germany to the United Nations to the Secretariat of the United Nations (No. 88/2005) of 5 April 2005; Note of the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations (NY/PM/443/1/98) of 5 July 2005.

⁷⁴ See *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission* (Doc. CLCS/44 of 3 May 2005) para. 23.

⁷⁵ Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor of 20 May 2002 (available at <www.austlii.edu.au/au/other/dfat/treaties/2002/11.html>). On 12 January 2006 Australia and Timor-Leste concluded the Treaty on Certain Maritime Arrangements in the Timor Sea, which is a further interim agreement that is without prejudice to the position of either country on their maritime boundary claims. Under the 2006 Treaty, Australia and East Timor are bound to refrain from asserting or pursuing their claims

submission to the CLCS, Timor-Leste points out that it does not agree with the way in which figures included in the executive summary of the submission depict the situation in respect of maritime boundaries in the Timor Sea. The position paper also observes that the question of delimitation between Timor-Leste and Australia is not directly referred to in this part of Australia's submission. Timor-Leste's *Note Verbale* states that the Australian submission and any recommendations issued by the Commission are without prejudice to the question of delimitation of any maritime boundaries between Timor-Leste and Australia.

It is correct that the executive summary of Australia's submission makes no mention of any disputes relating to delimitation or other cases of unresolved land or maritime disputes in relation to the Argo region, which also includes the Timor Sea. This can be explained by the fact that the pending delimitation between Australia and Timor-Leste is not a land or maritime dispute *related* to the submission in the sense of Annex I. The part of the submission that attracted the comments of Timor-Leste is concerned with the outer limit of the continental shelf well to the west of the Timor Sea. At the same time, in view of the fact that Australia presents its views on the maritime delimitation in the Timor Sea, the reaction of Timor-Leste is quite understandable.⁷⁶

As was noted above, the French reaction to the Australian submission is concerned with the delimitation of maritime boundaries between the two States for the Kerguelen Plateau and New Caledonia regions. The French *Note* is silent on the submission of Australia in respect of the AAT, although, or maybe rather because, the French Antarctic territory borders on the two parts of the AAT.⁷⁷

The submission by Ireland to the Commission made on 25 May 2005 is the first partial submission. According to the submission's executive summary, Ireland

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to rights, jurisdiction or maritime boundaries, in relation to the other, for 50 years (see further "Australia-East Timor Maritime Arrangements", available at <www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html>; the text of the 2006 Treaty is available at <www.austlii.edu.au/au/other/dfat/treaties/notinforce/2006/1.html>.)

⁷⁶ In its comments, Timor-Leste also observes that

it is not clear why Australian [sic] has chosen not to refer to its claimed entitlement beyond 200 nautical miles in the Timor Sea. It is equally unclear why Australia has not referred to the dispute that involves the delimitation of its maritime boundaries with Timor-Leste, in relation to which the Australian claim relies on an argument of natural prolongation beyond 200 nautical miles (Timor-Leste Position Paper; attachment to Letter of the Permanent Mission of the Democratic Republic of Timor-Leste, note 73 at para. 12).

This statement seems to suggest that Timor-Leste considers that Australia should have submitted information on this area to the CLCS to comply with its obligations under Article 76 of the LOS Convention. However, as the area in the Timor Sea is wholly within 200 nautical miles and does not border on the Area, there arguably is no requirement to submit information on the extent of the continental shelf to the Commission.

⁷⁷ Norway, the other State with an Antarctic claim mentioned by Australia in the executive summary of its submission, also did not submit a Note stating its views on this matter following the submission.

is involved in ongoing discussions with neighboring States with regard to the northwestern (Denmark, Iceland and the United Kingdom) and southwestern (France, Spain and the United Kingdom) portions of its continental shelf.⁷⁸ As far as the northwestern area is concerned, the States concerned seem to disagree about the validity of their respective claims, making this more than a delimitation exercise. For instance, Denmark has advanced the argument that this area of continental shelf is a micro-continent with its summit in the Faroe Islands, which is detached from the continental shelves of Iceland, Ireland and the United Kingdom, and Ireland has protested the Danish and Icelandic claims.⁷⁹ Ireland and the United Kingdom have concluded a delimitation agreement delimiting continental shelf areas beyond 200 nautical miles,⁸⁰ thus recognizing each other's continental shelf entitlement in this area.

The partial submission is only concerned with an area abutting the Porcupine Abyssal Plain. This area lies to the east of the Icelandic continental shelf designation of 1985⁸¹ and some 100 kilometers from the southern continental shelf boundary between Ireland and the United Kingdom. The executive summary indicates that having regard to Article 76(10) of the LOS Convention and Article 9 of its Annex II, and in accordance with paragraph 3 of Annex I to the Rules of Procedure of the Commission, in order not to prejudice unresolved questions relating to the delimitation of boundaries between Ireland and some of its neighbors in other portions of the extended continental shelf claimed by Ireland, submissions in respect of those other portions will be made at a later date. Details of the most northerly and southerly points (endpoints) of the outer limit in respect of which this submission is made, and the corresponding foot-of-slope points from which they are measured, have been communicated to the governments of the Faroe Islands/Denmark, France, Iceland, Spain and the United Kingdom.⁸² Ireland's position is that the consideration of this partial submission by the Commission will not prejudice the question of delimitation of boundaries in other parts of the continental shelf.⁸³

⁷⁸ *Ireland, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the area abutting the Porcupine Abyssal Plain, Part I Executive Summary.*

⁷⁹ See, e.g., A.G. Oude Elferink "Maritime Delimitation between the United Kingdom and Denmark/Faroe Islands" 14 (1999) *International Journal for Marine and Coastal Law* 538-552 at 547-548. For a detailed discussion of Ireland's outer continental shelf limits see C.R. Symmons *Ireland and the Law of the Sea*, 2nd ed. (Round Hall Sweet and Maxwell, Dublin: 2004) 191-238.

⁸⁰ Agreement between the Republic of Ireland and the United Kingdom of Great Britain and Ireland concerning the Delimitation of Areas of the Continental Shelf between the Two Countries, done in Dublin, 7 November 1988, in force 11 January 1990 ((1989) 13 *Law of the Sea Bulletin* 48).

⁸¹ Regulation No. 196, 9 May 1985, concerning the Delimitation of the Continental Shelf to the West, South and East (1986 8 *Law of the Sea Bulletin* 10).

⁸² *Executive Summary*, note 78. As is observed by Symmons, the executive summary does not make clear when this communication was made or whether these other States consented in advance to the submission (see Symmons, note 16 at 305).

⁸³ *Executive Summary*, note 78.

Denmark and Iceland have reacted to the partial submission of Ireland in similar terms.⁸⁴ Iceland has observed that it considers the submission and any recommendations by the Commission to be without prejudice to any future submission made by Iceland and to the delimitation of the continental shelf between Iceland and Ireland.⁸⁵ Denmark made similar observations and in addition noted that it was not possible to assess the potential impact of the partial submission on further delimitation in the area.⁸⁶ These commentaries hint at one problem in relation to partial submissions. Ireland has limited its submission to areas which in Ireland's words are "not subject to any dispute". However, as far as can be ascertained from the executive summary of Ireland's partial submission, Ireland makes this assessment on the basis of the Danish and Icelandic continental shelf claims from the 1980s. These claims should not be considered to necessarily represent the final views of Denmark and Iceland on the outer limits of their continental shelf. It cannot be ruled out that these outer limits might extend into the area covered by the partial submission of Ireland.⁸⁷ The Commission would have to address this matter in its recommendations. The Commission does not seem to have concluded that the Danish and Icelandic Notes prevented it from considering the Irish submission.⁸⁸

The submission of New Zealand made in April 2006 is also a partial submission. One of the issues New Zealand had to consider in connection with the preparation of its submission to the CLCS was how to deal with areas of the continental shelf appurtenant to Antarctica. New Zealand has opted not to include these areas in its submission, indicating that a submission for that area may be made later.⁸⁹ The three paragraphs of the *Note Verbale* communicating this decision indicate the reasons for this approach. These paragraphs are worded exactly the same as the three paragraphs of the Australian *Note Verbale* requesting the Commission not to take any action in respect of Australia's submission that relates to the continental shelf appurtenant to Antarctica. Only one of the six States that communicated observations on the Australian submission in respect of the continental shelf appurtenant to Antarctica has thus far reacted to the New Zealand *Note Verbale*. A Japanese *Note Verbale* of 28 June 2006 indicates that the balance of interests in the Antarctic Treaty should not be affected in any way by the intention expressed by New Zealand to submit to the CLCS information on the outer limits of the continental shelf of

⁸⁴ For an analysis of the Notes see also Symmons, note 16 at 305–306.

⁸⁵ Note of the Permanent Mission of Iceland to the United Nations to the United Nations Secretariat (UTN0580174/97.B.512) of 24 August 2005.

⁸⁶ Note of the Permanent Mission of Denmark to the United Nations to the Secretary-General of the United Nations (55.DAN.1) of 19 August 2005.

⁸⁷ Moreover, the legal methodology contained in the partial submission by Ireland may have implications for the areas beyond the area covered by the partial submission (Symmons, note 16 at 308).

⁸⁸ See *ibid.*, 307.

⁸⁹ See Note of the New Zealand Permanent Mission to the United Nations to the Secretary-General of the United Nations (NZ-CLCS-TPN-02) of 19 April 2006.

Antarctica.⁹⁰ It should be noted that the *Note Verbale* of New Zealand does not explicitly express such an intention, but limits itself to noting that in accordance with the Commission's rules "a submission may be made later".

The diplomatic *Note* accompanying New Zealand's submission invokes paragraph 3 of Annex I to the Rules of Procedure to explain New Zealand's decision not to include the continental shelf appurtenant to Antarctica in its submission. Paragraph 3 of the Rules of Procedure allows a partial submission "in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf". It would not seem to be altogether clear which delimitation is concerned in the case of New Zealand's Antarctic territory. To the west, Australia submitted information on the outer limit of the continental shelf of the AAT up to a point at 200 nautical miles from the baseline of the AAT and New Zealand's Antarctic territory.⁹¹ There is no coastal State to the east of New Zealand's Antarctic territory as it borders on the unclaimed sector of Antarctica. These facts further confirm the significance of the interaction between the law of the sea and the Antarctic Treaty System for New Zealand's decision to make a partial submission.

The executive summary of New Zealand's partial submission indicates that there are three States with which New Zealand has (potential) continental shelf boundaries beyond 200 nautical miles in the areas covered by it: Australia, Fiji and Tonga.⁹² New Zealand and Australia concluded a treaty in 2004⁹³ delimiting all of their maritime boundary in the areas of relevance for New Zealand's partial submission. This boundary forms the outer limit of New Zealand's continental shelf at a number of points in three of the regions contained in the submission.⁹⁴ New Zealand, Fiji and Tonga all have continental shelf entitlements in the Northern Region of New Zealand's submissions. Negotiations on the delimitation of these shelf areas between New Zealand and Fiji and between New Zealand and Tonga are ongoing.⁹⁵ The part of New Zealand's submission covering this area is, consistent with Article 76(10), made without prejudice to the eventual delimitation of boundaries between New Zealand and each of the two other States.⁹⁶ According to the executive summary, Fiji and Tonga have indicated to New Zealand that they have no objection to the

⁹⁰ *Note* of the Permanent Mission of Japan to the United Nations to the Secretariat of the United Nations (SC/06/459) of 28 June 2006. The Japanese reaction to the New Zealand's submission lists the same legal considerations as the Japanese *Note* in reaction to the submission of Australia in respect of Antarctica.

⁹¹ See further above.

⁹² New Zealand Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea; Executive Summary, Part 5.

⁹³ See note 60.

⁹⁴ New Zealand Submission, note 92, Part 5.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

Commission considering and making recommendations on this part of the submission, without prejudice to any such delimitation.⁹⁷ In a Note of 23 June 2006, Fiji confirmed the existence of negotiations with New Zealand and indicated that the submission and any recommendation of the Commission "ought to be without prejudice to any future submission to be made by the Republic of the Fiji Islands nor [sic] to the delimitation of the continental shelf [...] between the Republic of the Fiji Islands and New Zealand".⁹⁸ The Note thus not only refers to the delimitation of the continental shelf with New Zealand, as is done in New Zealand's executive summary, but also to any future submissions Fiji may make. This latter issue is certainly relevant. From New Zealand's executive summary it is apparent that, in the area concerned, New Zealand has submitted information on points defining the outer limits of the continental shelf up to the 200-nautical-mile limits of, respectively, Fiji and Tonga.⁹⁹ It is not to be excluded that Fiji or Tonga in any future submission they may make would include different outer limit points for this region. This could, for instance, be the result of differences in the underlying data or of a different view concerning the interpretation of the application of Article 76.

Following the lodgment of New Zealand's submission, New Zealand informed the UN Secretariat that France had expressed the view that there may be an outstanding delimitation in the area of the Three Kings Ridge included in the submission.¹⁰⁰ New Zealand has indicated that its submission is without prejudice to any eventual future delimitation between France and New Zealand that may be required.¹⁰¹ This understanding was confirmed in a subsequent French *Note*.¹⁰²

France, Ireland, Spain and the United Kingdom made a joint submission in respect of the area of the Celtic Sea and Bay of Biscay on 19 May 2006.¹⁰³ To the north, the first point of the outer limit contained in the submission coincides with the southern point of the partial submission of Ireland of 25 May 2005.¹⁰⁴ This suggests that this point was agreed by the four States before

⁹⁷ *Ibid.*

⁹⁸ Note of the Permanent Representative of the Republic of the Fiji Islands to the United Nations to the Secretary-General of the United Nations (NY/6/10/8/5) of 23 June 2006.

⁹⁹ See New Zealand Submission, note 92, figure NZ-EZ-6.1.

¹⁰⁰ Australia in its submission in respect of the Three Kings Ridge region has indicated that there is a potential outstanding delimitation with France. Like Australia, New Zealand does not refer to Vanuatu as a State with which it has a potential maritime delimitation. Contrary to Australia, New Zealand does not define the outer limit of its continental shelf in the Three Kings Ridge region by reference to the 200-nautical-mile limit of Matthew and Hunter Islands, which are in dispute between France and Vanuatu (on these issues see also above).

¹⁰¹ Note of the New Zealand Permanent Mission to the United Nations to the United Nations Division of Ocean Affairs and Law of the Sea, Office of Legal Affairs (NZ-CLCS-TPN-03) of 10 July 2006.

¹⁰² *Note Verbale* de la Mission Permanente de la France auprès des Nations Unies au Secrétariat des Nations Unies, Bureau des Affaires juridiques, Division des affaires maritimes et du droit de la mer No. 422 of 13 July 2006.

¹⁰³ For a discussion of the submission see also Symmons, note 16 at 300–305 and 315–317.

¹⁰⁴ See Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to

Ireland made its partial submission.¹⁰⁵ To the south, the final outer limit point of the submission is located on the Spanish 200-nautical-mile limit.¹⁰⁶ The executive summary of the Joint Submission does not include any views of the submitting States concerning their bilateral boundaries. Three bilateral continental shelf boundaries have been established between these States.¹⁰⁷ Only one of these continental shelf boundaries, between Ireland and the United Kingdom, extends beyond 200 nautical miles, but still lies a considerable distance landward of the outer limit lines contained in the Joint Submission.¹⁰⁸ This Joint Submission is an illustration of the flexibility that is allowed by Article 76 of the Convention and explicitly contemplated by the Rules of Procedure of the CLCS. The complexity of the political geography of the area involved might have made it impossible for the States involved to agree to the consideration by the CLCS of four separate submissions, each covering a part of the area concerned. If the CLCS will issue recommendations confirming the outer limit lines contained in the Joint Submission, the States concerned will know the extent of the area in which they will have to agree on their bilateral boundaries.

Conclusion

The discussion concerning Article 76(10) of the LOS Convention in the first part of this article concludes that it guarantees that the implementation of Article 76 by one State does not affect the rights of another State, in a case where the delimitation of the continental shelf between the States concerned is at issue. At the same time, the analysis of Annex I to the Rules of Procedure of the Commission observed that the Rules might seem to introduce new factors that affect the making of a submission by a coastal State and in certain circumstances would seem to give other States control over whether the submission is considered at all. However, as is argued, the Rules of

cont.

Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the area of the Celtic Sea and the Bay of Biscay, Part 1 Executive Summary, p. 2 and Appendix 1.

¹⁰⁵ See also Symmons, note 16 at 317.

¹⁰⁶ See Joint Submission, note 104, p. 2 and Appendix 1.

¹⁰⁷ Convention between the Government of the French Republic and the Government of the Spanish State on the delimitation of the continental shelves of the two States in the Bay of Biscay of 29 January 1974 (*The Law of the Sea*, note 48 at 55); Arbitration between the United Kingdom and France, Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland concerning the delimitation of areas of the continental shelf between the two countries of 7 November 1988 (13 (1989) *Law of the Sea Bulletin* 48).

¹⁰⁸ An impression of the location of the continental shelf boundary in relation to the outer limit line can be gathered from Figure 1.3 of the executive summary of Ireland's Partial Submission, note 78, which shows that boundary and the location of the northern end point of the Joint Submission (being the southern end point of Ireland's partial submission).

Procedure should not be viewed in isolation from the relevant provisions of the LOS Convention.

In the light of these provisions, other States should in principle accept the consideration by the Commission of a submission from a coastal State which raises issues of delimitation of the continental shelf. The consideration of the submission and subsequent recommendations by the Commission will not prejudice their rights. This line of argument also indicates that a coastal State should only employ paragraph 3 of Annex I to the Rules of Procedure to limit the area for which a submission is made if this is concerned with areas in which there is an overlap with the continental shelf of another State. In the case of the other land and maritime disputes to which Annex I refers, the rights of other States are not explicitly safeguarded by the Convention. As was argued, at least in the case in which one outcome of a dispute would lead to different outer limits of the continental shelf than another outcome, it would seem to be appropriate that a submission is not considered and that the Commission does not make a recommendation on the delineation of the outer limits of such a shelf area.

The discussion of State practice concerning submissions involving land or maritime disputes reveals the diverging approaches open to the submitting States and the variety of commentary that the submissions have elicited.¹⁰⁹ In general, State practice would seem to conform to the conclusions in respect of Article 76 of the Convention and Annex I to the Rules of Procedure. The delimitation of maritime boundaries between States has never led a State to object to the consideration of a submission by the Commission. This issue seems to have led to consultations between the States involved in most instances. There are a number of cases in which such consultations may not have taken place. This certainly was the case for France in the case of New Zealand's submission, but that did not lead to a French objection to consideration of the submission by the CLCS. In other cases in which consultations seem to have taken place, these may not always have led to a prior agreement between the States concerned on their approach to the matter.¹¹⁰

The partial submission of Ireland covers almost all of its outer limit in the area in which there apparently are no overlapping continental shelf claims of other States. As was observed, the reactions of Iceland and Denmark to the Irish submission suggest that a partial submission may still raise questions concerning the consequences of a submission for other States. The areas not included in the Irish submission both concern overlapping claims of more than

¹⁰⁹ Some of these approaches, such as the indication of provisional limits or an outer limit of the continental shelf beyond 200 nautical miles by reference to the 200-nautical-mile limit of another State, raise questions concerning the kind of recommendations the CLCS should issue and the follow-up a coastal States should eventually give to those recommendations.

¹¹⁰ See, e.g., the discussion of the case of New Zealand and Fiji above and the comparison of the Irish and Australian submissions by Symmons, note 16 at 306–307.

one other coastal State, and at least the northwestern area also involves diverging views on the existence of continental shelf entitlement. In such circumstances, it would stand to reason that States would first work out a mutually acceptable arrangement before proceeding with a submission to the Commission. The Joint Submissions of Ireland, France, Spain and the United Kingdom covering the outer limit of the continental shelf to the south of the outer limit contained in the partial submission of Ireland is such an arrangement. That Joint Submission aims to finally establish the outer limit of the continental shelf in the Celtic Sea and Bay of Biscay. The bilateral continental shelf boundaries of the four States remain to be settled.

A number of submissions have attracted observations of other States on other matters than bilateral delimitation. Comments of the United States on the submissions of the Russian Federation and Brazil, pointing to issues of interpretation and application of the Convention, were intended to draw the attention of the Commission to certain matters in the consideration of the submission concerned. The United States did not object to the consideration of the submissions. Japan did not object to the consideration of the submission of the Russian Federation concerning the outer limits of the continental shelf in the Sea of Okhotsk, even though Japan noted the existence of a territorial dispute in relation to this part of the Russian Federation's submission.

Thus far there is only one case in which the Commission has decided not to consider a submission.¹¹¹ That concerns the outer limit lines in the Australian submission concerning the continental shelf appurtenant to Australia. The request of Australia not to consider that part of its submission, a step that was explicitly supported by six other States, is explained by the complex interaction between the Antarctic Treaty System and the law of the sea. As was noted above, that approach seems to have defused any difficulties that might otherwise have resulted from the implementation of Article 76 of the LOS Convention in respect of Antarctica. New Zealand has taken a different approach in respect of the continental shelf of Antarctica than Australia.¹¹² It has made a partial submission on all of its continental shelf with the exception of the continental shelf appurtenant to Antarctica. The identical wording of the diplomatic Notes of Australia and New Zealand addressing the continental shelf

¹¹¹ The cases of the continental shelf of the AAT and New Zealand's Ross Dependency might at first sight seem to contradict the conclusions of the present analysis in respect of Article 76(10) of the Convention and Annex I to the Rules of Procedure. However, submissions in respect of Antarctica can hardly be taken as a precedent for submissions in respect of other parts of the world.

¹¹² That difference seems to be in line with the differences that generally exist between Australia and New Zealand in respect of the definition of the maritime zones of their Antarctic territories.

appurtenant to Antarctica suggests that there was agreement on how to approach this matter before Australia proceeded with its submission.¹¹³

The procedures concerning land and maritime disputes developed by the CLCS allow coastal States to take a number of different approaches in respect of submissions involving such disputes. The submissions that have been made thus far attest to the flexibility of these procedures. Practice in respect of these submissions suggests that only in exceptional cases, such as the continental shelf appurtenant to Antarctica, will States not give their consent to the Commission considering a submission. The LOS Convention and the procedural rules devised by the Commission may thus assist in creating certainty about the location of the boundaries of the continental shelf to the largest extent possible, making a significant contribution to the stability and finality of ocean boundaries.

¹¹³ It should not be excluded that such an agreement also includes at least the other Antarctic claimant States (France and Norway) whose territorial claim does not overlap with that of other claimant States.

