

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



The Outer Continental Shelf: Some Considerations
Concerning Applications and the Potential Role of the
International Tribunal for the Law of the Sea

Statement by

H.E. JUDGE RÜDIGER WOLFRUM,

President of the
International Tribunal for the Law of the Sea

at the

73rd Biennial Conference of the
International Law Association
Rio de Janeiro, Brazil

21 August 2008

The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea

Rüdiger Wolfrum

- I. Introduction
- II. Submission of information by coastal States
 - 1. In general
 - 2. Non-States Parties
 - 3. Late submission of information
- III. The potential role of the international courts and tribunals referred to in Part XV of the Convention
 - 1. Jurisdiction of international courts and tribunals concerning delimitation
 - 2. Does article 76, paragraph 8, of the Convention exclude recourse to dispute settlement?
 - 3. Standing
- IV. Final observation

I. Introduction

The delimitation of the continental shelf was one of the most disputed issues at the Third United Nations Conference on the Law of the Sea. The solution finally adopted, namely Part VI of the Convention on the Law of the Sea (“the Convention”) and, in particular article 76, paragraphs 4 to 8 of the Convention, including the Statement of understanding concerning a specific method to be used in establishing the outer edge of the continental margin, constitutes a compromise. It may even be said that these parts of the Convention do not contain an agreement in substance but rather provide for a procedure through which the outer limits of the continental shelf is to be defined in future and on a case-by-case basis. This procedure involves both the coastal State

concerned and the Commission on the Limits of the Continental Shelf set up under Annex II of the Convention.

Although the outer limits of a continental shelf are defined in a dialogue between the State concerned (or several States as the case may be) and the Continental Shelf Commission, the final responsibility in this respect rests with the coastal State. This being said, it must be stressed that the definition of the outer limits of a national continental shelf also defines the limits of the international seabed area (“the Area”). Nevertheless, the International Seabed Authority is not involved in the process of delimiting outer continental shelves. This should be borne in mind when considering what judicial recourse can be taken against a particular delimitation of the outer limits of a continental shelf. The role of the Continental Shelf Commission is an advisory one. Nevertheless, such role is of far-reaching significance, as is indicated by article 76, paragraph 8, of the Convention. The recommendations of the Continental Shelf Commission are meant to be based upon technical and scientific rather than legal considerations. *De facto*, the Commission contributes to the interpretation of article 76 of the Convention and thus its recommendations have legal implications. In addition, the Commission has frequently been called upon to give an opinion on legal issues, mostly of a procedural nature. Taking into account the qualifications of the members of the Commission, it is doubtful whether in such cases the Commission would not be well-advised to have recourse to legal expertise.

Note should be taken of article 76, paragraph 10, of the Convention, which provides that the provisions of that article are “without prejudice” to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. This provision ensures that the implementation of article 76 of the Convention by one State does not affect the rights of others and that the Commission has no competence to deal with overlapping claims.

This contribution will address two issues: firstly, the relevance of the submission of information by the coastal States, the situation of non-States Parties in this context and late submissions; and secondly the potential role of

the International Tribunal for the Law of the Sea in the establishment of the outer limits of the continental shelf in specific cases. These two issues may appear unrelated. But, as will be shown, the legal principles to draw on in order to answer the questions are similar.

II. Submission of information by the coastal State

1. In general

As already indicated, article 76 of the Convention provides for a procedure by means of which the outer limits of the continental shelf are established. This process involves several stages. Firstly, it is for the coastal State concerned initially to delineate the outer limits of its continental shelf in accordance with article 76 of the Convention. The second stage is the submission to the Continental Shelf Commission of the information upon which the delineation was based. On this basis, the Commission develops its recommendation to the coastal State. This is not to say that the Commission is bound by the scientific information received and in particular the assessment thereof by the coastal State concerned. The third stage involves the adoption by the coastal State of the outer limits of its continental shelf on the basis of the recommendations of the Commission. 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”. If the coastal State concerned is in agreement with the recommendations and has established the outer limits of its continental shelf, it continues to a fourth stage, namely the submission of the relevant data to the Secretary-General of the United Nations for publication.

The procedure in general has been well analysed in the literature and by the Division for Ocean Affairs and the Law of the Sea so it need not be repeated here. Instead this contribution will concentrate on a particular aspect which came into focus only recently.

2. Non-States Parties

In particular in the context of the ongoing discussion concerning the Russian claim to parts of the Arctic continental shelf up to the North Pole, the potential claim of the United States, a non-State Party, has attracted considerable attention. Such claim was used politically by both sides, those advocating the adherence of the United States to the Law of the Sea Convention and those against. The actual question is: will a non-State Party in the long run forfeit its claim to an outer continental shelf?

Article 76 of the Convention refers to coastal States as the ones to whom the continental shelf is attributed. The term 'coastal State' is used throughout this provision without being qualified as 'State party'. Therefore it is only logical to raise the questions as to whether non-States Parties also may claim a continental shelf, whether they may claim a continental shelf beyond 200 nm, and whether they may also submit information to the Continental Shelf Commission with a view to establishing the outer limits of their continental shelves beyond 200 nm. These questions should be clearly separated, namely: the claim to a continental shelf; the claim to the outer continental shelf; and the taking advantage of the advisory role of the Continental Shelf Commission.

It is to be noted that the concept of the continental shelf was already part of customary international law prior to the Third United Nations Conference on the Law of the Sea. The use of the term 'coastal State' in article 76 of the Convention confirms this fact. During the Conference negotiations, many States declared continental shelves of up to 200 nm. This cemented the practice concerning the continental shelf. Therefore the first question raised – namely as to whether non-States Parties may claim a continental shelf – can be answered in the affirmative. This seems to be the uncontested view.

However, the view is expressed that the continental shelf beyond 200 nm does not come under customary international law. Those who advocate this view indicate that this part of the shelf is not yet dealt with by State practice. They further emphasize that only the Law of the Sea Convention refers to this

option and only those States which have also assumed responsibilities under the Convention should be able to profit from this option. In his statement at the final session of the Third United Nations Conference on the Law of the Sea, Tommy Koh, the President of the Conference, explained that, owing to the radical changes experienced by the concept of the continental shelf, “a State which is not a party to this Convention cannot invoke the benefits of article 76”.

It is not for me to express an opinion as to whether this view is the only one which may be made and, in particular, whether it will prevail in the end. Several counter arguments can be imagined.

One such argument could be based upon the nature of the continental shelf and the reasons for recognizing that the continental shelf appertains to the coastal State concerned. The continental shelf is defined in article 76, paragraph 1, of the Convention as the seabed and the subsoil of the submarine areas that extend throughout the natural prolongation of its land territory to the outer edge of the continental margin. The use of the words ‘natural prolongation’ is a reference to the judgment of the International Court of Justice (“ICJ”) in the *North Sea Continental Shelf Cases*. The ICJ held that the “right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea”. There is some controversy as to how this concept of ‘natural prolongation’ is to be interpreted and applied in a given case, namely which factors prevail for establishing the existence of natural prolongation. Several issues are, however, generally agreed upon. The term ‘land territory’ refers to the land mass of the coastal State concerned, and not to the continent, and to the fact that the crustal nature of the prolongation must be continental in character or identical with the structure of the coast concerned. If the reason for the attribution to the coastal State is the latter’s sovereignty over its coast together with the identity of the characteristics between coast and shelf then this constitutes a basis for accepting the sovereignty of the coastal States over the outer continental shelf too. This

would, in fact, mean that non-States Parties also exercised a sovereign right over the outer continental shelf.

As indicated earlier, it is not for me to render an opinion on this issue. It is sufficient to note that this problem was discussed at the Meeting of States Parties upon the request of the Continental Shelf Commission. The Meeting of States Parties, however, did not take a decision on this question since it felt that it lacked the competence to render an opinion on legal questions.

However, it is a different matter as to whether non-States Parties may submit their data to the Continental Shelf Commission and whether the Commission would be entitled to receive them and to issue recommendations to the coastal State concerned.

It is doubtful whether this would be in line with the functions of the Continental Shelf Commission as an organ of the Meeting of States Parties. This means in essence that although a non-State Party may validly claim an outer continental shelf, its delimitation will not profit from article 76, paragraph 8, of the Convention; that is to say, such limits would not be final and binding. It will be for the State concerned to provide for the legal certainty necessary for exploration and exploitation activities through different means, in particular by seeking the acceptance of that claim by the State community.

If one were to follow this line of reasoning then one would accept the theoretical entitlement of the coastal State concerned but the latter would have problems legally securing such claim. It may also be questionable as to whether industry would invest in activities on an outer continental shelf whose limits have not been established through an internationally accepted procedure or – in other words – whose limits may not be regarded as final and binding in accordance with article 67, paragraph 8, of the Convention.

3. Late submission of information

So far, it seems to be commonly understood that a coastal State which failed to submit the information to the Commission as required under article 76,

paragraph 8, of the Convention within the time frame established in article 4 of Annex II of the Convention loses its claim to its outer continental shelf. At the Meeting of States Parties in 2008, however, several delegations stated that not submitting the relevant data in time to the Continental Shelf Commission would not deprive that coastal State of its rights pertaining to the outer continental shelf. These statements did not meet with any objection.

It is doubtful whether the assumption that a State not having filed the information within the time frame provided for has forfeited its claim to the outer continental shelf is sustainable. Here again the argument can be made that the claim to the outer continental shelf is based upon the sovereignty of the State concerned over its land mass. If this assumption is accepted, the failure to submit the information deprives that coastal State of the possibility of making use of article 76, paragraph 8, of the Convention. In other words, that State would not gain the legal certainty for which this paragraph provides. The failure to submit the information in time would, however, have no relevance for the validity of the claim as such and it could nevertheless be accepted by the community of States. This would mean in essence that the non-States Parties and States Parties which have not submitted the information in time are in the same legal position as far as the delimitation of the outer continental shelf is concerned.

III. The potential role of international courts and tribunals referred to in Part XV of the Convention in respect of delineating the outer continental shelf

1. Jurisdiction of international courts and tribunals concerning delimitation

Reiterating the principle enshrined in Article 33 of the United Nations Charter, Part XV of the Convention provides that States Parties shall settle by peaceful means any dispute between them concerning the application and interpretation of the Convention. Legal disputes encompass disputes about the delimitation of maritime areas, including the delimitation *vis-à-vis* the international deep seabed area. Part XV of the Convention provides for a two-step procedure. Parties to a legal dispute are first called upon to settle it

through mechanisms referred to in section 1 of Part XV of the Convention; such procedures do not entail binding decisions. Where no settlement has been reached by recourse to section 1 of Part XV of the Convention, any dispute concerning the interpretation and application of the Convention can, in accordance with article 286 of the Convention, at the request of any party to the dispute be submitted to compulsory dispute settlement. In accordance with article 287 of the Convention, States Parties have the right to choose one of three mechanisms for dispute settlement: the International Tribunal for the Law of the Sea, the International Court of Justice or arbitration. If no choice has been expressed or where parties to a dispute have opted for different mechanisms, the legal dispute may be submitted unilaterally to arbitration.

Section 3 of Part XV applies certain limits to the compulsory jurisdiction under this Part. According to article 298, paragraph 1(a), of the Convention, a State Party may exclude from compulsory dispute settlement disputes concerning the delimitation of the territorial sea, the delimitation of the exclusive economic zone between States with opposite or adjacent coasts and the delimitation of the continental shelf between States with opposite or adjacent coasts. There is no mention of the delimitation towards the international deep seabed area or the high seas being possible exclusions from compulsory dispute settlement. Therefore it may be argued that such disputes cannot be excluded from compulsory dispute settlement. It is, however, conceivable to argue that legal disputes concerning the outer limits of the continental shelf had not been anticipated at the time when the Convention was drafted and therefore there was no need felt to provide for such limitation. It may further be argued that, if it was felt appropriate to limit the applicability of the compulsory dispute settlement system in view of the sovereignty of the coastal States concerning the delimitation of the coastal areas under their jurisdiction, then it would also be possible to speak in favour of limitation in disputes concerning the outer limits of the continental shelf.

It should, however, be borne in mind that the situation is different for the outer limits of the continental shelf compared with the delimitation *vis-à-vis* States with opposing or adjacent coasts. The latter cases involve two or more States,

whereas the former involve only the coastal State and mankind as a whole, on whose behalf the deep seabed area is being administered. The factual implications of the delimitation of the outer continental shelf for the extension of the international seabed area and the functions of the International Seabed Authority indicate against extending the restriction to compulsory jurisdiction under article 298 of the Convention to disputes concerning the delimitation of the outer continental shelf. Otherwise the common heritage principle, a structural principle for the international seabed regime, would be significantly curtailed.

2. Does article 76, paragraph 8, of the Convention exclude recourse to dispute settlement?

It has been argued, however, that article 76, paragraph 8, of the Convention excludes recourse to dispute settlement concerning the delimitation of the outer continental shelf. The relationship between Part XV, article 76, and the Commission is not explicitly addressed in the Convention. Authors draw different conclusions from this fact. 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”. Brown, however, 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. Clingan has commented: “Whether 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”.

According to the last sentence of this paragraph, “[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.” Article 76, paragraph 8, of the Convention constitutes an “if/then” clause: If an outer limit delineation is based on the Commission’s recommendations, then that delineation is “final and binding”. Three questions

arise from this wording. What is the meaning of “final”; what is the meaning of “binding”; and whom does this sentence address? 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 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” (emphasis added). Statement of the Delegation of Canada, dated 2 April 1980, United Nations document A/Conf. 62/WS/4, reprinted in United Nations Conferences on the Law of the Sea, Official Records, 3rd Conference, Vol. 11-13, 1979-80.

According to the ILA-Report the word ‘final’ implies that the coastal State concerned may not change the delimitation once it has been established. This interpretation is corroborated to a certain extent by article 76, paragraph 9, of the Convention, according to which the data concerning the delimitation of the outer continental shelf have to be submitted to the Secretary-General of the United Nations for publication.

The word ‘binding’ can be applied only to third States. Third States have to respect the delimitation in the same way that they have to respect the agreement between sovereign States concerning land boundaries. Although in this case the delimitation is not established by agreement, article 76 of the Convention clearly indicates that it is for the coastal State to establish the outer limits of its continental shelf. Neither the Continental Shelf Commission nor the International Seabed Authority has a vote in this respect.

However, a delimitation of the outer continental shelf is binding only if the limits of the continental shelf have been established in accordance with the substantive and procedural requirements set out in article 76 of the Convention, which refers to the recommendation of the Commission. This is the clause which opens the delimitation of the outer continental shelf to adjudication.

The question may be advanced as to whether an accord between the Commission and the coastal State concerned as to the delineation of the outer limits of the continental shelf removes from other States the right to object to such a delineation. Since all unilateral acts of States – among them the delineation of borders – may be challenged by other States, it is doubtful whether the delineation of the outer continental shelf can be exempted therefrom. What is essential - in spite of the wording of article 76, paragraph 8, of the Convention – is whether the delineation is in conformity with that article 76. Therefore, other States may challenge a delimitation, arguing that article 76 of the Convention has been violated. Whether they may do so successfully is a different matter.

3. Standing

This is the point at which the question as to who may challenge the delimitation of an outer continental shelf by a particular coastal State has to be considered. This is – to put it in general terms – a matter of who has standing before the international courts or tribunals referred to in Part XV of the Convention.

There is no possibility for the Continental Shelf Commission to challenge such delimitation before the international courts or tribunals under Part XV of the Convention since the Continental Shelf Commission is not an international organization which may become a party to a legal dispute before any of the courts and tribunals referred in article 287 of the Convention.

Equally, it is not for the International Seabed Authority to challenge such delimitation before the international courts or tribunals under Part XV of the

Convention. The International Seabed Authority is entitled to bring a case before the International Tribunal for the Law of the Sea, or more specifically its Seabed Disputes Chamber. However, article 187 of the Convention provides for limits on the type of disputes in which the International Seabed Authority may be involved before the Seabed Disputes Chamber. Such disputes concern only the activities within the Area and do not include cases concerning the boundary between the continental shelf and the Area. The International Seabed Authority therefore has no standing to bring before the International Tribunal for the Law of the Sea a case concerning the limits of the Area alleging that a delimitation of a particular outer continental shelf was excessive.

Therefore, the question remains as to whether States Parties may have standing before an international court or tribunal to challenge the excessive delimitation of an outer continental shelf. Several sources seem to deny this possibility, indicating that it would result in an *actio popularis*, traditionally not accepted in international litigation. Certainly there is nothing in the Convention that expressly allows third States to bring such a case to a juridical forum.

However there are some doubts as to whether this is, firstly, a case of *actio popularis* and, secondly, if the *actio popularis* is excluded from the dispute settlement system of the Law of the Sea Convention.

A State Party or an entity referred to in article 153, paragraph 2(b), in conjunction with article 4, Annex III, of the Convention has a right to undertake deep seabed mining activities in accordance with article 153, paragraph 2, of the Convention. It may be argued that such potential mining State or State sponsoring State enterprises or natural or juridical persons engaging in deep seabed mining activities have not only a general but also an individual interest in potential mining sites not being taken from the Area, in particular, not the ones in which it or an entity has undertaken prospecting and which are incorporated in a national regime on the continental shelf.

Another basis for submitting a case may be article 140, paragraph 2, of the Convention, which requires the equitable sharing of any benefits derived from economic activities in the Area. It may be argued that it is possible for a State to bring an action against the delimitation of the outer continental shelf that could or would curtail the sharing of benefits and thus curtails the interests of mankind as a whole.

In both such cases the State concerned would not undertake an *actio popularis*. The ILA Committee seems to agree with this approach, stating that at least in these cases individual States have a definite legal interest in the exploration and exploitation of the resources of the Area. Such considerations may be invoked to justify the standing before the judicial fora referred to in article 287 of the Convention.

Another option which would justify standing may be having recourse to the principle of the common heritage of mankind and the interest of the international community in the Area. States should be allowed to file a case on the basis of the common heritage principle. To deny States the possibility of taking action to protect the interests of the international community in the international seabed Area would render this common heritage principle devoid of any meaning.

So far the arguments advanced presumed that an *actio popularis* to challenge excessive claims to an outer continental shelf would be excluded. It is an open question as to whether this view can really be sustained.

According to article 288 of the Convention, the courts and tribunals referred to in article 287 have jurisdiction concerning the interpretation and application of the Convention. There is no mention of the State concerned having to file a case to defend its individual interests. It is sufficient as well as necessary that there is a disagreement as to the interpretation or application of the Convention. It may be argued that the traditional restriction applying to international dispute settlement, namely that a State must defend its individual rights is not applicable in the context of the Law of the Sea Convention.

IV. Final observation

The delimitation of the outer continental shelf is – as stated at the outset – a matter of compromise. When looking at article 76 of the Convention and the functions of the Commission, it should be borne in mind that the delimitation of the outer continental shelf is a matter for experts on geography, geomorphology, etc. as well as being a matter for lawyers. Certainly the final responsibility for delimiting the outer continental shelf rests with the coastal State concerned but, owing to the implications this delimitation has for other States, it cannot be said that such delimitation cannot be challenged. Hence the final word should be with the judicial entities referred to in article 287 of the Convention. It is evident that they cannot challenge the recommendations of the Continental Shelf Commission on issues within the competences of the latter. On the contrary, they should be seen as strengthening the implementation of the recommendations of the Commission.