

The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World

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ABSTRACT

The Commission on the Limits of the Continental Shelf is a body created by the 1982 Law of the Sea Convention. The Commission was established as part of the careful compromises respecting Article 76 and the formula therein for the determination of the outer limits of the continental shelf. The purpose of this contribution is to explore what role the Law of the Sea Convention provides to the Commission when a coastal state seeks to establish the outer limit of the continental shelf under the Convention. The argument of this contribution is that the principal role of the Commission is as a *legitimator* of the claims of a coastal state and that this is a relatively modest role in what is essentially a boundary-making process that is political.

Introduction

The Commission on the Limits of the Continental Shelf (hereinafter the Commission) is one of the institutional bodies established pursuant to the 1982 United Nations Convention on the Law of the Sea.¹ The Commission was an integral and useful component in the crafting of the diplomatic compromise respecting Article 76 of the LOS Convention and the formula for the determination of the outer limits of the continental shelf contained therein.²

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¹ United Nations Convention on the Law of the Sea, done at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994. Hereinafter the 1982 LOS Convention. Text available in (1982) 21 *International Legal Materials* 1261 and on the United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (DOALOS) website, www.un.org/Depts/los/index.htm.

² Respecting the negotiating history of Article 76, see S.N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Martinus Nijhoff, 1993), vol. II, pp. 837–890 and E.L. Miles, *Global Ocean Politics* (The Hague, Martinus Nijhoff, 1998), pp. 380–388.

Article 76(8) is the key provision within the LOS Convention regarding the Commission.

“Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographic representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”

Annex II of the LOS Convention, “Commission on the Limits of the Continental Shelf”, directs that the Commission is to be composed of an elected group of 21 technical specialists,³ with the following functions:

- (a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;
- (b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).⁴

Annex II, Article 4 notes that within 10 years of entry into force of the LOS Convention states which intend “to establish ... the outer limits of [their] continental shelf beyond 200 nautical miles” are to submit to the Commission scientific and technical data to support their proposed establishment of such limits.⁵ As noted above, the Commission is to “consider the data” and “make

³ LOS Convention, Annex II, Art. 2(1). The first election took place in March 1997; a second election is to take place in April 2002. See generally the home page of the Commission, available at www.un.org/Depts/los/clcs_new/clcs/home.htm and accessible through the DOALOS home page, note 1 above.

⁴ LOS Convention, Annex II, Art. 3(1).

⁵ At the Eleventh Meeting of the State Parties to the LOS Convention the state parties decided that the ten-year time period would commence as of 13 May 1999. See Eleventh Meeting of State Parties to the LOS Convention, “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, available at www.un.org/Depts/los/meeting_states_parties/documents/SPLOS_72e and accessible through the DOALOS home page, note 1 above. See also *Report of the Eleventh Meeting of the State Parties*, Doc. SPLOS/73 of 14 June 2001, paras. 67–82 available at www.un.org/Depts/los/meeting_states_parties/documents/splos_73 and accessible through the DOALOS home page, note 1 above.

recommendations” to the submitting state respecting the outer limits of the continental shelf.⁶ Where a submitting state is in “disagreement” with the recommendations of the Commission, the state is to “make a revised or new submission to the Commission”.⁷ Finally, Article 76(8) of the LOS Convention states that: “The limits of the shelf established by a coastal State *on the basis of* . . . recommendations [made by the Commission] shall be final and binding” (emphasis added).

The Commission is to become engaged where a state: is a party to the LOS Convention;⁸ seeks to establish the outer limits of its continental margin area beyond a distance of 200 nautical miles; and submits information on the location of the outer limits to the Commission. While there may exist evidence to suggest that the formula for determining the outer limit of the continental margin detailed in Article 76 is part of customary international law,⁹ it is more difficult to extend customary international law status to the role and position of the Commission in continental margin outer limit delineation. Nevertheless, it has been argued that non-parties to the LOS Convention *may* also be under a legal obligation to utilise the Article 76 outer limit formula, including the activation of the Commission.¹⁰ There is nothing in the mandate of the Commission that

⁶ LOS Convention, Annex II, Arts. 5 and 6 direct that a subcommission of seven members is first to undertake the consideration of the information provided by a submitting state. The subcommission is to deliver its recommendations to the full Commission. The full Commission is to vote on the subcommission recommendations and if two-thirds of the Members agree, the subcommission recommendations are approved by the Commission and are transmitted to the submitting state and the Secretary-General of the United Nations. The relationship between the recommendations of the subcommission and the final recommendations of the Commission is unclear. Can the Commission alter recommendations from the subcommission? Is the Commission only to approve or not approve the recommendations developed by the subcommission? Does the Commission have the authority to approve some but not all subcommission recommendations? The Rules of Procedure adopted by the Commission are silent on these issues. See *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, adopted 1998, Doc. CLCS/3/Rev. 2 of 4 September 1998. The most recent version, Doc. CLCS/3/Rev. 3 of 6 February 2001, is available at www.un.org/Depts/los/clcs_new/documents/CLCS_3r3.htm and are to be transmitted to the DOALOS home page, note 1 above, and the Commission’s home page, note 3 above. The *Modus Operandi of the Commission*, adopted 1997, Doc. CLCS/L.3 of 12 September 1997 available at www.un.org/Depts/los/clcs_new/documents/CLCS_L.3.htm indicates in para. 16 that the Commission “will consider and approve or amend the report of the subcommission”.

⁷ LOS Convention, Annex II, Art. 8.

⁸ As of 8 January 2002 there were 138 state parties to the LOS Convention. Non-parties of note include: Canada, Columbia, Denmark, Ecuador, the United States and Venezuela. For updates, see the DOALOS home page, note 1 above.

⁹ See R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, Manchester University, 3rd ed., 1999), p. 150: “It would be difficult to argue that any continental shelf claim consistent with the article 76 formula was not compatible with customary international law.”

¹⁰ See generally T.L. McDorman, “The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime”, (1995) 10 *International Journal of Marine and Coastal Law* 165, 179–185.

would preclude a non-party to the LOS Convention from utilising the Commission.¹¹

It is Article 76, paragraphs 3 to 6, which establishes the multi-tiered formula for the determination of the outer limit of the continental margin. One scholar has described these paragraphs as combining the “influences of geography, geology, geomorphology, and jurisprudence”.¹² It is not the purpose here to delve into the complexities of the meaning or the scientific uncertainties that arise from the wording of outer limit formula set down in Article 76.¹³ The following succinct summation of the Article 76 formula provides a brief insight into the above noted complexities and uncertainties.

“Pursuant to Article 76(4), the outer limit of a state’s continental margin is to be either: (i) a line connecting the outermost points where ‘the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope’, or (ii) a line connecting points ‘not more than 60 nautical miles from the foot of the continental slope’. Lines created pursuant to 76(4) are not to extend beyond either 350 nautical miles from a state’s baselines or 100 nautical miles from the 2,500 metre isobath. For submarine ridges the 350 nautical mile limit applies. For ‘submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs’, either the 350 nautical mile or the 100 nautical miles from the 2,500 metre isobath criterion is the limitation. A further general limitation is that the continental margin does not include the oceanic floor with its oceanic ridges.

The criteria are not easily applicable in any given situation because of the technical and definitional difficulties of determining thickness of sediment, foot of the continental shelf, the 2,500 metre isobath, and distinguishing

¹¹ The Commission had requested a legal opinion be prepared on whether it could deal with submitted information from a non-party to the LOS Convention. At the Eighth Meeting of the State Parties in 1998, it was concluded that the question need not be answered until the situation arose. *Report of the Eighth Meeting of the State Parties*, Doc. SPLOS/31 of 4 June 1998, available at www.un.org/Depts/los/meeting_states_parties/documents/SPLOS_31.htm and accessible through the DOALOS home page, note 1 above. See T.A. Clingan, Jr., “Dispute Settlement Among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf” in T.A. Clingan, Jr. (ed.), *The Law of the Sea: What Lies Ahead?* (Honolulu, Law of the Sea Institute, 1988), pp. 497–499, which takes the view that the Commission can deal with information submitted by non-parties.

¹² D.M. Johnston, *The Theory and History of Ocean Boundary-Making* (Montreal, McGill-Queen’s University Press, 1988), p. 91.

¹³ For a sampling of some of the complexities raised by the wording within Art. 76, see United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Definition of the Continental Shelf* (New York, 1993) and P.J. Cook and C.M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface* (New York, Oxford University Press, 2000).

among submarine ridges, oceanic ridges, and submarine elevations that are natural components of the continental margin.” (Footnotes deleted).¹⁴

Article 76(10) provides an important caveat respecting both the formula set out in Article 76 and the potential work of the Commission: “The provisions of this article [76] are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.” Paragraph 5(a) of Annex I of the Rules of Procedure adopted by the Commission in 1998 indicates that the Commission will not examine a submission where a land or maritime dispute exists.¹⁵

The LOS Convention provides to the Commission a role in the establishment by a coastal state of its outer limits of the continental shelf utilising Article 76 of the LOS Convention. The Commission’s role is restricted to the question of the outer limits of the continental shelf and does not interfere with the right recognised in both customary international law¹⁶ and the LOS Convention¹⁷ of a coastal state to a continental shelf area beyond 200 nautical miles where the physical features are present.¹⁸ The following statements were attributed to

¹⁴ Adopted with some modification from McDorman, note 10 above, 175–176.

¹⁵ Annex I (*Submissions in Case of a Dispute between States with Opposite or Adjacent Coasts or in other Cases of Unresolved Land or Maritime Disputes*) to the Commission, *Rules of Procedure*, note 6 above. Paragraph 1 of Annex I to the Rules of Procedure of the Commission notes:

“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.”

Paragraph 2 of Annex I indicates that it is up to the submitting state to inform the Commission of the existence of bilateral disputes. Rules 49 and 50 of the Rules of the Procedure provide that, after notice is given to non-submitting states, the Commission must wait 90 days before commencing work respecting the submission. In the *Report of the Eighth Meeting of the States Parties*, note 11 above, at para. 44 it was noted that during the 90-day period states concerned about a submission involving a land or maritime dispute could “make relevant statements or raise objections” to the Commission.

¹⁶ The International Court of Justice in the *North Sea Continental Shelf Cases*, [1969] *International Court of Justice Reports* 3, at p. 23 stated:

“[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.”

¹⁷ LOS Convention, Art. 77(1)–(3) provides:

- “1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”

¹⁸ LOS Convention, Art. 76(1) provides:

“The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles

some states at the Eleventh Meeting of States Parties to the LOS Convention in 2001.

“Some delegations pointed out that there was no legal consequence stipulated by the Convention if a State did not make a submission to the Commission. Several delegations underscored the principle that the rights of the coastal State over its continental shelf were inherent, and . . . did not depend upon occupation, effective or notional, or any express proclamation . . .”¹⁹

It is the purpose of this contribution to explore the nature of the Commission and the relationship between the Commission and a state claiming to utilise the formula in Article 76 respecting the establishment of the outer limit of the continental margin. *One certainty is that it is the coastal state, not the Commission, which has the legal capacity to set the state’s outer limit of the continental margin.*²⁰ Beyond this, the role of the Commission *vis-à-vis* the establishment by a coastal state of its continental shelf outer limit is less certain. The relationship or process between the Commission and the submitting coastal state “was envisaged by its proponents . . . as being a *narrowing down* ‘ping-pong’ procedure”²¹ (emphasis added)—state submission, Commission recommendations, state resubmission, Commission recommendations, etc.—with the submitting state, acting in good faith, and the Commission eventually achieving accord.²² However, it is important to note that there is no legislated endpoint to the “ping-pong” process.²³

It is acknowledged that the role of the Commission may evolve in a particular manner based upon how both submitting and other states elect to interact with the Commission. In late 2001, Russia became the first state to submit to the Commission data and information respecting the proposed outer limits of its

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from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

¹⁹ *Report of the Eleventh Meeting of State Parties*, note 5 above, para. 75.

²⁰ The US government, for example, has stated: “Ultimate responsibility for the delimitation [of the outer limit of the continental margin] lies with the coastal State itself.” *Commentary—The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI*, attached to the Letter of Submittal from the US Secretary of State to the US President, part of the Message of Transmittal of the LOS Convention from the US President to the US Congress, US Senate, Treaty Doc. 103–39, 103rd Congress, 2nd Session, 1994, p. 57, reprinted in (1995) 34 *International Legal Materials* 1393. See also United Nations, *Definition of the Continental Shelf*, note 13 above, p. 29. There is no disagreement on this point.

²¹ P.R.R. Gardiner, “The Limits of the Area beyond National Jurisdiction – Some Problems with Particular References to the Role of the Commission on the Limits of the Continental Shelf” in G. Blake (ed.), *Maritime Boundaries and Ocean Resources* (London, Croom Helm, 1987), p. 69.

²² Gardiner, note 21 above, p. 69.

²³ R.W. Smith and G. Taft, “Legal Aspects of the Continental Shelf” in Cook and Carleton, note 13 above, p. 20, note that the “process could go on indefinitely”.

continental shelf in the Arctic and Pacific Oceans.²⁴ It is expected that the Russian submission will be dealt with during 2002. Until a clear pattern emerges of the manner in which states are responding to the Commission's work, one is drawn to the wording of Article 76 and Annex II and the political context of ocean boundary-making to provide insight into the role of the Commission. It will be argued below that the best view of the Commission, based on the political context of boundary-making and a careful analysis of the wording of Article 76 and Annex II, is that it is a unique body constrained to speak a technical and scientific language yet involved in a process where the language that matters is that of politics.

The Political and Legal Context Informing the Role of the Commission

The Real Achievement in Article 76

The real achievement in Article 76 is not the complexity of the outer limit formula or the establishment of the Commission. The real achievement in Article 76 is that *there is a definable limit* on the claim that a state can make to the continental margin however difficult the defining of that limit may be. To understand why this is the true achievement of Article 76 reference has to be made to Article 1 of the 1958 Geneva Convention on the Continental Shelf.²⁵ Pursuant to Article 1 a coastal state had jurisdiction over the adjacent continental shelf as far seaward as the resources of the adjacent shelf were exploitable. The "exploitability" criterion was seen as such an elusive criterion, subject as it was to seaward creep, that Article 1 provided no reasonably definable limit at all.²⁶ However difficult the wording of the Article 76 formula,

²⁴ See Press Release, "Commission on Limits of Continental Shelf Receives Its First Submission", 21 December 2001, available at www.un.org/New/Press/docs/2001/sea1729.doc.htm, and Commission, "Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission", available at www.un.org/Depts/los/clcs_new/commission_submissions.htm, accessible through the DOALOS home page, note 1 above, and the Commission's home page, note 3 above. It appears that it is Russia's submitted outer limits in the Arctic Ocean and the question of submarine ridges that will generate the most scrutiny. See Miles, note 2 above, pp. 387–388. Regarding submarine ridges and Art. 76, see P.A. Symonds, *et al.*, "Ridge Issues" in Cook and Carleton, note 13 above, pp. 285–307.

²⁵ Convention on the Continental Shelf, done at Geneva, 29 April 1958, entered into force 10 June 1964. Reprinted in 499 *United Nations Treaty Series* 311. Article 1 states: "For the purposes of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands" (emphasis added).

²⁶ Churchill and Lowe, note 9 above, p. 147, state: "Even at the 1958 conference it was recognised that the addition of the exploitability test rendered the seaward limit dangerously imprecise. It was clear that new technology would push the limit farther and farther from the shore, and that 'exploitability'—which could mean anything from the ability to drag up a basket of sedentary fish to the ability to establish a full-scale profit-making offshore oil complex—was itself an elusive criterion. Moreover, it was not clear whether it was the ability of the coastal State, or of

there is no doubt that a limit can be ascertained²⁷ and, moreover, it is the intent of Article 76 that a limit be ascertained.

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”.²⁸

What can be drawn from this respecting the role and workings of the Commission is that what should concern the Commission is not so much whether a submitting state justifies its choice of outer limit, rather whether, in the view of the Commission, there is an exaggerated claim. In discussing the Commission, the government of the United States made use of the word “safeguards”.²⁹ This is a useful way of looking at the role of the Commission—it has a safeguard or watchdog role respecting exaggerated continental margin claims.

The Politics of Ocean Boundary-Making

Coastal State Authority

Nation states jealously control the determination of both their land and sea boundaries. A state’s assertion of an international boundary, its outer limit of national sovereignty, is a political act which, however, is usually accompanied both by legal justification and technical expertise in the delineation of the precise location of the boundary. In the maritime context, there is no question both of the political nature of an assertion of national jurisdiction over an offshore area

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any other State—or even of all other States—which was in question . . .

. . . It became clear that, given sufficient investment, there were few, if any, areas of the ocean bed which could not be exploited in some way. It was feared that the consequence of continued adherence to the exploitability test in the face of rapidly developing technology, rendering ever deeper areas ‘exploitable’, would be the eventual extension of coastal State ‘continental shelf’ claims so as to cover the entire ocean floor.”

²⁷ In 1978 the Third United Nations Conference on the Law of the Sea (UNCLOS III) Secretariat prepared a map which illustrated what would be the results of the application of the various Article 76 formulae then being considered by the negotiators. See “Preliminary Study Illustrating Various Formulae for the Definition of the Continental Shelf”, Doc. A/Conf. 62/C.2/L.98 of 18 April 1978: (the map is Add 1) the study, but not the map, is reprinted in Third United Nations Conference on the Law of the Sea (UNCLOS III), *Official Records* (New York, 1980), vol. IX, p. 189; and see “Study of the Implications of Preparing Large-Scale Maps for the Third United Nations Conference on the Law of the Sea”, Doc. A/Conf. 62/C.2/L.99 of 9 April 1979, reprinted in UNCLOS III, *Official Records* (New York, 1980), vol. XI, p. 121. The latter document is also reprinted in Nandan and Rosenne, note 2 above, p. 884.

²⁸ The meaning to be given “final and binding” in the last sentence of Article 76(8) is discussed below.

²⁹ See 1994 US *Commentary*, US Senate Treaty Doc. 103–39, note 20 above, p. 57. This *Commentary* does not explicitly indicate that the Commission is to provide “safeguards”, although this is clearly what is intended. “The Commission is designed to provide a mechanism to prevent or reduce the potential for dispute and uncertainty over the precise limits of the continental shelf . . . Ultimate responsibility for the delimitation lies with the coastal State itself, subject to safeguards against exaggerated claims.”

including the delineation of the outer limit of the area and that such an assertion is of a unilateral nature. States establish the outer limit of their 12-nautical mile territorial seas and 200-nautical mile exclusive economic zones unilaterally and without consultation with other states or international institutions even in situations where those claims may overlap with those made by other states. It is only in the rarest of situations where a state yields the ultimate decision-making respecting the location of a national boundary to an independent authority. Canada, for example, has agreed on two occasions to have independent third-party judicial bodies determine the location of Canada's maritime boundary where Canadian claims conflicted with that of its neighbour: a chamber of the International Court of Justice constructed a maritime boundary between Canada and the United States in the Gulf of Maine;³⁰ and an international arbitral tribunal constructed a maritime boundary between Canada and France in the outer Gulf of St. Lawrence.³¹

The political reality of boundary-making reinforces the one certainty respecting the role of the Commission that a coastal state retains the legal and political responsibility for establishing its continental margin outer limit. 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.

The Dynamic Process of Ocean Boundary-Making

In attempting to properly position the role of the Commission in the outer limit delineation process, it is also important to note that the inter-state dynamic respecting unilateral ocean boundary-making (or claims) is assertion and counter-assertion. A state makes an offshore claim; a reacting state demonstrates its disagreement with the breadth or outer limit of the claim through an official protest. Each state retains its independence of action respecting both the initial claim and the reaction.

The content of a state's reaction to an assertion of national jurisdiction over an identified ocean space may be either that the space has already been claimed by the reacting state (overlapping claims) or, less frequently, that the breadth or basis of the claim has been determined using improper criteria. The latter situation arises, for example, respecting state constructed straight baselines from which they can measure both their 12-nautical mile territorial sea and 200-nautical mile exclusive economic zone and which delimit the state's internal waters.

³⁰ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, [1984] *International Court of Justice Reports* 246.

³¹ *Case Concerning the Delimitation of the Maritime Areas Between Canada and France*, 10 June 1992, reprinted in (1992) 31 *International Legal Materials* 1148–1219.

There are criteria established in the LOS Convention (which are broadly consistent with those that exist in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone)³² that states are to apply in the construction of straight baselines.³³ There is a high degree of flexibility in many of the criteria to be applied by a state when constructing straight baselines.³⁴ The political reality of ocean boundary-making ensures that a coastal state has the unilateral authority to construct straight baselines. Where straight baselines are constructed which are inconsistent with the widely-accepted criteria, the baselines will be considered by those states which officially protest the baselines as being inconsistent with international law and of no force and effect. For example, the United States has officially protested many of the straight baselines constructed by Canada in the 1960s and also the baselines constructed by Canada in 1985 enclosing the waters between and among Canada's Arctic islands.³⁵

With straight baselines, normal baselines and other "lines in the water" such as the outer limit of the 200-nautical mile exclusive economic zone, the recourse of a state which takes the view that a line has been improperly constructed or delineated is to make an official protest. The effect of such protest is that the "line in the water" is not legally opposable to the protesting state.³⁶

Unlike for all other "lines in the water", respecting the construction of the outer limit of the continental shelf a claiming state is obligated to interact with an independent institution—the Commission. However, there is nothing in the wording of Article 76 or Annex II which changes in a fundamental way the inter-state dynamic respecting "lines in the water" of assertion and counter-assertion.

³² Convention on the Territorial Sea and Contiguous Zone, done at Geneva, 29 April 1958, entered into force 10 September 1964. Reprinted in 516 *United Nations Treaty Series* 205. The relevant provisions are Arts. 4–11 and 13.

³³ The principal provision is Art. 7, LOS Convention.

³⁴ See generally Churchill and Lowe, note 9 above, pp. 31–59; W.M. Reisman and G.S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (London, Macmillan, 1992); and J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims* (The Hague, Martinus Nijhoff, 2nd ed., 1996), pp. 57–146.

³⁵ See Roach and Smith, note 34 above, pp. 96–100 and 117–121.

³⁶ In less legalese wording, the effect of a protest is that the existence of a "line in the water" is not "the law" or binding as between the asserting and protesting states. Roach and Smith, note 34 above, p. 9, point out that: "The failure to make a timely protest in circumstances when it reasonably could have been expected to do so may constitute tacit acceptance of the claim." It is a common feature of bilateral ocean boundary litigation that one state argues that the other state acquiesced to its offshore claim such that the acquiescing state is estopped from denying the validity of the offshore claim. This argument was raised by Canada against the United States in the *Gulf of Maine* case but, based on the facts in the case, was not accepted by the Chamber of the International Court of Justice. See *Gulf of Maine* case, note 30 above, paras. 114–154. More generally on the legal effect of protests in this situation, see V.D. Degan, *Sources of International Law* (The Hague, Martinus Nijhoff, 1997), pp. 346–348.

The Constitutive Structure of the Commission

Irrespective of the above-noted potential “ping-pong” process that may arise regarding Commission recommendations and coastal state disagreement with recommendations and re-submission, it is clear that the workings of the Commission are to be non-adversarial.³⁷ It is also clear that the Commission is to or can carry out its “consideration of data” from a submitting state in a collaborative manner with the submitting state.³⁸ It is to be noted that there is no representation on the Commission of the one body that would demonstrably lose from exaggerated outer limits claims—the International Seabed Authority.

One interesting question that arises is who, if anyone, does the Commission represent? The answer is that the Commission does not represent the international community of states in a manner similar to, for example, the way in which the United Nations or other intergovernmental organisations can be said to represent or speak for its member states. The Commission is far removed from speaking on behalf of any or all states that are parties to the LOS Convention. The Chair of the Commission has referred to the Commission as “an autonomous body” apart from the state parties to the LOS Convention.³⁹ The wording of the LOS Convention contains no explicit delegation of authority from state parties to the LOS Convention to the Commission and no explicit yielding by state parties of their ability to claim, react, protest or reject actions related to the outer limits of the continental shelf.

As one member of the Commission stressed: “The Commission is ... comprised of individuals, and not States or representatives of States.”⁴⁰ This is the requirement of Annex II of the LOS Convention which provides that Commission members are to be individuals unattached to their states and “experts in the field of geology, geophysics or hydrography”.⁴¹ Nevertheless, the Commission is not similarly positioned to an international court such as, for

³⁷ This is specifically noted in the 1994 US *Commentary*, US Senate Treaty Doc. 103–39, note 20 above, p. 57: “The process is not adversarial ...”.

³⁸ Rule 51 of the Commission, *Rules of Procedure*, note 6 above, indicates that the submitting state is to be present when the Commission considers the information presented concerning the outer limit claim. Nevertheless, it is apparent that most of the work of the subcommissions and the Commission is expected to be done without the direct participation of the submitting state. See *Modus Operandi of the Commission*, note 6 above.

³⁹ *Report of the Eleventh Meeting of State Parties*, note 5 above, para. 61. Nevertheless, the Commission has addressed requests to and sought the advice of the regular meetings of states parties to the LOS Convention. See, for example, the issues arising respecting LOS Convention, Annex II, Article 4 and the ten-year time period for outer limit claim submission, discussed at note 5 above, and the issue of the Commission accepting claims by non-parties to the LOS Convention, discussed at note 11 above.

⁴⁰ N.N. St. Claver Francis, “The Continental Shelf Commission” in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* (The Hague, Martinus Nijhoff, 1999), p. 142.

⁴¹ LOS Convention, Annex II, Art. 2(1).

example, the International Tribunal for the Law of the Sea.⁴² First, it is clear that the authority and role of the Commission is not as an arbitrator of a coastal state's continental shelf outer limit. Secondly, there are important constitutive differences between the Commission and an international court in that the state which nominates a member of the Commission is to "defray the expenses" of that Commission member.⁴³ Despite the financial prudence of this measure, the statements regarding the independence of Commission members, and the exhortation that Commission members "serve in their personal capacities",⁴⁴ the financial relationship is indicative that the Commission is not in a position equivalent to an international court and was never intended to approximate that status. Moreover, the financial relationship between the nominating state and the Commission member creates perceptual problems that undermine the impartiality of the Commission. As one Commission member stated:

"[T]he concept of the independence of each Commission member is a most desirable one. However, one has to ask the question as to the extent to which this Commission can be truly independent when all expenses of the Commission member are borne by the State party which proposed the member. It is my opinion that the expenses of each Commission member should be borne by the United Nations to make it a real independent Commission."⁴⁵

Note should also be made that Commission members can act as advisors and consultants to states regarding the Article 76 formula and, while excused from being the subcommission charged with examining a submission, can participate in the work of the Commission in approving the work of the subcommission.⁴⁶ This again clouds perceptions of impartiality.

The financial relationship of Commission members and states and the advisor/consultant role Commission members can play are further indications of the indirect role assigned the Commission within the LOS Convention respecting the delineation of the outer limit of the continental margin.

During the negotiations of the Article 76 formula, states demonstrated a direct interest in its possible interpretation and application. For example, the Soviet Union was troubled during the negotiations on Article 76 with the possibility of Iceland utilising the mid-Atlantic Ridge; and the United States was concerned

⁴² See LOS Convention, Annex VI, "Statute of the International Tribunal for the Law of the Sea" and the Tribunal's web page, available at www.itlos.org, accessible through the DOALOS home page, note 1 above. Regarding the work of the Tribunal, see P.C. Rao and R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice* (The Hague, Kluwer Law International, 2001).

⁴³ LOS Convention, Annex II, Art. 5.

⁴⁴ See LOS Convention, Annex II, Art. 2(1) and see also Commission, *Rules of Procedure*, note 6 above, Rules 10 and 11.

⁴⁵ Francis, note 40 above, p. 144.

⁴⁶ See LOS Convention, Annex II, Arts. 4-6 and note 6 above.

about the Soviet Union's possible continental shelf claim in the Chuckchi Sea.⁴⁷ As Miles describes it: "For the superpowers, the oil and gas interests were competitive with security interests which called for as narrow shelves as possible and, in any case, clearly defined outer limits."⁴⁸ Subsequent to the conclusion of the LOS Convention, Chile, Ecuador and Iceland have all asserted national jurisdiction over the continental margin beyond 200 nautical miles that have resulted in official protests from France, Germany and the United States in the case of the Chilean and Ecuadorian claims, and the United Kingdom in the case of the Icelandic assertion.⁴⁹

The point here being raised is that, as the Commission cannot be said to represent states, or to have been explicitly delegated significant authority by states, and because the financial relationship of nominating state and Commission member creates perception problems regarding impartiality, *all* states retain their independence of action and reaction: to the work of the Commission; to any recommendations made by the Commission to a submitting state; and to *any* action taken by a coastal state respecting its outer limits of the continental shelf.

The Wording of the Last Sentence of Article 76(8)

The last sentence of Article 76(8) provides: "The limits of the shelf established by a coastal state *on the basis of* these recommendations [made by the Commission] shall be *final and binding*." It is this sentence to which almost all examinations of the relationship between the Commission and the submitting state turn. Brown comments that: "It is clear from the Conference records that several aspects of the package of Article 76(8) ... are regarded by many States as less than satisfactory."⁵⁰

In 1980 the government of Canada expressed significant concerns about the wording of Article 76(8).

"The ... Commission is *primarily an instrument which will provide the international community with reassurances* that coastal States will establish their continental shelf limits in strict accordance with the provisions of article 76. *It has never been intended*, nor should it be intended, *as a means to impose on coastal States limits* that differ from those already recognized in article 76. Thus to suggest that the coastal States limits shall be established 'on the basis' of the Commission's recommendations rather than on the basis of article 76, could be interpreted as giving the

⁴⁷ See: Miles, note 2 above, pp. 384–388. See also the 1994 US *Commentary*, US Senate Treaty Doc. 103–39, note 20 above, p. 56.

⁴⁸ Miles, note 2 above, p. 382.

⁴⁹ See generally Roach and Smith, note 34 above, pp. 205–208.

⁵⁰ E.D. Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Areas Within National Jurisdiction* (London, Graham and Trotman, 1984), p. 1.4.13.

Commission the function and power to determine the outer limits of the continental shelf of a coastal State. *We are assured on all sides that this is not the intention . . .*⁵¹ (emphasis added).

Brown notes that a number of other states expressed similar views.⁵²

It was the Canadian perspective that Article 76(8) should be interpreted to remove the reference to the Commission recommendations and insert “the formula of Article 76”. Such a perspective would clearly diminish the relationship between the outer limit proposed by a coastal state and the Commission and be more consistent with the political reality of ocean boundary-making. The Canadian objection to Article 76(8) has been overlooked as emphasis has been placed on the meaning to be given to “on the basis of” Commission recommendations.

The “on the basis of” relationship implies a closer fit between a coastal state’s claimed outer limit and Commission recommendations than the alternative wording of “taking into account” that was considered during the negotiations.⁵³ Nevertheless, Clingan commented that “the Commission’s powers were restricted to making recommendations which affect the final decision in a fairly remote way”.⁵⁴ Smith and Taft have commented that: “The ‘based upon’ requirement in paragraph 8 . . . provides certainty and consistency *for the international community, while preserving* sufficient, although unspecified, *flexibility* for the coastal State”(emphasis added).⁵⁵ This sentence raises more questions than it answers.

The most straightforward reading of the last sentence of Article 76(8) is as an if/then clause: *if* an outer limit claim is based on the Commission recommendations, *then* the outer limit is “final and binding”. “Final and binding” on whom? The US government has noted that “final and binding” means that a claim “may not be contested”.⁵⁶ Lupinacci is relied on in a UN Office of Legal Affairs study for the statement that: “The limit thus established will become obligation *erga omnes*”— which means final and binding on all states.⁵⁷ These sources suggest

⁵¹ Statement by the Delegation of Canada, dated 2 April 1980, UN Doc. A/Conf. 62/WS/4 reprinted in UNCLOS III, *Official Records* (New York, 1981), vol XIII, p. 102.

⁵² Brown, note 50 above, p. I.4.14.

⁵³ See generally the proposals considered during the negotiations set out in Nandan and Rosenne, note 2 above, pp. 848–870 and 873.

⁵⁴ Clingan, note 11 above, p. 497.

⁵⁵ Smith and Taft, note 23 above, p. 20.

⁵⁶ The 1994 US *Commentary*, US Senate Treaty Doc. 103–39, note 20 above, p. 57: “If the coastal State agrees, the limits of the continental shelf established by the coastal State on the basis of these recommendations are final and binding (article 76(8)), thus providing stability to these claims *which may not be contested*” (emphasis added).

⁵⁷ J.C. Lupinacci, “El regimen de la plataforma continental en la Convencion sobre el Derecho del Mar” in P.M. Arana (ed.), *Trabajos presentados a la Conferencia Internacional sobre Recursos Marinos del Pacifico, Vina del Mar, Chile, 1983* as cited in United Nations, *Definition of the Continental Shelf*, note 13 above, p. 29. Respecting the meaning of obligation *erga omnes*, see O. Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), pp.

that “final and binding” applies to both the submitting state and all other states.

However, does accord between the Commission and a submitting state as to location of the outer boundary of the continental margin remove from other states their capacity to reject (protest and thus not accept) a state’s continental shelf outer limit? *Prima facie* the answer to this would seem to be no since the Commission does not represent states, does not and cannot speak for states. States are not deprived of their legal right to disagree with another state’s established outer limit even if that outer limit delineation can be said to be on the basis of Commission recommendations.

Moreover, while attention tends to focus on the meaning to be given to “on the basis of”, the more interesting question is who gets to make that assessment as this relates directly to the “final and binding” wording. It is not the Commission which decides or evaluates if the coastal state’s outer limit has been delineated “on the basis” of the recommendations of the Commission. The Commission is mandated only to react to submissions and resubmissions. The assessment of whether a coastal state’s outer limit has been made “on the basis” of Commission recommendations can only be made by individual states, both claiming and non-claiming, which, in the case of non-claiming states, can then react (accept or not accept) the limit established. Thus, since individual states must evaluate “on the basis of”, “final and binding” cannot mean that where the Commission and the submitting state appear to be in accord on the outer limits that the limits are “final and binding” on all states.⁵⁸

The more convincing interpretation of “final and binding” is that it refers only to the submitting state in that the submitting state, having delineated its outer limit of the continental shelf *and that limit not being challenged by other states*, cannot subsequently change the location of its outer limit.⁵⁹ To this extent, and this extent only, would the outer limit be “final and binding”, not be contestable and perhaps become an obligation *erga omnes*. This interpretation of “final and binding” is consistent with the political dynamic of ocean boundary-making and the real achievement of Article 76 which is that a claiming state cannot revisit its outer limit boundary. This interpretation of “final and binding” is also consistent with the sanctity yielded by international law and practice to well-

cont.

208–213; A. Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press, 2000), pp. 208–209; and, more generally, M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

⁵⁸ This argument is further supported by the relationship between Article 76, the Commission and the dispute settlement provisions of the LOS Convention detailed below which, it is argued, provides to all state parties to the LOS Convention the capacity to utilise dispute settlement regarding applications of Article 76. See text at note 69 below.

⁵⁹ M. Shaw, *Title to Territory in Africa* (Oxford, Clarendon Press, 1986), p. 222 comments in the context of bilateral boundaries: “The legal force of a boundary may derive . . . either from a treaty or by virtue of acquiescence or recognition by the parties concerned.” Note also the commentary at note 36 above.

established boundary lines. Referring to state practice, judicial decisions and multilateral treaties, Shaw comments:

“Since the concept of boundaries is of such crucial importance to the international community, the element of stability in the determination and maintenance of boundaries has been consistently emphasized The tenor, therefore, of the discussion of boundaries in international law is characterized by the perceived requirement for certainty. This militates against boundary changes . . .”⁶⁰

Note should also be made of Article 76(9) which provides that a coastal state is to deposit with the Secretary-General of the United Nations the charts and data “permanently” describing the outer limits of the continental shelf. Information deposited with the Secretary-General is to be given due publicity. This paragraph does not require that the submitted material or outer limit location be that on which there is accord signified by the Commission. The Secretary-General has no independent authority to review or evaluate the information provided by the submitting state. Acceptance by the Secretary-General of submitted material does not mean that the outer limit established in the material is binding on other states. Article 76(9) must be treated as placing upon the Secretary-General a responsibility similar to that of a treaty depositary,⁶¹ which means that the Secretary-General will accept all submitted materials with no legal consequences attaching to such acceptance.⁶²

Legal consequence can be said to attach to the claimed outer limit of the continental margin where, once the limits are submitted to the Secretary-General

⁶⁰ Shaw, note 59 above, pp. 222 and 223. Support for Shaw’s statements, provided at pp. 221–263, is founded upon the treatment of boundary treaties as being unaffected by state succession issues (see Aust, note 57 above, p. 307), or by a subsequent fundamental change in circumstance (see Vienna Convention on the Law of Treaties, done 23 May 1969, entered into force 27 January 1980, reprinted in (1969) 63 *American Journal of International Law* 875, Art. 62(2)(a)), and by the embracing by international tribunals of the doctrine of *uti possidetis* (see M. Shaw, “The Heritage of States: The Principle of *Uti Possidetis Juris* Today”, (1996) 67 *British Yearbook of International Law* 75–154).

⁶¹ M. Hayashi, “The Role of the Secretary-General under the LOS Convention and the Part XI Agreement”, (1995) 10 *International Journal of Marine and Coastal Law* 157, 159 refers to Art. 76(9) responsibilities on the Secretary-General as “unprecedented” and “to be distinguished clearly from the usual depositary functions”. What is distinguishable is the responsibility on the Secretary-General regarding receiving, recording and giving due publicity to the information submitted. What is not distinguishable is the legal responsibility for the Secretary-General to receive the information and the non-legal consequences of the Secretary-General receiving the information and giving due publicity to that information. On these issues, the Art. 76(9) responsibilities of the Secretary-General are the same as that of a treaty depositary. See note 62 below.

⁶² Vienna Convention on the Law of Treaties, note 60 above, Art. 76(2) states: “The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.” See generally Aust, note 57 above, pp. 265–267 and United Nations, *Summary Practice of the Secretary-General as Depositary of Multilateral Treaties* (New York, 1994).

and publicity given thereto, following a reasonable time period no protest or objection is registered. Then the outer limit claimed by a coastal state would be considered “final and binding” and not open to contest.

The Dispute Settlement Provisions of the LOS Convention

Part XV of the LOS Convention provides to state parties a series of options for the peaceful settlement of disputes “concerning the interpretation or application” of the Treaty.⁶³ One of these options, while cumbersome to navigate, is compulsory third-party adjudication procedures.⁶⁴ The relationship between Article 76, the Commission and the dispute settlement procedures of the LOS Convention is not easily deciphered. According to Brown it was not possible to reach a consensus during negotiations on how Article 76, the Commission and the dispute settlement provisions were to interrelate⁶⁵ with the result that there is no explicit wording in either Part XV or Article 76 on the relationship. Clearly, the lack of consensus fogs how one is to interpret the absence of wording.

Smith and Taft have written that “the Conference negotiators opted ... to exclude establishment of the outer limit of the continental shelf from compulsory and binding third-party dispute settlement procedures ... ”.⁶⁶ Brown, however,

⁶³ LOS Convention, Art. 279. More generally on the dispute settlement provisions and process within the LOS Convention, Part XV, see J.G. Merrills, *International Dispute Settlement* (Cambridge, Cambridge University Press, 3rd ed., 1998), pp. 170–196; the DOALOS website devoted to dispute settlement, available at www.un.org/Depts/los/settlement_of_disputes/settlement_of_disputes.htm, accessible through the DOALOS home page, note 1 above; and Churchill and Lowe, note 9 above, pp. 447–462.

⁶⁴ The following, drawn from T.L. McDorman, “Global Ocean Governance and International Adjudicative Dispute Resolution”, (2000) 43 *Ocean and Coastal Management* 255, 259–260, provides a convenient overview of the dispute settlement process.

“Indicative of the flexibility and options within the 1982 LOS Convention is Article 280 which provides that parties can agree to utilize which ever peaceful means they wish to resolve a dispute and by so agreeing they can avoid the dispute settlement mechanisms of the LOS Convention. Where avoidance is not desired, the LOS Convention provides for either compulsory third-party adjudication or compulsory conciliation. The third-party adjudicative body can be either the International Court of Justice, the newly-created International Tribunal for the Law of the Sea, an arbitral tribunal or a special arbitral tribunal. By means of a declaration, a state can pre-select which body it wishes to utilize or, when a dispute arises, the disputants can agree on the appropriate body. Article 287(5) of the LOS Convention directs that where disputants cannot agree on the appropriate adjudicative body to resolve a dispute, arbitration is to be used.

“Subject to Article 280, compulsory adjudication using one of the above bodies is to be utilized by disputing states unless the issue in dispute is one explicitly excluded by Article 297 or the issue in dispute is one listed in Article 298 regarding which a state, prior to a dispute arising, can elect to exclude from compulsory adjudication. The principal exclusion under Article 297 is the coastal state’s exercise of authority over living resources within its 200 nautical mile exclusive economic zone. There are two important areas that a state can elect to exclude from compulsory adjudication pursuant to Article 298: maritime boundary disputes and disputes concerning military activities” (footnotes and references deleted).

⁶⁵ Brown, note 50 above, p. I.4.15. See also the Evenson Group Draft put before the LOS Convention negotiators in 1975, reproduced in Nandan and Rosenne, note 2 above, p. 850.

⁶⁶ Smith and Taft, note 23 above, p. 20.

puts forth the case that there is nothing explicit in Part XV or Article 76 which provides for an “opt-out” of outer limit disputes from dispute settlement and, therefore, dispute settlement must be available.⁶⁷ Clingan has commented:

“Whether the final adoption [by a coastal state of its outer limit] is perceived to be ‘on the basis’ of the Commission recommendations may itself be a question that could be resolved by traditional juridical settlement procedures provided for in the Convention, a question of treaty interpretation being involved. This view of the Commission is in accord with the wishes of the various negotiators.”⁶⁸

What may have been meant by the “opt-out” phraseology of Smith and Taft is that once the outer limit becomes “final and binding”, which as pointed out above can or will occur after acquiescence on the part of states following the submission of the information on the outer limits to the Secretary-General, then the outer limit is not open to being contested through the LOS Convention dispute settlement procedures.

It would have been possible to include in the LOS Convention phraseology excluding or precluding contesting an outer limit claim through the dispute settlement procedures. Alternative phraseology could have been included which would have provided that accord between a submitting state and the Commission precluded the use of third-party adjudication or created a strong presumption in favour of preclusion. No such language exists. If “final and binding” in Article 76(8) meant binding on all states, then this could and probably should have been reflected in the dispute settlement procedures since it would mean that indeed this was an issue that was precluded from the dispute settlement procedures of Part XV. The failure to include such a preclusion gives further weight to the argument that “final and binding” does not mean final and binding on all state parties to the LOS Convention.⁶⁹

The political realities of ocean boundary-making direct that states are reluctant to give over to any third party the determination of a state’s ocean boundaries. States can, under Article 298, opt out of adjudicative dispute settlement where disputes arise over overlapping offshore claims.⁷⁰ Interestingly, there is no opt-out of compulsory dispute settlement respecting disputes over the construction of straight baselines, the outer limit of the territorial sea or the exclusive economic zone except where claims overlap with neighbours. Again, this suggests that state application of the Article 76 criteria is not precluded from the dispute settlement procedures of the LOS Convention. However, Brown comments that as regards the outer limit of the continental margin being decided by third-party adjudication:

⁶⁷ Brown, note 50 above, pp. I.4.15–16.

⁶⁸ Clingan, note 11 above, p. 497.

⁶⁹ See note 58 above.

⁷⁰ LOS Convention, Art. 298 and see note 64 above.

“[I]t must be noted that such compulsory imposition of a boundary line is likely to be no more acceptable to States like Canada and Australia than is a binding determination by a boundary commission . . . The fact remains, nonetheless, that . . . Part XV of the Convention does require disputes over the outer limit to be resolved by some form of binding settlement.”⁷¹

The ambiguity respecting state access to the third-party dispute settlement procedures in the LOS Convention respecting outer limit claims again points out that the Commission’s role in the delineation is limited. The absence of a preclusion clause or any mention of the Commission in the dispute settlement section of the LOS Convention can be seen as lending weight to the assertion that both the claiming and non-claiming states have full legal and political autonomy respecting continental shelf outer limits and that the Commission’s role is more one of process than substance.

Understanding the Role of the Commission

The Commission appears to understand its mandate as one of providing guidance and information both to submitting states and other states with an interest in continental shelf outer limits. This, however, does not deal with the question of the role served by the Commission in outer continental margin delineation.

What the political context of ocean boundary-making, the real achievement of Article 76, the constitutive structure of the Commission, an understanding of the wording of the LOS Convention and the intention of the negotiators all lead to is the conclusion that the role served by the Commission in outer continental margin delineation is that of *legitimator*. Legitimation is not the same thing as legal or political approval. Moreover, legitimation must be understood not in terms of black and white (legitimate or illegitimate) but as a spectrum between greater legitimacy and lesser legitimacy. The calculation by a state of whether the establishment of a continental margin outer limit by another state is legitimate and whether a protest will or will not be issued by a non-claiming state involves law and politics. The state parties to the LOS Convention have not surrendered or delegated this calculation to the Commission.

It can be suggested that the only concrete role of the Commission in the delineation of the outer limits is *procedural*. Article 76(8) directs that:

⁷¹ Brown, note 50 above, p. I.4.16. One writer has noted that recourse to the LOS Convention dispute settlement procedures respecting the outer limit of the continental shelf “is unlikely to occur in reality”. The writer goes on: “In pursuing a dispute with a coastal State, the objecting State would be acting on behalf of the world community, it would not be asserting a direct right of its own. Few States have the resources and the inclination to engage in such litigation.”

S. Vasciannie, “Landlocked and Geographically Disadvantaged States and the Question of the Outer Limit of the Continental Shelf”, (1987) 58 *British Yearbook of International Law* 271, 291. The political realities of ocean boundary-making supports this position.

“Information on the limits . . . shall be submitted by the coastal State to the Commission . . .” The Commission’s own description (found on its website) of its role states that the Commission’s role is to facilitate, which is indicative of a procedural role.⁷² A failure by a claiming state to submit “information” to the Commission would be a breach of the LOS Convention, for which recourse may lie through the dispute settlement procedures, and may make any outer limit delineation established less legitimate in the eyes of other states.⁷³

For a submitting state, satisfying the procedural role of the Commission would appear to be quite straightforward. All that is required, according to Article 76(8), is that “information on the limits” be submitted. Annex II, Article 4 amplifies this informational requirement where it provides that: “a coastal State . . . shall submit particulars of such limits . . . along with supporting scientific and technical data . . .”. There is no sense in either Article 76 or Annex II about the adequacy of such information. This is no surprise given the essentially political nature of ocean boundary-making. The Commission itself, through a Scientific and Technical Guidelines document issued in 1999,⁷⁴ has attempted to create expectations on the type of information it hopes to receive.

Once the procedural hurdle is overcome (the Commission mailbox stuffed with information), the role of the Commission is purely *informational*. Its task is to “consider the data” and “make recommendations”. In short, the role of the Commission is to provide information both to the submitting state and, through the Secretary-General of the United Nations,⁷⁵ to other states concerning the general congruency of the submitted information and the outer limit claimed by the submitting state. It is the view of the Commission that the “recommendations” that can be made include suggestions as to where the outer limits should be located.⁷⁶ Both the submitting state and other states will receive the

⁷² See the Commission document “Purpose, Functions and Sessions”, available at www.un.org/Depts/los/clcs_new/commission_purpose.htm and accessible through the Commission’s home page, note 3 above, and the DOALOS home page, note 1 above. The Oxford English Dictionary provides the following definition for facilitate—“make easy or less difficult or more easily achieved”.

⁷³ It is worth repeating that non-compliance with the submission requirements does not effect a coastal state’s claim to a continental shelf area beyond 200 nautical miles since: (a) the Commission only deals with “outer limits” and (b) a coastal state’s right to a continental shelf is premised in customary international law. See the statement made by delegates at the Eleventh Meeting of States Parties to the LOS Convention in 2001 quoted at note 19 above.

⁷⁴ Commission on the Limits of the Continental Shelf, “Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf”, adopted 13 May 1999, Doc. CLCS/11, 13 May 1999, available at www.un.org/Depts/los/clcs_new/documents/clcs_11.htm and accessible through the Commission’s home page, note 3 above, and the DOALOS home page, note 1 above.

⁷⁵ LOS Convention, Annex II, Art. 6(3).

⁷⁶ *Modus Operandi of the Commission*, note 6 above, para. 7, provides: “The recommendations of the Commission will deal primarily with the definitive position of the outer limit of the continental shelf of the coastal state. Where the outer limit of the continental shelf is different from that proposed in the submission, the Commission’s recommendations will include the position of its revised outer limits, and the reasons for its revision.”

information from the Commission and use that information as it sees fit in determining how to proceed with the location of the outer limits⁷⁷ or whether to protest the location of the outer limits. In simple terms, the greater the accord between the submitting state and the Commission the more likely that other states will perceive the proposed outer limits as legitimate with the converse also being true.

Implications for the Workings of the Commission

It is important that the Commission be aware of its delicate position in the political reality of ocean boundary-making. The important role of the Commission is to watch for exaggerated outer limits assertions. It is to provide information on exaggerated outer limits assertions to the international community through the recommendations the Commission makes to the submitting state. The information the Commission provides should make exaggerated outer limits assertions less likely and, if made, less legitimate. If the Commission strays beyond this modest role in the process of establishing an outer limit of the continental margin, the Commission will interfere with the autonomy of coastal states in establishing their continental margin outer limits. The risk for the Commission is that it will be ignored, except as a procedural hurdle, and the positive involvement of the Commission in providing information for determinations of legitimation will be squandered.

A number of implications arise for the workings of the Commission given the modest role it has in the relationship with submitting and other states in the delineation of the outer limits of the continental margin.

First, the Commission does not have the role or authority to dictate to submitting states what information is to be provided to the Commission to support a state's asserted outer limit of the continental margin. The informational requirement in the wording of Article 76 and Annex II is open-ended and must be interpreted to favour the coastal state and not be pre-determined by the Commission. There can be no such thing as inadmissible information or information which the Commission pre-determines that it will not consider.

Secondly, there is no burden of proof on the submitting coastal state respecting establishing its claim to the outer limit of the continental margin to the satisfaction of the Commission. To the extent that a burden of proof can be said to exist at all, where a coastal state submits the information the state feels to be relevant, the Commission has the burden of showing that the information is in some manner inadequate.

Thirdly, tied to the first two points, there is no precise standard of proof that

⁷⁷ The submitting state is obligate to resubmit revised information on the outer limits (LOS Convention, Annex II, Art. 8), although, as noted above, there is no defined endpoint to this process. See notes 21–23 above.

the Commission can or should apply to the information supplied by the coastal state. It has been stated that “the Commission must be satisfied that the data submitted *truly reflect* the geological/geomorphological conditions claimed”⁷⁸ (emphasis added). Using “truly reflect” as a standard of proof is simply too onerous and inconsistent with the role of the Commission. 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. An important additional factor to this point is the issue of costs. While each situation will be different, the more exacting the scientific and technical requirements of the Commission, the more the funds that will be needed to gather that scientific and technical information and the less likely that states will be willing to spend the funds or resort to the Commission. The Commission should avoid encouraging a feeding-frenzy of Article 76 consultants, scientists, lawyers and various techno-specialists that use the Commission bogeyman in order to try and pry money from states.⁷⁹

Fourthly, the Commission must be mindful that it does not have the authority to judge or evaluate too closely the adequacy, sufficiency or necessarily the technical veracity of the information submitted. The Commission’s mandate “to consider” and “make recommendations” must be interpreted in a manner which avoids the passing of judgement on submitted materials or the proposed outer limit delineation.

The 1999 Scientific and Technical Guidelines issued by the Commission⁸⁰ are moderately, though not fully, faithful to the above four points concerning the workings of the Commission. Paragraph 1.4 of the Guidelines acknowledges the Commission’s lack of authority to establish rigid informational requirements where it states:

“The Commission is aware that there might be other scientific and technical methodologies used by States to implement the provisions of article 76 to prepare a submission which may not be covered in this document. These Guidelines are not intended to exhaust the full range of possible methodologies contemplated by States . . . [S]everal scientific and technical avenues are available to develop an *admissible* body of evidence which may conform equally to all the relevant provisions contained in the Convention . . . ” (emphasis added).

⁷⁸ United Nations, *Definition of the Continental Shelf*, note 13 above, p. 28.

⁷⁹ Respecting the Commission’s request for funds for staff, premises and technical equipment, see “Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of the Commission”, Doc. CLCS/29, 25 May 2001, available at www.un.org/Depts/los/clcs_new/documents/clcs_29.pdf and accessible through the Commission’s home page, note 3 above, and the DOALOS home page, note 1 above.

⁸⁰ “Scientific and Technical Guidelines”, note 74 above.

The use of the word “admissible” somewhat undermines the point of the section, which is that the Commission is open to consider various types and sources of information. Moreover, later Guidelines provisions, which make restrictive lists of data types that the Commission will find acceptable, implying that other data types will not be acceptable, appear to be inconsistent with the intention of paragraph 1.4 and more generally with the authority and role of the Commission. An example of this restrictive approach is in Guidelines, paragraph 4.2 where there is an exhaustive list of the data types that will be accepted respecting the delineation of the 2,500-metre isobath.⁸¹ The Guidelines state that only single- and multi-beam echo-sounding measurements will be considered as primary sources of evidence in this delineation,⁸² although admitting for some exceptions in special circumstances.⁸³ In short, not only does it appear that the Guidelines have eliminated various technologies from consideration as primary evidence respecting the 2,500-metre isobath criteria, the Guidelines have also excluded from consideration evidence that may be gleaned from sources not listed in paragraph 4.2.

Detailed scrutiny of the Guidelines is not necessarily very helpful since there does appear to be sufficient flexibility for the crafting of the Commission’s work to meet the limited role that the LOS Convention has provided for the Commission. Moreover, the Guidelines issued by the Commission must be understood as just that—guidelines—to which the Commission cannot and should not be rigidly committed since it is beyond the Commission’s mandate, legal competence or political position to be so committed.

Conclusion

The number of states which may be in a position to make a claim to the continental margin area beyond 200 nautical miles is usually set at thirty-four. The list includes Angola, Argentina, Australia, Brazil, Canada, Denmark, Ecuador, Fiji, France, Guinea, Guyana, Iceland, India, Indonesia, Ireland, Japan, Madagascar, Mauritius, Mexico, Micronesia, Myanmar, Namibia, New Zealand, Norway, Portugal, the Russian Federation, Seychelles, South Africa, Spain, Surinam, United Kingdom, United States and Uruguay.⁸⁴ For most of these states, the name of the game is maximising their continental margin claim.

⁸¹ “Scientific and Technical Guidelines”, note 74 above, para. 4.2.1 provides that only a combination of single-beam echo-sounding measurements, multi-beam echo-sounding measurements, bathymetric side-scan sonar measurements, interferometric side-scan sonar measurements and seismic reflection-derived bathymetric measurements may be included in the database used to delineate the 2,500-metre isobath.

⁸² “Scientific and Technical Guidelines”, note 74 above, para. 4.2.2.

⁸³ “Scientific and Technical Guidelines”, note 74 above, para. 4.2.3. One special circumstance noted in this section is the case of ice-covered areas, in which case the Commission will accept “bathymetric information derived from seismic reflection and interferometric side-scan sonar . . .” as the primary source of evidence.

⁸⁴ United Nations, *Definition of the Continental Shelf*, note 13 above, p. 6.

Few governments have the political luxury of being able or willing to claim less than what the law, in this case the Article 76 formula, entitles. The United States is in the curious position of wanting to restrict coastal state claims while at the same time being in a position to be a major beneficiary of expansive offshore claims.⁸⁵ The role of the Commission as set out in Article 76 and Annex II is to provide information both to the submitting state and all other states respecting the submitted claim to assist the states in acting and reacting to the political action of asserting a delineation of the outer limit of the continental margin. This can best be described as being in the role of a *legitimator*. The work of the Commission will assist or undermine the legal and political legitimacy of a state claim to delineate its continental margin outer limit.

The conclusion reached in this contribution is that the Commission is without significant direct authority in the relationship with a submitting state and that the intended role of the Commission was as “the canary in the mine shaft” respecting exaggerated continental shelf outer limit claims. The political context of ocean boundary-making, the real achievement of Article 76, the constitutive structure of the Commission, an understanding of the wording of the LOS Convention and the intention of the negotiators all lead to this conclusion.

It is accepted that the relationship among the submitting state/other states/Commission can evolve in such a way so as to enhance the role of the Commission. While the pointers explained in this contribution indicate a minimal relationship, over time, based on how the Commission handles the first series of claims, the position of the Commission in the outer limit process could become more significant. The unknown is whether this enhanced position can be accomplished by reliance on the rigour of the scientist—more exacting and expensive information and high proof standards—or the dexterity of the politician—acceptance of reasonable and credible data. It is clearly the view herein that the latter is the more likely path to an enhanced role for the Commission since ultimately boundary-making is political and not technical.

⁸⁵ Note the quote of Miles, note 48 above, and more generally, see the 1994 US *Commentary*, US Senate Treaty Doc. 103–39, note 20 above, pp. 50–58.