

INTERNATIONAL LAW ASSOCIATION
NEW DELHI CONFERENCE (2002)
COMMITTEE ON LEGAL ISSUES OF THE OUTER
CONTINENTAL SHELF

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PRELIMINARY REPORT

15 January 2002

1. INTRODUCTION

The ILA Committee on Legal Issues of the Outer Continental Shelf was established in May 2000. The Committee is to deal with the regime applicable to the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and the establishment of the limits of this area of continental shelf.¹ Two co-rapporteurs have been nominated to deal with these two questions. The part of this report dealing with the regime of the outer continental shelf was chiefly drafted by Mr. Ong. The part of the report dealing with issues related to the establishment of the outer limits of the continental shelf have been chiefly drafted by Dr. Oude Elferink. The present report is primarily intended to identify issues, which may be addressed by the Committee. An earlier version of the materials contained in this report, also drafted by Mr. Ong and Dr. Oude Elferink, was discussed at a meeting of the Committee in Oxford on 13 and 14 October 2001. The discussions during this meeting and comments submitted in writing by members of the Committee have been taken into consideration in preparing this report.

¹ Hereinafter the term 'outer continental shelf' will also be used to refer to this part of the continental shelf. It should be noted that the term 'outer continental shelf' is nowhere to be found in the LOS Convention itself. Indeed, the term 'outer continental shelf' itself is not applied uniformly. Notably, in United States legislation, it is defined as submerged lands seaward of the limits of the submerged lands that lie within the jurisdiction of the states of the United States, i.e., in most cases seaward of three (3) geographical miles from the baseline (29 U.S.C. ss.1301(a) and 1331(a)).

2. LIMITS OF THE OUTER CONTINENTAL SHELF

The extent of the continental shelf is defined in article 76 of the United Nations Convention on the Law of the Sea (LOS Convention) of 1982.² This article is intended to result in permanent limits between the continental shelf and the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. Under article 76 the outer limit of the continental shelf extends either to the outer edge of the continental margin or to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance. In the former case, article 76 contains a number of considerations to be taken into account in establishing the outer limit and requires the coastal state to submit information to the Commission on the Limits of the Continental Shelf (CLCS). The Commission is to make recommendations to the coastal state and the limits established by that state on the basis of these recommendations shall be final and binding. The CLCS was established in 1997 and has drawn up a number of documents that are of relevance for the implementation of article 76 by coastal states. The first submission to the CLCS was made by the Russian Federation on 20 December 2001.³ It is expected that a number of coastal states will also make submissions to the CLCS in the first half of the present decade.

It is proposed that the Committee will focus on questions of interpretation of article 76 arising in the implementation of its provisions on the limits of the outer continental shelf. Apart from article 76 of the LOS Convention, the 1958 Convention on the Continental Shelf⁴ and customary international law provide definitions of the extent of the continental shelf. It is proposed that the Committee will also look at these sources of the law, especially with a view to establish how they interact with article 76 of the LOS Convention. The next two paragraphs outline issues that may be addressed by the Committee in respect of the limits of the outer continental shelf. Paragraph 2.1 deals with the outer limit of the continental shelf. Paragraph 2.2 indicates some legal issues that may arise from the delimitation of the outer continental shelf between states with opposite or adjacent coasts. Paragraph 2.3 suggests how the Committee might proceed with its work on these topics.

2.1 The Outer Limit of the Continental Shelf

2.1.1 Introduction

Rules on the outer limit of the continental shelf are contained in three sources:

- the LOS Convention;
- customary international law; and
- the Convention on the Continental Shelf;

The next three subparagraphs identify questions in respect of these three sources. Paragraph 2.1.5 presents a number of issues that arise from the existence of these different sources containing rules on the outer limit of the continental shelf.

As was noted above, it is proposed to make article 76 of the LOS Convention the focus of inquiry for the Committee. It is expected that there will be a continued interest in the implications of this article for the establishment of the outer limit of the outer continental shelf in the next decades. The analysis of the Convention on the Continental Shelf and customary international law is primarily intended to establish how they are related between themselves and to the rules contained in the LOS Convention.

² 1833 UNTS 396.

³ See further <http://www.un.org/Depts/los/clcs_new/commission_submissions.htm> (last accessed on 9 January 2002).

⁴ 499 UNTS 311.

2.1.2 The LOS Convention

2.1.2.1 Introduction

Article 76(1) of the LOS Convention provides that the continental shelf comprises the seabed 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 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.

The other paragraphs of article 76 are mainly concerned with the establishment of outer limit of the continental shelf in cases it extends beyond the 200 nautical mile limit. This concerns both the substantive rules that have to be applied by the coastal state to establish the outer limit of the continental shelf and the procedure that has to be followed in this connection. It is proposed that the Committee in its work will consider questions related to both of these issue areas, as they both are relevant for the effective implementation of article 76 of the LOS Convention. It would appear that at least a number of these issues may be clarified (to some extent) by looking at article 76 from a legal perspective, i.e. interpreting it in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties.⁵

One question, which is not directly related to the interpretation of article 76, but still might be considered by the Committee, concerns the outer limit of the EEZ. Paragraph 8 of article 76 of the LOS Convention provides that the limits of the continental shelf established by the coastal state on the basis of the recommendations of the CLCS shall be final and binding. Paragraph 9 of article 76 provides that the coastal state shall deposit charts and relevant information with the Secretary-General of the United Nations, permanently describing the outer limits of its continental shelf.⁶ The wording of article 76(8) seems to indicate that it is only applicable to the outer limit of the outer continental shelf. On the other hand, article 76(9) seems to be applicable to the outer limit of all of the continental shelf.⁷ A similar provision indicating the finality of the outer limit is not contained in Part V of the Convention concerning the EEZ. This raises the question if the outer limit of the EEZ can be extended beyond the outer limit of the continental shelf which has been established by the coastal state in conformity with article 76 of the LOS Convention.

It is intended that the Committee will address the legal issues arising out of the implementation of article 76 in a general manner, and will not assess the outcome of the application of article 76 in specific cases. At the same time, this should not exclude taking into account issues which arise in specific cases. Such an approach in general does not seem to raise particular problems, with the possible exception of Antarctica. The application of article 76 to the continental shelf off Antarctica is intricately linked to the question how the Antarctic Treaty⁸ (system) and the law of the sea interact. This question clearly goes beyond the issues the Committee is intended to address. In addition, any discussion specifically focussing on this issue is bound to take up considerable time and detract from the work of the Committee on other issues. In view of these considerations, it is proposed not to address those aspects of the application of article 76 in Antarctica that also require a discussion of the legal regime applicable to Antarctica.

⁵ 1155 UNTS 331.

⁶ Article 84 of the LOS Convention on charts and lists of geographical co-ordinates does not provide that these charts or lists describe the outer limit of the continental shelf permanently.

⁷ See also S.N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982; A Commentary, Vol. II* (Dordrecht, 1993), p. 882.

⁸ 402 UNTS 71.

2.1.2.2 Substantive Provisions of Article 76⁹

Article 76 of the LOS Convention is concerned with entitlement to the continental shelf and the outer limit bounding this entitlement. In case the entitlement of the coastal state extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, the outer edge of the continental margin is to be established in accordance with the rules contained in article 76. The CLCS has found that the coastal state has to demonstrate that the natural prolongation of its land territory extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, in order to delineate the outer limit of its continental shelf by means of the rules contained in paragraphs 4 to 10 of article 76.¹⁰ Remarks by states parties to the LOS Convention concerning the 10-year deadline for making submissions on the outer limit of the continental shelf to the CLCS point to its relevance, or absence thereof, for entitlement to the outer continental shelf.¹¹ These observations suggest that the starting point of the work of the Committee on article 76 should be a clarification of the relationship between the entitlement to the continental shelf and the substantive and procedural rules for establishing its outer limits. The discussion of this point might include the issue of whether the outer continental shelf is in any way distinct from the continental shelf up to 200 nautical miles from the coast in legal terms. For example, do any restrictions apply in respect of the exploitation of the resources of this part of the continental shelf in case its outer limits have not yet been established in accordance with the procedures set out in article 76.

Other questions in respect of article 76 concern the interpretation of specific provisions addressing the establishment of the outer limit of the outer continental shelf. A large number of these questions have been identified in the literature on article 76 or by the CLCS. For instance, the CLCS has observed that article 76 does not indicate what approach has to be taken if there is more than one 2,500 meters isobath. In its Scientific and Technical Guidelines the Commission has addressed this matter.¹² Another contentious issue is how paragraph 76(6) on ridges has to be interpreted.¹³ Another question is whether the evidence to the contrary rule in respect of the foot of the slope contained in article 76(4)(b) can only be used to place the foot of the slope further seaward. I.e. what happens if this is not the case, e.g. can the CLCS find that the actual slope is landward of the point of maximum change in the gradient at its base? A final example is the application of the sediment thickness formula contained in article 76(4)(a), which may pose a problem in the case of coastal states with a continental shelf having a complex and irregular topography.

⁹ Some of the topics in this and the next subparagraph may be concerned with substantive as well as procedural questions. The present classification is only provisional and in no way should be taken as predisposing of the question how certain topics will eventually be classified. It may be decided to abandon this distinction altogether.

¹⁰ *Scientific and Technical Guidelines of the Commission on the Limits off the Continental Shelf*, Doc. CLCS/11 of 13 May 1999, p. 12, para. 2.2.3.

¹¹ See Press releases SEA/1704 and SEA/1706 of 17 May 2001.

¹² See *Scientific and Technical Guidelines*, note 10, p. 36, para. 4.4.2. A comment on an earlier draft of this provision has noted that '[s]ome coastal States may feel that this introduces an additional requirement or restriction not supported by article 76' (P.A. Symonds, O. Eldholm, J. Mascle and G.F. Moore "Characteristics of Continental Margins" in P.J. Cook and C.M. Carleton (eds) *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford University Press, Oxford: 2000), pp. 25-63 at p. 58).

¹³ See e.g. P.A. Symonds, M.K. Coffin, G. Taft and H. Kagami "Ridge Issues" in P.J. Cook and C.M. Carleton, note 12, pp. 285-307 at p. 285.

2.1.2.3 *The Role of the CLCS under Article 76*

The establishment of the outer limit of the outer continental shelf in accordance with article 76 of the LOS Convention differs from the establishment of the outer limit of other coastal state zones, because it involves an international body, the CLCS.¹⁴ Article 76(8) of the Convention provides that the coastal state has to submit information on the outer limit of the outer continental shelf to the CLCS. The CLCS shall make recommendations to coastal states on matters related to the outer limit of the continental shelf. The limits of the continental shelf established by the coastal state on the basis of these recommendations shall be final and binding. Annex II to the Convention sets out the composition and functions of the CLCS and the obligations of coastal states in relation to the Commission.

Publications on article 76 of the Convention indicate that the exact implications of the procedure for establishing the outer limits of the continental shelf involving the coastal state and the CLCS are far from clear. Discussions at the 11th Meeting of States Parties also seem to suggest that the CLCS and certain coastal states may have different views on the place of the Commission in the overall scheme of article 76 of the LOS Convention.¹⁵

It is proposed that the Committee will assess the functions of the CLCS and the obligations of coastal states in relation to the Commission under the LOS Convention. In this connection it would seem useful to compare the case of the CLCS to other treaty bodies. Such comparison would indicate what principles and rules of administrative law are applicable to the Commission, taking into account its functions and position under the LOS Convention.

Specific questions to be addressed in this connection may include:

- Rule 45 and Annex I of the Rules of Procedure of the CLCS¹⁶

Article 76(10) of the LOS Convention stipulates that the provisions of article 76 are without prejudice to the question of the delimitation of the continental shelf between states with opposite or adjacent coasts. Article 9 of Annex II of the LOS Convention provides that the CLCS shall not prejudice matters relating to the delimitation of boundaries between states with opposite or adjacent coasts. The Rules of Procedure of the CLCS address the delimitation of maritime boundaries in Rule 45 on submissions in case of a dispute between states with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes. Annex I to the Rules of Procedure sets out the implications of unresolved land and maritime disputes for submissions. Annex I implies that the CLCS in specified circumstances will not consider a submission on outer limits of a coastal state. This requires among others that the existence of a dispute in the sense of Annex I is established. It is proposed that the Committee will look at the issues of interpretation raised by Rule 45 and Annex I of the Rules of Procedure, taking into account the relevant provisions of the LOS Convention.

- What is the meaning of the words ‘on the basis of’ the recommendations of the CLCS contained in article 76(8) of the LOS Convention?

¹⁴ Some similarity would seem to exist with the procedure for the designation or substitution of archipelagic sea lanes by archipelagic states under article 53 of the Convention. However, the procedure under this article involving the IMO is different from that under article 76. This makes a comparison of limited value.

¹⁵ See e.g. Press release SEA/1706 of 17 May 2001 and Doc. SPLOS/31 of 4 June 1998, p. 12, paras. 47-48.

¹⁶ A draft of this report dealt with this issue in paragraph 2.2 on the delimitation of the outer continental shelf between states with opposite or adjacent coasts. On closer consideration it was considered that this issue rather concerns the implementation of article 76 and is not so much concerned with the substantive rules of delimitation between states. As such it is better placed in paragraph 2.1.

The CLCS seems to have taken the position that its recommendations will always include a specific limit line, which the coastal state can accept or reject. In the latter case, the coastal state will make a revised or new submission.¹⁷ It has to be asked whether this is the only possible interpretation of the relevant provisions of article 76 of the Convention. For instance, is the coastal state obliged to accept a finding of the Commission, which does not concern the interpretation of technical data, but gives a specific interpretation of the provisions of article 76. If the latter is not the case, what possibilities exist to resolve a difference of opinions in this respect.

- relationship of the procedure under article 76 of the LOS Convention to the Convention's provisions on compulsory dispute settlement

Article 76 of the Convention establishes a specific procedure for the establishment of the outer limits of the outer continental shelf. This procedure does not exclude the application of the provisions on the compulsory settlement of disputes contained in Part XV of the Convention to disputes arising in respect of article 76. For instance, it would seem that a dispute over the question whether the outer limit has been established 'on the basis' of the recommendations of the CLCS can be settled in accordance with section 2 of Part XV of the Convention. At the same time, it would seem that the procedures contained in Part XV cannot be employed to review recommendations of the CLCS that have been made in accordance with the relevant provisions of the LOS Convention. It is proposed that the Committee will consider the relationship between the procedure under article 76 of the LOS Convention and the Convention's provisions on compulsory dispute settlement. This may include the questions what issues may be submitted to compulsory dispute settlement and which entities can be a party to or participate in such proceedings.

- Status of outer limit lines that have not been established on the basis of the recommendations of the CLCS

Article 76(8) provides that the limits established by the coastal state on the basis of these recommendations shall be 'final and binding' and article 7 of Annex II to the Convention provides that the coastal state 'shall establish the outer limits of the continental shelf in conformity with the provisions of article 76, paragraph 8'. It is proposed to investigate the exact implications of these provisions, including the question what is the status of outer limit lines that have not been established taking into account these provisions.

- Status of the documents that have been adopted by the CLCS

The CLCS has adopted a number of documents, which elaborate and comment upon the provisions of article 76 of and Annex II to the Convention. It has been observed that the Scientific and Technical Guidelines 'are not legally binding, but they come close to being an authoritative interpretation of the provisions to be found in article 76'.¹⁸

- Consistency and predictability of the work of the CLCS

As any body concerned with the iterative application of a rule of law, the CLCS has to consider the consistency and predictability of its work. The Scientific and Technical Guidelines and other documents of the Commission provide an important contribution in this respect, as they specify the way in which the CLCS will manage information that will be submitted to it and what requirements such data will have to meet. Specific information concerning a submission will be circulated to the states parties to the LOS Convention and other states upon its reception by the CLCS. A similar procedure does not seem to apply

¹⁷ Modus Operandi of the Commission, section VII, paras 17 and 18.

¹⁸ L.D.M. Nelson, "The Continental Shelf: Interplay of Law and Science", N. Ando et al. (eds) *Liber Americorum Judge Shigeru Oda*, 2002, 1235-1253 on 1242.

in respect of the recommendations of the Commission, which shall be submitted in writing to the coastal state which made the submission and to the Secretary-General of the United Nations.¹⁹

Some concern has been voiced in respect of the consistency and predictability of the work of the CLCS. These concerns seem to stem among others from the fact that procedure for election of the members of the CLCS can result in a significant turnover in membership and that there will be limited information on the reasoning of the CLCS in dealing with submissions. It is proposed that the Committee will address this issue, to assess whether there is scope and a need for additional steps to contribute to the consistency and predictability of the work of the CLCS.

2.1.3 Customary International Law

There does not seem to exist general agreement on the definition of the continental shelf under customary international law. State practice concerning the entitlement to and outer limits of the continental shelf is far from uniform. However, a review of national legislation on the extent of the outer continental shelf shows that most states either adopt the criteria contained in article 1 of the Convention on the Continental Shelf or article 76(1) of the LOS Convention.²⁰ This seems to suggest that customary international law is most likely to be similar in content to either of these articles or a combination of them.

A more detailed analysis of state practice might shed further light on its significance. For instance, the formula to establish continental shelf entitlement and limits could be compared to the actual continental shelf areas of the state concerned. This might reveal that the majority of states still employing the formula contained in article 1 of the Convention on the Continental Shelf does not have a continental shelf that extends beyond the 200 nautical mile limit. Other forms of state practice (*e.g.* the location of concession areas or bilateral delimitation agreements) might also clarify the views of states on the extent of the continental shelf. However, such an analysis requires a large amount of information, which may not be readily accessible and will take significant time to analyse.

The case law on the delimitation of maritime boundaries also contains indications on the content of the rules of customary international law in respect of entitlement to and outer limits of the continental shelf. This indicates the propriety of an analysis of the relevant judgments including the separate and dissenting opinions, with a view of establishing the position of the judiciary on those questions.

Factors, which can be expected to be of relevance in answering the question what the content of the rules of customary international law on the entitlement to and the outer limits of the continental shelf is, are:

- The interpretation of article 1 of the Convention on the Continental Shelf and to what extent it results in entitlement and outer limits which are similar to the limits that would result from the application of article 76 of the LOS Convention to areas beyond 200 nautical miles;
- The question if article 76 of the LOS Convention can provide the basis for the formation of a rule of customary international law. This includes the question if this only concerns the general definition of the continental shelf contained in article 76(1) of the Convention or also the specific rules contained in its subsequent paragraphs.

It is proposed that the analysis of customary international law should include the question whether it results in an outer limit of the continental shelf that is permanent or whether it can be subject to subsequent changes.

¹⁹ LOS Convention, Annex II, article 6(3). If the CLCS recommends an outer limit different from that proposed in a submission, it will include the position of its revised limits, and the reasons for its revision (*Modus Operandi of the Commission*, Doc. CLCS/L.3 of 12 September 19997, p. 5, para. 17). This makes such recommendations of considerable interest for the interpretation and application of article 76 and assessing the consistency of the work of the CLCS.

²⁰ See *e.g.* the table contained in Annex II to the Report of the Secretary-General of the United Nations on the Law of the Sea (UN Doc. A 56/58 of 9 March 2001).

2.1.4 The Convention on the Continental Shelf

Article 1 of the Convention on the Continental Shelf defines the continental shelf as:

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 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

The reference to the exploitability criterion made that article 1 of the Convention on the Continental Shelf did not provide a satisfactory definition of the continental shelf and this same provision was not included in article 76 of the LOS Convention. Although the wide ratification of the LOS Convention has diminished the significance of the Convention on the Continental Shelf, it still provides the applicable law for a number of states with an outer continental shelf.²¹

It is proposed that an analysis of article 1 of the Convention on the Continental Shelf should focus on the question what outer limit presently results from its application. In this connection, a number of issues can be taken into consideration:

- the implications of the basis of entitlement to the continental shelf under article 1 of the Convention on the Continental Shelf for the interpretation of its provisions on outer limits;
- the significance of subsequent state practice on the outer limit of the continental shelf for the interpretation of this article, i.e. has this practice amended or replaced the term continental shelf as contained in this article; and
- the question whether limits, once they have been established under the Convention on the Continental Shelf, are permanent in the same sense as an outer limit established under article 76 of the LOS Convention or can be changed by the coastal state.

2.1.5 The Interaction between the Rules contained in the Convention on the Continental Shelf, the LOS Convention and Customary International Law

The exact nature of the questions to be addressed under this heading to a large extent depends on the content of the relevant rules of customary international law and article 1 of the Convention on the Continental Shelf. If an analysis of customary international law and article 1 of the Convention on the Continental Shelf points out that they result in the same continental shelf entitlement and outer limits of the outer continental shelf as the application of article 76 of the LOS Convention, the main issue that would seem to arise in this context would be if, and if so, under what conditions, states that are not parties to the LOS Convention, can make a submission to the CLCS.²² A question that probably will have to be addressed in this connection is the possible linkage between this issue and article 82 of the Convention.²³

On the other hand, if it is concluded that the rules in respect of continental shelf entitlement and outer limits of the continental shelf under the two Conventions and customary international law are different, and their application results in different limits, it is proposed to investigate what consequences

²¹ Article 311(1) of the LOS Convention provides that it “shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.” Article 311(1) implies that any dispute over the extent of the outer continental shelf between two states, which are both parties to the Convention on the Continental Shelf, but only one of which is a party to the LOS Convention, will be governed by the Convention on the Continental Shelf.

²² This issue was considered by the Eighth Meeting of States Parties to the Convention after it had been submitted to the meeting by the CLCS (see Doc. SPLOS/31 of 4 June 1998, p. 12, paras 51-52).

²³ It should be agreed to what extent article 82 should be dealt with by this co-rapporteur or by the other co-rapporteur. It is proposed that issues concerning the implementation and application of article 82 by states should rather be dealt with by the other co-rapporteur (if he finds this agreeable) and that the co-rapporteur on the limits of the outer continental shelf should only address article 82 to the extent that is may be linked to the implementation of article 76 for states that are not parties to the LOS Convention.

follow from this state of affairs. This analysis should make it possible to assess how any potential conflict may be resolved. In this case it also would be an option to investigate the issue of submissions to the CLCS by coastal states that are not parties to the LOS Convention.

2.2 Delimitation of the Outer Continental Shelf between States

A number of states with opposite or adjacent coasts have already delimited areas of outer continental shelf. Two factors seem to suggest that more states will have to address this issue in the coming decade. Available information indicates that a large number of areas of outer continental shelf overlap between states with opposite or adjacent coasts. The Rules of Procedure of the CLCS require states to address this issue in some way. States do not necessarily have to reach agreement on the delimitation of their continental shelf in connection with a submission to the CLCS. However, it seems that they at least have to consider the implications of the way in which they present information to the CLCS for the future delimitation with other states.²⁴

The rule on the delimitation of the continental shelf between states with opposite or adjacent coast contained in article 83 of the LOS Convention does not make any explicit distinction between the delimitation of the continental shelf within the 200 nautical mile limit and beyond that distance. However, the fact that the basis for entitlement to continental shelf and its delimitation are linked suggests that the process of delimitation may be different in these two cases. Entitlement to the EEZ and a continental shelf extending up to the 200 nautical mile limit is based on distance from the coast. This makes the distance criterion also an important consideration in the delimitation of these areas. Distance does not play the same role in the establishment of entitlement over and the outer limit of the outer continental shelf. This may have an impact on the rules applicable to the delimitation of this part of the continental shelf. Consequently, it is proposed that the focus of this part of the Committee's work will be on the question to what extent the substantive law applicable to the delimitation of the outer continental shelf between states differs for the substantive law applicable to the delimitation of this zone within the 200 nautical mile limit.²⁵

On a preliminary basis two more specific questions to be included for further consideration can be suggested:

- Can all situations involving the delimitation of the outer continental shelf be treated similarly or is it necessary to distinguish between different situations, depending on the location of the outer limit line. For instance, there may be a difference between a situation in which both states have a continental shelf up to a distance of 350 nautical miles and a situation in which a continental shelf with an outer limit at 350 nautical miles overlaps with a continental shelf with an outer limit beyond that distance; and
- Does the foot of the continental slope provide an alternative baseline to establish an equidistance line. The reason for suggesting this option is that under article 76 of the LOS Convention the outer limit of the outer continental shelf is not linked directly to the baseline of the territorial sea, as is the case for the territorial sea and 200 nautical mile zones, but depends on the location of the foot of the continental slope.

2.3 Issues for Consideration by the Committee in Respect of the Limits of the Outer Continental Shelf

A draft of paragraph 2 of this report was presented at a first meeting of the Committee in Oxford on 13 and 14 October 2001. Not all Committee members were able to participate in this meeting, and no final decisions concerning the work of the Committee were taken during this meeting. The final decision con-

²⁴ See further supra paragraph 2.1.2.3.

²⁵ Whether similar consideration apply in case of a delimitation under the Convention on the Continental Shelf or customary international law would depend on the content of the rule of entitlement to the continental shelf in these two cases.

cerning the program of work of the Committee on the issues discussed in paragraph 2 can be taken during the meeting of the Committee at the Conference in New Delhi.

It is proposed that the part of the final report on issues concerning the limits of the outer continental shelf should aim to make recommendations that may be used in the effective implementation of the regime for the establishment of these limits. However, other outcomes can also be considered. The Committee is requested to decide this issue and to establish what consequences a specific choice in this respect has for the organization of its work. It might e.g. be considered what would be the best approach to receive feedback from the actors involved in the implementation of this regime.

One of the issues that the Committee will have to decide is the order in which to address the issues identified in paragraph 2. It would seem possible to either focus first on only one or more of the topics in the next report or to address all issues that the Committee decides to look into in that report. As the issues contained in paragraph 2.1 are interrelated, the only way not to discuss all matters in the next report would seem to be to refrain from addressing issues related to the delimitation of the outer continental shelf between states with opposite or adjacent coasts. However, as this latter issue probably is only the smaller part of the overall workload, it might be included in the next report, as this would give the Committee a more detailed overview of all the issues within the ambit of this part of its mandate.

Another issue to be discussed by the Committee is the input Committee members may provide to the work of the Committee. In view of the proposed scope of the work set out above, it is suggested that Committee members, apart from their regular involvement in the work of the Committee, might provide specific input on a number of issues. Committee members might provide information on the national implementation of articles 76 and 82. In this respect, the attention might focus on whether legal questions have arisen concerning the implementation or application of these articles. Committee members might also be in a position to provide information concerning the delimitation of the outer continental shelf between states, which is not readily available otherwise. Specific information to be provided by Committee members might include:

- national legislation and practice concerning the implementation of article 76 of the Convention;
- activities on the outer continental shelf (e.g. are there leases for exploration or exploitation of living or non-living resources); and
- provisions in national legislation implementing article 82 of the Convention.

3. THE OUTER CONTINENTAL SHELF LEGAL REGIME: AN ANALYSIS OF ITS INTERPRETATION AND IMPLEMENTATION IN STATE PRACTICE

3.1 Introduction

The adoption (in 1982) and subsequent entry into force in 1994 of LOS Convention established a codified and developed legal regime governing the sea-bed area beyond the 200 nautical mile seaward limit prescribed for the EEZ. Within this regime, coastal states have sovereign rights and certain other jurisdictional powers over the sea-bed and subsoil of the outer continental shelf. The purpose of the subsequent part of the report is to examine the evolving legal regime governing relations between coastal states and other states in respect of activities taking place within the outer continental shelf. The focus here is on the content of the interested states' rights in this area, both in the sea-bed and its superjacent waters. Now that a large majority of states in the world are parties to the LOS Convention, this study will examine various state practice within the outer continental shelf maritime space to see how well the balance of rights and duties initially provided by the LOS Convention has been preserved.

Within the LOS Convention, there is no specific Part, Section or even individual article providing for a specific breakdown of the rights and duties of states that have interests in the outer continental shelf area. Thus the legal regime governing different states' activities in this area needs to be constructed from several different provisions located in various Parts of the LOS Convention. These include, but are not necessarily limited to, Part VI (Continental Shelf), Part V (EEZ), Part VII (High Seas), Part XI (Deep Sea-bed Area), Part XII (Protection of the Marine Environment), and Part XIII (Marine Scientific Research). Despite the lack of a specific legal regime governing the outer continental shelf area within the Convention, the concept is well known to states, international organisations and especially publicists,

judging from the burgeoning literature on this issue. However, most of this literature is devoted to the complex legal, technical and institutional criteria that must be fulfilled to define the outer limit or seaward extent of the legal continental shelf, rather than the legal regime governing the outer continental shelf area itself. For example, although the *Encyclopaedia of Public International Law* has a section devoted to the ‘Continental Shelf, Outer Limits’,²⁶ most of the discussion therein outlines the uncertain customary legal status of the outer continental shelf and the legal issues raised by the technical criteria for establishing the outer limit of the continental shelf. There is very little explanation of the legal regime governing the various activities that take place within this area. Prior to the Third UN Conference on the Law of the Sea (UNCLOS III) negotiations, Slouka had noted that the (then) international legal regime governing the continental shelf said nothing about the extent of the ‘fullness’ of the coastal state’s control over the uses of the sea-bed and subsoil of the continental shelf, let alone its superjacent waters.²⁷ As Part VI of the LOS Convention repeats many of the relevant provisions on the rights and duties of states in the continental shelf area almost *verbatim*, this does not advance the lack of precision of these provisions. The legal treatment of the outer continental shelf area apparently does not distinguish it from the continental shelf regime operating within the 200 nautical mile limit, the so-called ‘inner’ continental shelf, albeit with two exceptions noted below. Specifically, the overlap within the outer continental shelf area between superjacent waters governed by the high seas regime and the sea-bed governed by the continental shelf regime is not addressed. Kwiatkowska is one of the few writers who has specifically addressed the legal regime governing the outer continental shelf area.²⁸

State practice on this issue also does not specifically address the balance between competing interests in the outer continental shelf area. Even states that claim continental shelf areas well beyond the 200 nautical mile limit do not necessarily provide for whole gamut of their sovereign rights and duties in the outer continental shelf. A good example is Australia, which provides for both sovereign rights and jurisdictions in its 200 nautical miles EEZ,²⁹ but does not appear to legislate for its continental shelf beyond the 200 nautical mile limit except for the purpose of exploring and exploiting the nature resources of the shelf.³⁰ The discrepancy in its legal provision for the outer continental shelf area is most notable in respect of marine scientific research and environmental protection.

Thus, before we can proceed, we should propose a working definition of the ‘outer continental shelf’ to describe the area of maritime space that is the focus of our legal analysis.³¹ The ‘outer continental shelf’ can be described as the area of sea-bed and subsoil ranging from the 200 nautical mile EEZ limit to the seaward limit of the legal continental shelf, incorporating the geological continental shelf, rise, slope and margin but not including the superjacent water column above it. However, even marine activi-

²⁶ See U. Dieter Klemm, “Continental Shelf, Outer Limits”, in R. Bernhardt (ed.) *Encyclopaedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, Amsterdam: 1992) Vol. I (A - D), pp. 804-6.

²⁷ See Z. J. Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law* (The Hague, Martinus Nijhoff: 1968) at p. 90.

²⁸ B. Kwiatkowska, “Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 LOS Convention and State Practice”, *Ocean Development and International Law*, Vol. 22 (1991) pp. 153-87, at pp. 159-164.

²⁹ See Preamble of the Seas and Submerged Lands Act, 1973 as amended by the Maritime legislation Amendment Act, 1994 at paras (a), (b), (c) and (d), reprinted in *Law of the Sea: Current Developments in State Practice, No. IV* (New York, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, UN: 1995) at pp. 18-23.

³⁰ *Ibid.*, at Part II, Division 2, para. 11.

³¹ This is especially pertinent when it is noted that certain domestic legislation has used the term ‘outer continental shelf’ to denote all of the sea-bed beyond domestic territorial waters, including the continental shelf area *within* the 200 nautical mile limit as well as beyond it. See, for example, the 1953 Outer Continental Shelf Lands Act (OCSLA, 1953) of the USA. Pub. L. No.83-212.

ties that only take place in the superjacent waters of the outer continental shelf are included within the scope of this study as they may impinge or otherwise affect the rights of other states in this sea-bed area. The converse may also occur, whereby the exercise of states' rights over the sea-bed and subsoil of the outer continental shelf area may interfere with other states' rights in both the sea-bed and the superjacent waters in the outer continental shelf area. Thus for the purposes of this study, the outer continental shelf regime includes not merely the sea-bed and subsoil described above but also the superjacent waters over this area.

The following analytical method will be utilised for this study. First, a few general observations will be made about the evolution of the outer continental shelf regime. This will be followed by an examination of the negotiating positions of the main groups of interested states in the outer continental shelf regime during the negotiations at UNCLOS III. Secondly, an analysis of the LOS Convention's outer continental shelf regime and state practice interpreting and implementing this regime in respect of several different types of maritime activities will be undertaken. These include the following activities: the exploitation of non-living mineral resources, fisheries, especially sedentary fisheries, navigation, scientific research, pollution and the laying of pipelines and cables. Finally, this study will consider the impact that state practice on these activities is making on the delicate balance between states' rights and duties established by the outer continental shelf regime.

3.2. Evolution of an Outer Continental Shelf Regime

It is always useful to precede the examination of a new legal regime with a discussion of the previously applicable regime governing the same or similar factual situation. In the case of the outer continental shelf regime, this background analysis assumes an even greater legal significance than usual. The present factual situation of the outer continental shelf reflects and indeed almost mirrors the factual situation that prevailed from the late 1940s (following the Truman Proclamation in 1945) until the early 1970s (with the advent and acceptance of exclusive fishing zones). Gradual acceptance of the continental shelf legal regime following the 1945 Truman Proclamation gave rise to coastal states' functional jurisdiction over sea-bed resources. This incipient legal regime was however constrained to the sea-bed areas appertaining to the coastal states' coastlines. It did not envisage the inclusion of the waters superjacent to the sea-bed area that was now subject to coastal state jurisdiction. This situation therefore resembles the current situation in respect of the sea-bed area beyond the 200 nautical mile limit of the EEZ. One difference between them is that the previous regime began from the (then) 3 nautical mile limit of the coastal states' territorial sea whereas the present regime begins from the 200 nautical mile limit of the EEZ, both ending at the outermost limit of the continental shelf regime. The relevant tensions between the territorialist aspirations of the coastal states and other interested states in both the sea-bed and its superjacent waters also resonates within both the past and present legal regimes governing these areas.

It should be noted however that neither the continental shelf regime governing the sea-bed, nor the high seas regime governing the superjacent waters are precisely the same at the present time as in the immediate post-World War II period when the first continental shelf claims were made. Thus, any comparative analysis between present state practice in the outer continental shelf and previous state practice in the initial period of continental shelf claims must first compare the two regimes past and present.

Kwiatkowska has addressed the legal implications of the so-called 'parallelism' between the continental shelf and EEZ regimes in the outer continental shelf area.³² Citing Judge Oda's Dissenting Opinion in the *Libya/Tunisia* case before the ICJ,³³ Kwiatkowska notes that such parallelism is two-fold. First, within the 200 nautical mile limit it occurs between the EEZ and continental shelf regimes. Secondly, beyond the 200 nautical mile limit it exists between the 'inner' and 'outer' continental shelf regimes. In both instances, the legal regimes are the same or very similar and thus 'parallel' to each other. The only exceptions relate to the revenue-sharing requirement under article 82, and marine scientific research

³² Kwiatkowska (1991) *op. cit.*, at 159.

³³ Dissenting Opinion of Judge Oda, *ICJ Rep.* (1982) at para.107, 222.

provisions in article 246(6) for the outer continental shelf, which are different from the 'inner' continental shelf and 200 nautical mile EEZ.

According to Opeskin

(t)he 1982 Convention attempts to balance the interests of coastal states and foreign states in respect of the continental shelf, in view of the circumstance that the waters above the continental shelf are EEZ within 200 (nautical) miles and high seas beyond that distance.³⁴

This study will examine present state practice on this balance between coastal states' and other states' jurisdictional competence in the major activities that take place in the outer continental shelf area. The main indicators of state practice that will be examined in this context will include sovereign proclamations and declarations by states and the promulgation of national legislation purporting to regulate either the outer continental shelf area itself or the main activities that states undertake in this area. The following analysis begins with the stance adopted by the state concerned during UNCLOS III, its legislation (if any) on this issue and finally, current practice.

3.2.1 Broad Continental Margin States³⁵

3.2.1.1 Australia

Australia ratified the LOS Convention on 5 October 1994 and the Convention therefore entered into force for it on 16 November, 1994. Throughout the negotiations for the Convention, Australia maintained a broad/wide continental margin stance, arguing for geomorphologically or geologically-blessed states' entitlement to a continental shelf area beyond the 200 nautical mile limit accepted for the EEZ.

3.2.1.2 Canada

Although Canada is presently not a party to the LOS Convention, its prominent role as one of the 'broad margin' or 'marginer' states during the negotiations towards this Convention makes it an ideal focus for subsequent state practice on the outer continental shelf regime. Canada is an interesting example of a non-party to the Convention that has nevertheless promulgated legislation regulating activities throughout the Canadian continental shelf. The Canadian Laws Offshore Application Act, 1990 has been described as a first step towards a comprehensive legal regime for the offshore. The Act creates a general framework for the application of all laws to the shelf, and fills some important gaps, particularly in relation to the extra territorial application of the Criminal Code.³⁶

Despite this comprehensive objective, it has been noted that the extension of laws under the Act should not be regarded as a 'territorialization' of the continental shelf or the future EEZ of Canada.³⁷ Indeed, section 6 of the 1990 Act provides specifically that federal laws shall not be applied ... in a manner that is inconsistent with the rights and freedoms of other states under international law and in particular, with the rights and freedoms of other states in relation to navigation and overflight.

³⁴ B.R. Opeskin, "The Law of the Sea", in S. Blay, R. Piotrowicz and B.M. Tsamenyi (eds.), *Public International Law: An Australian Perspective* (Melbourne, OUP: 1997), pp. 325-54, at p. 336.

³⁵ The next report will include the practice of other broad margin states and will discuss the practice of the states presently included in more detail.

³⁶ R. Hornby, "The Canadian Laws Offshore Application Act: The legislative incorporation of rights over the continental shelf", *Canadian Yearbook of International Law*, Vol.29 (1991) pp. 355-72.

³⁷ *Ibid.*, at p. 362.

3.2.1.3 United States

The most important non-party, indeed non-signatory, state to the LOS Convention whose state practice we should examine here is the United States. President Truman's Proclamation of a Continental Shelf in 1945 was the very genesis of the legal concept of the continental shelf under international law. The United States lack of accession to the LOS Convention, however, raises an interesting question as to whether it is nonetheless bound by the sophisticated legal regime for the continental shelf under Part VI of the LOS Convention, as part of customary international law. This question can be framed more broadly to encompass the extent to which the rights and duties provided by Part VI of the LOS Convention are applicable to non-parties? For its own part, the United States considers that the LOS Convention reflects customary international law. This includes article 76 which provides that the legal continental shelf can extend to the outer edge of the continental margin.³⁸ The United States regards any continental shelf areas beyond 200 nautical miles that clearly fall within the article 76 definition as part of her legal continental shelf. The continuing uncertainty surrounding the applicability of specific aspects of the outer continental shelf regime extends to the potential of the revenue-sharing provision in article 82. The United States has taken into account the potential applicability of article 82 but holds that article 82 does not apply until it accepts the Convention.

3.2.2. Land-locked and Geographically Disadvantaged States (LL/GDS)

The next report will deal with the practice of these states.

3.3 *Specific Rights and Duties of States in the Outer Continental Shelf Regime*

It should be noted at the outset that very few coastal states have even enumerated in their national legislation or other state practice the full catalogue of sovereign rights, jurisdictional powers and especially, their legal duties within the continental shelf area. None have specifically provided for their rights and duties within the outer continental shelf, as distinct from the inner continental shelf within the 200 nautical mile limit.

3.3.1 Non-living Resources: The Revenue Sharing Obligation

Article 77(1) of the LOS Convention echoes article 2(1) of the 1958 Convention on the Continental Shelf *verbatim* in providing all coastal states with sovereign rights over the natural resources of the continental shelf. Indeed, every provision in these articles is exactly the same. Nonetheless, within the numerous examples of continental shelf legislation there appear to be two categories of divergence from the definitional norm.

First, certain states have either deliberately or accidentally confused the legal nature of the sovereign rights and other functional maritime jurisdictions attributed to the coastal state under the continental shelf regime. Most commonly 'sovereign rights' are misconstrued as conveying territorial sovereignty and jurisdictional powers available only on land. Thus, sovereign rights are treated as conferring full title and ownership over the continental shelf's natural resources. Moreover, the functional jurisdictional powers provided to states within the EEZ and continental shelf regimes are also interpreted as providing full rather than limited jurisdiction over certain activities. Examples include the Brazilian continental shelf

³⁸ The policy of the United States in respect of the continental shelf was established in 1987 by an Inter-agency Group. Art. 76 of the Convention was considered to reflect customary law. At such time in the future that it were to be determined desirable to delimit the outer limit of the continental shelf beyond 200 nautical miles this shall be carried out in accordance with pars. (4), (5), (6) and (7) of art. 76 (J.A. Roach and R.W. Smith *Excessive Maritime Claims* (US Naval War College, Newport: 1994) 124-125).

legislation.³⁹ This provides that Brazil has the ‘exclusive right’ to regulate not merely the construction, operation and use of artificial islands and installations,⁴⁰ but also marine scientific research and marine environmental protection, for which she does not have similar exclusive rights or complete jurisdiction under the Convention.

Secondly, a further discrepancy arises in the way that ‘natural resources’ are defined in certain national continental shelf legislation. The non-living natural resources that coastal states have sovereign rights over are usually defined in very similar language thus denoting a common, if not uniform legal understanding of the meaning to be attributed to this phrase. This definition derives from article 77(4) of the LOS Convention which in turn is taken *verbatim* from article 2(4) of the Convention on the Continental Shelf and denotes ‘natural resources’ as consisting of the mineral and other non-living resources of the sea-bed and subsoil, together with sedentary marine species (discussed below). Relatively little attention was paid to this definition at UNCLOS III mainly because of the emergence of the EEZ concept which covers all living and non-living resources within the 200 nautical mile limit. As Rao notes presciently for our purposes in this study, what is included by the words ‘natural resources’ is then only of interest to those states whose continental shelf extends beyond the 200 nautical mile limit.⁴¹

More recently, however, the term ‘natural resources’ has taken on an expansive interpretation in domestic legislation. Yugoslavian state practice provides a good example of this second type of divergence. Article 24 of the 1987 Yugoslavian Law on the Coastal Sea and the Continental Shelf⁴² enumerates Yugoslavia’s sovereign rights over its continental shelf. Significantly, article 24 proclaims sovereign rights not only over the usual ‘natural resources’ but also over ‘other resources’ of the continental shelf. This phrase, according to Skrk, denotes archaeological and other submerged objects.⁴³ Skrk argues that such an interpretation of the continental shelf’s ‘other resources’ is not an acceptable notion given the fairly straightforward meaning conveyed by the phrase in article 77(4).⁴⁴

Notwithstanding the definitional issues noted above, one of the major differences between the so-called ‘inner’ continental shelf regime, within the 200 nautical mile zone and the outer continental shelf, consists of the revenue-sharing requirement under article 82. Under this provision, states exploiting the continental shelf beyond the 200 nautical mile limit shall make payments and contributions in kind through the International Sea-Bed Authority to other states parties of the Convention. (Art.82(4))

3.3.2 Fisheries, Especially Sedentary Fisheries

Two aspects of this issue have given rise to disputes. First, the definition of ‘sedentary fisheries’ for purposes of exerting jurisdictional controls over foreign fishers. Secondly, we should note the progressive encroachment by certain states of their fisheries jurisdiction within the superjacent waters of their outer continental shelf. Examples of this latter type of state practice include Canada and Chile.

³⁹ See article 13 of Law No.8617 of 4 January, 1993 on the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Published in the Federative Republic of Brazil, *Diario Oficial* (Official Gazette) No.2, Tuesday 5 January, 1993.

⁴⁰ Allowed under article 80 of the LOS Convention, applying article 60 *mutatis mutandis*.

⁴¹ P.C. Rao, *The New Law of Maritime Zones: With Special Reference to India's Maritime Zones* (New Delhi: Milind Publications: 1983) at p. 130.

⁴² Enacted by the Yugoslav Federal Assembly on 23 July, 1987. Entered into force on 2 August, 1987. See Official Gazette of the Socialist Federal Republic of Yugoslavia, No.49/1987. Yugoslavia ratified the LOS Convention on 27 November, 1985.

⁴³ M. Skrk, “The 1987 Law of Yugoslavia on the Coastal Sea and the Continental Shelf”, *Ocean Development and International Law*, Vol.20 (1989) pp. 501-14, at p. 508.

⁴⁴ *Ibid.*, at 508.

3.3.3 Navigation

An important and interesting trend is discernible in respect of navigation rights for other states through the superjacent waters of the outer continental shelf. The otherwise self-serving domestic legislation on the continental shelf is nevertheless generally consistent in providing for the continued exercise of navigation rights in the superjacent waters of the continental shelf. Examples abound whereby specific provisions are included to protect these rights. For example, in its 1945 Presidential Decree laying claim to the whole of the continental shelf adjoining the Mexican coastline and the natural resources therein, Mexico declared that it did not seek to disregard the lawful rights of third states on the basis of reciprocity. Moreover, the high seas character of the superjacent waters above the continental shelf would not be affected.⁴⁵

3.3.4 Pollution

Another problem arising from continental shelf exploration and exploitation activities in the outer continental shelf relates to the possible pollution of the high seas waters extending over this area and the deep sea-bed beyond it. In keeping with the general emphasis in national legislation by coastal states that these tend to uphold their rights within the continental shelf regime rather than highlight the duties attached to these rights, states generally have not provided for the possibility of state responsibility and even liability for pollution damage in the high seas from any activities undertaken in the outer continental shelf area.

3.3.5 Marine Scientific Research

As noted above, the legal regime governing marine scientific research (MSR) is different within the 200 nautical mile inner continental shelf/EEZ limit as opposed to the outer continental shelf. The main divergence relates to the coastal states' discretion as to whether to consent to MSR in the EEZ or continental shelf. Within the 200 nautical mile limit, the legal regime is to be found in article 246. This generally provides that the coastal state's consent is required to conduct MSR in another state's EEZ or continental shelf. (Art.246(2)) Within the continental shelf area but beyond the 200 nautical mile limit, in other words within the outer continental shelf, the right to refuse consent for MSR is qualified. Coastal states' discretion in relation to consenting to marine scientific research in the inner continental shelf is restricted in the outer continental shelf area. Coastal states may not withhold permission for MSR in such areas unless they have been designated as areas within which exploitation or detailed exploration is being undertaken or contemplated within a reasonable period of time.⁴⁶ As Landale and Burmester note, many 'broad margin' states were unwilling to accept this shift in the presumption of the consent requirement for MSR but did not manage to overturn it within the final text of the LOS Convention.⁴⁷ However, according to Kwiatkowska, article 246(6) had been (as of 1991) incorporated in only one 'broad margin continental shelf' state, namely the MSR regulations of Trinidad and Tobago.⁴⁸ Francalanci also notes that a series of regulations concerning the scientific research carried out by foreign ships on the Italian continental shelf reproduce exactly Part XIII of the LOS Convention governing marine scientific research, presumably including the restriction on coastal states' discretion to allow such MSR on the outer continental shelf under article 246(6).⁴⁹ However, as Prescott notes, '(T)his is far from being a cast-iron guarantee for re-

⁴⁵ Cited in A. Gündüz, *The Concept of the Continental Shelf in its Historical Evolution (With Special Emphasis on Entitlement)* (Istanbul: University of Marmara: 1990) at ??

⁴⁶ LOS Convention, article 246(6).

⁴⁷ M. Landale and H. Burmester, "Australia and the Law of the Sea – Offshore Jurisdiction", in K.W. Ryan (ed.) *International Law in Australia*, 2nd ed. (Sydney: Law Book Co: 1984) pp. 390-416, at p. 407, citing the Report of the Australian Delegation to the Ninth Session of the Law of the Sea Conference (1980) at p. 23.

⁴⁸ Kwiatkowska, note 28, at p. 160.

⁴⁹ G. Francalanci, "Problems of Management of Continental Shelf: Italian Perspective", in D. Pharand and U. Leanza (eds.) *The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime* (Dordrecht, Martinus Nijhoff: 1993) pp. 251-262, at p. 258.

search workers, and coastal states will be able to stall (research) programmes without contravening the letter of this provision.⁵⁰

Indeed, much state practice on the regulation of MSR points in the opposite direction, i.e., towards a qualitative encroachment of the freedom to conduct MSR in the continental shelf. This is achieved in two ways: first and most commonly by a lack of distinction between the inner and outer continental shelf regimes for MSR activities and secondly, by effectively subordinating the freedom to conduct MSR to the coastal state. A good example of this latter encroachment is found in the Brazilian continental shelf legislation already noted above. As a consequence of subscribing to itself the exclusive right to regulate MSR in its continental shelf (without distinguishing between the inner and outer continental shelf), Brazil follows this up by requiring that MSR may only be carried out by other states with the consent of the Brazilian government.⁵¹

3.3.6 Laying of Submarine Cables and Pipelines

The laying of submarine cables and pipelines is a well known freedom of the high seas.⁵² Article 79(1) of Part VI of the LOS Convention confirms the entitlement of all states to the laying of cables and pipelines on the continental shelf of the coastal state. Indeed, subject to its sovereign rights in relation to natural resource exploitation on the continental shelf, the coastal state may not impede the right of other states to lay pipelines and cables across its continental shelf.⁵³ However, nothing prevents the coastal state from establishing conditions for cables and pipelines entering its territory or territorial waters.⁵⁴ Moreover, the delineation of the proposed pipelines (but *not* cables) requires the consent of the coastal state.⁵⁵ In this respect, the article 79(3) of the LOS Convention differs from article 4 of the Convention on the Continental Shelf, which confers only partial discretion on the coastal state for natural resource exploration and exploitation activities, and emphasises the non-interference with other states' rights and by coastal states in pipeline and cable-laying activities.

However, state practice does not always follow the prescribed rules. For example, a People's Republic of China (PRC)'s Working Paper submitted to the Second Subcommittee of the UN Seabed Committee in 1973 submitted that the delineation of the course for laying *both* submarine pipelines and cables on the continental shelf by a foreign state is subject to the consent of the coastal state,⁵⁶ thus only partially corresponding to the text of article 79(3) of the LOS Convention,⁵⁷ and not at all with article 4 of the Convention on the Continental Shelf. Chinese legislation provides that the laying of submarine cables and pipelines in the EEZ and continental shelf must be authorized by the competent authorities.⁵⁸ Kwiatkowska notes that several other countries, including India, Myanmar, Mauritius, Pakistan, Seychelles, Malaysia, Guyana, Saint Lucia, Sao Tome and Principe, Trinidad and Tobago, and Bulgaria all provide that the state's consent to the delineation of the course of pipelines be extended to include cables as

⁵⁰ J.R.V. Prescott, *The Maritime Political Boundaries of the World* (London, Methuen: 1985) at p 44.

⁵¹ See para. 1, article 13 of Law No.8617 of 4 January, 1993, note 39.

⁵² See article 87(1)(c) of the LOS Convention, which provides for coastal and land-locked states the 'freedom to lay submarine cables and pipelines subject to Part VI.'

⁵³ Article 79(2) of the LOS Convention which substantially replicates article 4 of the Convention on the Continental Shelf.

⁵⁴ LOS Convention, article 79(4).

⁵⁵ *Ibid.*, article 79(3).

⁵⁶ See P.C. Yuan, "China's Jurisdiction Over Its Offshore Petroleum Resources", *Ocean Development and International Law*, Vol.12, No. 3-4 (1983) pp. 197-8.

⁵⁷ Yuan however is of the opinion that the PRC's view did comply with the then Draft UN Law of the Sea Convention, see *ibid.*, at p. 198.

⁵⁸ Exclusive Economic Zone and Continental Shelf Act of 26 June 1998 of the People's Republic of China, article 11.

well.⁵⁹ The qualitative extension of jurisdiction in these instances is especially significant within the outer continental shelf, given the fact that the superjacent waters are high seas.

⁵⁹ Kwiatkowska, note 28 at p. 163.