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LEGAL ISSUES OF THE OUTER CONTINENTAL SHELF

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SECOND REPORT

1. INTRODUCTION

This Second Report elaborates on the first substantive report of the Committee, which was presented at the 71st Conference of the International Law Association in Berlin in 2004 and has been published in the proceedings of that Conference.¹ That report contains an analysis of issues related to the establishment of the outer limits of the continental shelf in accordance with article 76 of the United Nations Convention on the Law of the Sea.² After consultations with the members of the Committee it was decided that the report of the Committee to be discussed at the 72nd Conference of the ILA in June 2006 should contain agreed conclusions and accompanying explanatory notes. A first draft of the Second Report, which was prepared by co-rapporteur A.G. Oude Elferink, was discussed at a meeting of the Committee in Utrecht, The Netherlands, on 21 and 22 January 2006. This report takes into account the views that were expressed during that meeting. The report is not a statement of the views of individual members of the Committee, and does not represent the views of any institution with which these members may be affiliated.

As stated above, the present report elaborates on the First Report of the Committee. In general, the

¹ Report of the Committee Legal Issues of the Outer Continental Shelf, in International Law Association *Report of the Seventy-First Conference* (ILA, London: 2004) (hereafter First Report) 773-819.

² Concluded on 10 December 1982; entered into force on 16 November 1994; 1833 UNTS 396 (hereafter Convention). The Committee's work focuses on article 76 of the Convention and not on whether and to what extent article 76 represents customary international law. The reports of the Committee also do not provide an exhaustive discussion of the consequences the establishment of the outer limits of the continental shelf by a State Party to the Convention may have for third States. These issues are governed by the rules of customary law reflected in article 34 to 38 of the Vienna Convention on the Law of Treaties (adopted on 23 May 1969; entered into force on 27 January 1980 (1155 UNTS 331) (hereafter Vienna Convention)).

analysis contained in that report provides the basis for the present report. The explanatory notes to the conclusions contained in the present report refer to the sections in the First Report discussing the same issue. Differences between an explanatory note and the section to which it refers are explained by a number of considerations. In a number of instances, further discussions led to further elaboration and/or adjustment of the text. Also, the format of the present report requires a different presentation of the materials concerned. Finally, due to restrictions of space, a number of points which were not considered essential to explain the conclusions have not been repeated in the present report. The First Report can be seen as supplementary to the present report and in a number of instances provides additional information. Cross-references to the First Report have been included as appropriate.

2. CONCLUSIONS

Conclusion No. 1: The relationship between the entitlement to the continental shelf and the establishment of its outer limits

Under the Convention, a coastal State is entitled to a continental shelf even if the State concerned has not established the outer limits of its continental shelf.

The absence of outer limits does not entitle the coastal State to exercise sovereign rights beyond the outer limits of the continental shelf provided for in article 76 of the Convention.

*Explanatory Note*³

Entitlement to the continental shelf is based on the title of the coastal State over the land or, more precisely, on possession by the territory concerned of a coastline.⁴ In the case of the continental shelf, the basis of entitlement is distance from the coast or natural prolongation of the land territory to the outer edge of the continental margin.⁵ The entitlement of a State exists by the sole fact that this basis of entitlement is present and does not require the establishment of outer limit lines. This is confirmed by article 77(3) of the Convention, which provides that the rights of the coastal State over the continental shelf do not depend on occupation or any express proclamation. The fact that article 76 contains both a general definition of the continental shelf and rules to define specific outer limits confirms that entitlement to the continental shelf is not dependent on the establishment of outer limits.⁶

The application of articles 76(5) to (7) may place a part of the natural prolongation of the land territory beyond the outer limits of the continental shelf. This will for instance be the case if the fixed points defined in accordance with article 76(4) extend beyond both restraints contained in article 76(5). This circumstance indicates that establishing the exact extent of the continental shelf of a coastal State does depend on the establishment of the outer limit lines of the continental shelf by the coastal State.

The absence of outer limits of the continental shelf established in accordance with article 76 does not entitle the coastal State to exercise sovereign rights over parts of the natural prolongation of its land

³ This explanatory note takes into account the discussion contained in sections 2 and 6.1 of the First Report.

⁴ The ICJ has observed in the *Anglo-Norwegian Fisheries* case in respect of the territorial sea “[i]t is the land which confers upon the coastal State a right to the waters off its coasts” ([1949] *Reports of Judgments, Advisory Opinions and Orders; The International Court of Justice* (ICJ Reports) 116 at 133). Specifically referring to the continental shelf and 200 nautical mile zones, the Court has later observed that “the attribution of maritime areas to the territory of a State [...] is a legal process based solely on the possession by the territory concerned of a coastline” (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) [1993] ICJ Reports 38 at 74, para.80).

⁵ Convention, article 76(1). See also Continental shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985; [1985] ICJ Reports 13 at 30, para. 27 and 34-35, para. 34.

⁶ See Continental shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, where the ICJ distinguishes between the definition of the continental shelf contained in paragraph 1 of article 76 and paragraphs 2 to 9 of the article “which deal with the details of the outer limits of the continental shelf” ([1982] ICJ Reports 18 at 48, para. 47). See also A. De Marffy Mantuano “La Fixation des Dernières Limites Maritimes: La Rôle de la Commission des Limites du Plateau Continental” in V. Coussirat-Coustère *et al. La Mer et son Droit; Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Éditions A. Pedone, Paris: 2003) 399-419 at 407; T.L. McDorman “The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Regime” (1995) 10 *International Journal of Marine and Coastal Law* 165-188 at 167; *Report of the Eleventh Meeting of States Parties* (Doc. SPLOS/73 of 14 June 2001) 12, para. 75.

territory that fall beyond potential outer limit lines under article 76. Article 76(2) provides that the continental shelf shall not extend beyond the limits provided for in paragraphs 4 to 6 of article 76.⁷ The absence of a reference to paragraphs 7 to 9 of article 76 indicates that paragraph 76(2) is also operative and binding on a coastal State before it has implemented paragraphs 7 to 9.

Article 76(2) does not of itself provide certainty over the exact extent of the continental shelf. Only the coastal State is competent to establish the outer limit lines of its continental shelf in accordance with paragraphs 4 to 6 of article 76 in accordance with the procedures envisaged by article 76. In some areas there may be a choice between different outer limit lines applying these paragraphs. Only the coastal State is competent to make that choice. This consideration indicates that the absence of outer limit lines of the continental shelf beyond 200 nautical miles is bound to raise doubts over the exact extent of the continental shelf, with the attendant difficulties for the coastal State to exercise sovereign rights over such specific areas of the continental shelf.

Conclusion No. 2: The meaning of the term ‘natural prolongation’ contained in article 76(1)

Article 76(1) of the Convention refers to the natural prolongation of the land territory to define the continental shelf. To establish which areas are comprised by the reference to natural prolongation, the starting point is the land territory. The connection between the land territory and the natural prolongation can be geomorphological and/or geological. One of the implications of the definition of the continental shelf by reference to natural prolongation is that the continental shelf may consist of areas that are either continental and/or oceanic in origin.

*Explanatory Note*⁸

Article 76(1) of the Convention defines the continental shelf by reference to two alternative bases for entitlement: natural prolongation and distance from the coast. In the former case the article provides that the “continental shelf of a coastal State comprises the seabed and the 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”. Two elements in this definition have to be considered to establish the scope of application of the term ‘natural prolongation’. On the one hand, the definition refers to the land territory, from which the natural prolongation extends. On the other hand, the definition limits the seaward extent of the natural prolongation by reference to the outer edge of the continental margin. The relationship between these two elements might seem to be problematical in, for instance, a case in which the land territory and its natural prolongation are oceanic in origin. The reference to natural prolongation of the land territory indicates that in such a case submarine areas of oceanic origin, which are sufficiently linked to the land territory of oceanic origin are its natural prolongation.⁹ However, in such a case there is no

⁷ As such areas would be part of the Area, article 137(1) of the Convention also imposes an obligation not to exercise sovereignty or sovereign rights over them or their resources.

⁸ This explanatory note takes into account the discussion contained in section 6.5 of the First Report.

⁹ During the early phases of Third United Nations Conference on the Law of the Sea (UNCLOS III) many delegations made reference to the concept of ‘natural prolongation’. These statements all point to the fact that the territory of a State was viewed as providing the starting point for the determination of what constitutes a natural prolongation. The statements do not provide a clear definition of the concept. References to both geology and/or geomorphology were made to define natural prolongation (see the summary of the debate in the Plenary during the Second Session of the Conference (*Third United Nations Conference on the Law of the Sea; Official Records* Vol. I, 35 *et seq.*) and the Second Committee during the Second Session of the Conference (*ibid.* Vol. II, 95 *et seq.*). The International Court of Justice (ICJ) has considered the concept of natural prolongation in the context of the definition of the continental shelf contained in article 76(1) in the *Tunisia/Libya Continental Shelf* case and the *Libya/Malta Continental Shelf* case. In both instances, the Court indicates that natural prolongation may be defined by reference to either the geology or geomorphology of the seabed (Continental shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982 ([1982] ICJ Reports 18 at 47-58, paras 45-68; Continental shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985; [1985] ICJ Reports 13 at 31-37 paras 29-41).

continental margin in the geoscientific sense. This requires further consideration of the definition of the term continental margin under the Convention. Article 76(3) provides that the continental margin comprises the submerged prolongation of the land mass of the coastal State, without any qualification of the nature of the land mass.¹⁰

The limits of the continental shelf beyond 200 nautical miles are to be established in accordance with articles 76(4) to 76(9). The application of these provisions may place a part of the natural prolongation of the land territory beyond the outer limits of the continental shelf.

Conclusion No. 3: The meaning of the term ‘oceanic ridges’ in article 76(3) and the terms ‘submarine ridges’ and ‘submarine elevations that are natural components of the continental margin’ in article 76(6)

Article 76(3) of the Convention provides that the continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. Article 76(6) of the Convention provides that on submarine ridges the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines. Article 76(6) does not apply to submarine elevations that are natural components of the continental margin. The use of these three different terms in articles 76(3) and 76(6) indicates that these have separate meaning. Any submarine feature can be subsumed under one of these terms.

The definition of the outer edge of the continental margin for the purposes of article 76 is contained in articles 76(4) to 76(6) of the Convention. Application of these provisions may lead to the inclusion of (parts of) ridges of oceanic origin in the continental shelf. The inclusion of the reference to oceanic ridges in article 76(3) establishes that such a result does not imply that as a consequence all of the feature concerned can be treated as part of the continental margin for the purpose of article 76. The term ‘oceanic ridge’ does not change the content of the terms ‘natural prolongation’ and ‘continental margin’.

The term ‘submarine ridges’ in article 76(6) of the Convention is applicable to ridges that are (predominantly) of oceanic origin and are the natural prolongation of the land territory of a coastal State.

The term ‘submarine elevations that are natural components of the continental margin’ is applicable to features which, although at some point in time were not a part of the continental margin or have become detached from the continental margin, through geological processes are or have become so closely linked to the continental margin as to become a part of it.

*Explanatory Note*¹¹

Article 76(3) of the Convention provides that the continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. Article 76(6) of the Convention provides that on submarine ridges the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines. Article 76(6) does not apply to submarine elevations that are natural components of the continental margin. Paragraphs 3 and 6 of article 76 took their final form at UNCLOS III at the same time. Due to the close connection between the two paragraphs they are discussed jointly in this conclusion.

The term ‘submarine ridge’ contained in article 76(6) is not further defined in article 76. Article 76(3) employs the term ‘oceanic ridge’ and provides that the continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. As submarine ridges under article 76(6) can be included in the outer limits of the continental shelf, this term has to have a different meaning from the term oceanic ridges employed in paragraph 76(3).

¹⁰ See also the discussion in the Explanatory Note to Conclusion No. 3. Hedberg, who was closely involved in elaborating the foot of the slope provision that is contained in article 76(4), refers to the “outer edge of the continent or island” (H.D. Hedberg “Relation of Political Boundaries on the Ocean Floor to the Continental Margin” (1976) 17 *Virginia Journal of International Law* 57-75 at 60). He also indicates that this also concerns the case of volcanic oceanic islands, and notes that “these have a composition generally similar to that of the oceanic crust on which they lie” (*ibid.*, 61).

¹¹ This explanatory note takes into account the discussion contained in section 6.5 of the First Report.

The interpretation of articles 76(3) and 76(6) has to take into account the object and purpose of article 76 as a whole. Article 76(1) indicates that the continental shelf is the natural prolongation of the land territory to the outer edge of the continental margin. This indicates that in order to establish what parts of the sea-bed and its subsoil are part of the deep ocean floor and its oceanic ridges it first has to be established what parts of the sea-bed and subsoil are part of the natural prolongation as defined in article 76(1).¹² The reference to the deep ocean floor and its oceanic ridges cannot lead to the exclusion of areas which form part of that natural prolongation of the land territory and meet the other criteria of article 76 which define the continental shelf.¹³ Ridges of an oceanic origin that are not a part of the natural prolongation of the land territory cannot be used to extend the continental shelf beyond 200 nautical miles.

This interpretation of articles 76(3) and 76(6) presupposes that article 76 does not distinguish between land territory which is continental in origin and land territory which is oceanic in origin, as may, for instance, be the case for certain islands. Article 76(1) indicates that the continental shelf extends throughout the natural prolongation of the coastal State's land territory to the outer edge of the continental margin. Thus the starting point for defining this natural prolongation is the land territory. If the land territory is oceanic in origin so is the natural prolongation extending from this land territory.¹⁴ The term continental margin in article 76(3) is similarly defined as comprising the submerged prolongation of the land mass of the coastal State.¹⁵ The provision on submarine ridges in article 76(6) has a dual purpose. On the one hand, it clarifies that a submarine ridge is a natural prolongation of the land territory. On the other hand, such a natural prolongation cannot be used to extend the continental shelf beyond 350 nautical miles.

The drafting history of article 76(6) lends support to the interpretation that the provision on submarine ridges is intended to cover ridges of an oceanic origin. Paragraph 6 was included in article 76 at a late stage of UNCLOS III. The article on the continental shelf in the first revision of the Informal Composite Negotiating Text did not contain a precursor to paragraph 6 and the last part of what was to become paragraph 3 did not contain a reference to oceanic ridges. A footnote to paragraph 3 stated that general understanding had been reached to the effect that there would be additional discussion and "a mutually acceptable formulation to be included in article 76 will be drawn up."¹⁶ The search for this mutually acceptable formulation was pursued during the resumed eighth session (1979) of the Conference. A number of pro-

¹² Cf. Convention, article 1(1)(1), which defines the Area as the seabed and ocean floor and subsoil thereof beyond national jurisdiction.

¹³ However, it has also been held that the operation of the second sentence of paragraph 3 in itself defines the scope of application of paragraph 6: "[t]he problem then becomes one of determining whether a submarine ridge is an oceanic ridge in the deep ocean floor. If it is such a ridge, then according to paragraph 3 the terms of article 76 do not apply" (*The Law of the Sea; Definition of the Continental Shelf; An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations, New York: 1993) 23, para. 63; see also M.H. Nordquist (general ed) *United Nations Convention on the Law of the Sea 1982; A Commentary* (6 Volumes) (Martinus Nijhoff Publishers, Dordrecht: 1985, 1989, 1991, 1993; The Hague: 2002) (hereafter *Virginia Commentary*) Vol. II, 879; R.W. Smith and G. Taft "Legal Aspects of the Continental Shelf" in P.J. Cook and C.M. Carleton (eds) *Continental Shelf Limits; The Scientific and Legal Interface* (Oxford University Press, Oxford: 2000) 17-24 at 20).

¹⁴ See further Conclusion No. 2; see also *Virginia Commentary*, note 13, Vol. II, 880; *Third United Nations Conference on the Law of the Sea; Official Records* Vol. XIII, 17, para. 96 and *ibid.*, 36, para. 58; N.M. Antunes and F.M. Pimentel *Reflecting on the Legal-Technical Interface of Article 76 of the LOSC: Tentative Thoughts on Practical Implementation* (paper presented at the international conference *Addressing Difficult Issues In UNCLOS*, organized by ABLOS, Monaco, 28-30 October 2003) 10-13 and 19-24; P.A. Verlaan, "New Seafloor Mapping Technology and Article 76 of the 1982 United Nations Convention on the Law of the Sea" (1997) 21 *Marine Policy* 425-434 at 426-427; *contra* V.E. McKelvey "Interpretation of the UNCLOS III Definition of the Continental Shelf" in D.M. Johnston and N.G. Letalik (eds) *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (Law of the Sea Institute, Hawaii: 1982) 465-472 at 469; G. Taft *Solving the Ridges Enigma of Article 76 of the United Nations Convention on the Law of the Sea* (paper presented at the Conference "Accuracies and Uncertainties in Maritime Boundaries and Outer Limits", Monaco 18 and 19 October 2001) 5-6; *The Law of the Sea*, note 13 at 22, para. 62.

¹⁵ See further Conclusion No. 2.

¹⁶ Doc. A/CONF.62/WP.10/Rev.1 (reproduced in R. Platzöder *Third United Nations Conference on the Law of the Sea: Documents* (18 Volumes) (Ocean Publications, Dobbs Ferry: 1982-1988) Vol. I, 375 at 421).

posals were made to limit the continental shelf on oceanic ridges to 350 nautical miles.¹⁷ At the ninth session (1980) of the Conference a compromise on this issue was reached which led to the present formulation of paragraph 3 and the inclusion of paragraph 6 in article 76. A number of delegations commented on this draft proposal. These observations, although most of them are not very specific, lend support to the view that the new provision on submarine ridges and submarine elevations clarified that certain features that might or might not be considered to be included in the definition as it stood at that time, would be included in the definition of the continental shelf by this amendment.¹⁸

The view that the inclusion of paragraph 6 in article 76 was intended to limit the continental shelf to 350 nautical miles on submarine ridges of an oceanic origin is confirmed by a number of commentaries on the negotiations.¹⁹

The term 'submarine elevations' in article 76(6) is followed by the qualification 'that are natural components of the continental margin'.²⁰ This qualification indicates that those elevations can be distinguished as separate features but at the same time are closely linked to the continental margin. This is the case for features which, although at some point in time were not a part of the continental margin or have become detached from the continental margin, have, through geological processes, become or remained so closely linked to the continental margin as to become or remain a part of it.²¹ The term 'submarine

¹⁷ For an overview see *Virginia Commentary*, note 13 Vol. II, 867 *et seq.*

¹⁸ For instance, the delegate of Iran observed that "[h]is delegation was concerned by the lack of precision in distinguishing between the sea-bed and subsoil and underwater oceanic ridges in the new definition of the continental shelf contained in article 76, annexed to the report of the Chairman of the Second Committee. By unduly extending the jurisdiction of coastal States, the article could adversely affect the concept of common heritage of mankind" (*Third United Nations Conference on the Law of the Sea; Official Records* Vol. XIII, 19, para. 122). The delegate of Switzerland expressed serious misgivings regarding the scope and meaning of article 76, paragraph 6. "[I]f the article meant that the coastal State could lay claim, as part of the continental shelf, to ridges that were not natural components of the continental margin in situations not envisaged by the revised negotiating text, particularly where the continental margin did not extend up to 200 miles, then his delegation could not accept the provision because it would officially sanction a new extension of the rights and jurisdiction of the coastal States" (*ibid.*, 15, para. 60). At the Resumed Ninth Session the delegation of Switzerland "reiterated its reservations on the provisions of article 76 concerning the outer limits of the continental shelf. Although the new provisions represented an improvement, they extended the limit too far, thereby reducing the international Area considerably" (*ibid.*, Vol. XIV, 37, para. 89). The delegate of Iceland stated that he understood that the new provision regarding submarine ridges meant that the 350-mile limit criterion would apply to ridges which were a prolongation of the land mass of the coastal State concerned (*ibid.*, Vol. XIII, 36, para. 58). The delegate of Denmark provided an interpretation of the term continental margin contained in article 76(3) that implies a similar view as that expressed by Iceland (*ibid.*, Vol. XIV, 61, para. 149).

¹⁹ See e.g. T. Treves "La Nona Sessione della Conferenza sul Diritto del Mare" (1980) 63 *Rivista di Diritto Internazionale* 432-463 at 437; E. Miles *Global Ocean Politics* (Martinus Nijhoff Publishers, The Hague: 1998) 387-388; see also E.D. Brown *Sea-Bed Energy and Minerals: The International Legal Regime; Volume 1 The Continental Shelf* (Martinus Nijhoff Publishers, Dordrecht: 1992) 26-27; S.A. Meese "The Legal Regime Governing Polymetallic Sulfide Deposits" (1986) 17 *Ocean Development and International Law* 131-162 at 145-146. Oxman seems to suggest that on oceanic ridges the continental shelf only extends to 200 nautical miles (B.H. Oxman "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)" (1980) 74 *American Journal of International Law* 1-47 at 21 and B.H. Oxman "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)" (1981) 75 *American Journal of International Law* 211-256 at 228, note 6; see also J.C. Lupinacci *La Plataforma Continental como Instituto del Derecho del Mar* (Instituto de Estudios Internacionales, Universidad de Chile, Serie de Publicaciones Especiales No. 61: 1984) 37 and 41). Oxman's view seems to place more weight on the fact that the footnote on agreement on a compromise solution was placed in paragraph 3 of the article of the Informal Composite Negotiating Text and less on the reference to the need for a mutually acceptable formulation (see Oxman [1981], note 19 at 21).

²⁰ Article 76 does not further define the term 'natural component'. One commentary on article 76(6) has noted that

The use of the term *natural components* in article 76.6 suggests that the features must be physically part of the margin and may be taken to imply a geomorphic and/or geologic definition of what is a *natural* component (P.A. Symonds, M.F. Coffin, G. Taft, H. Kagami "Ridge Issues" in Cook and Carleton, note 13, 285-307 at 301).

²¹ For a discussion see e.g. H. Brekke and P.A. Symonds "The Ridge Provisions of Article 76 of the UN Convention on the Law of the Sea" in M.H. Nordquist, J. Norton Moore and T.H. Heidar (eds) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff Publishers, Leiden: 2004) 169-199 at 188-191.

elevations' is contained in article 76(6) to clarify that certain features are not 'submarine ridges'. The term 'submarine elevations' does not further qualify the terms natural prolongation and continental margin as contained in article 76 and need not have a substantive meaning different from those terms.²²

Conclusion No. 4: The relationship between the two approaches to determine the foot of the continental slope contained in article 76(4)(b)

Article 76(4)(b) of the Convention provides that in the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base. The reference to these two approaches to determine the foot of the slope indicates that the foot of the slope can be determined on the basis of geomorphological and/or geological characteristics.

Article 76(4)(b) does not establish a precedence between the two approaches contained in it. A coastal State may opt to present evidence to the contrary to locate the foot of the slope, or, if such evidence is not available, present evidence on the maximum change of gradient at the foot of the slope.

*Explanatory Note*²³

Article 76(4) of the Convention provides two options to establish fixed points which can be used to delineate the limit of the continental shelf beyond 200 nautical miles.²⁴ In both cases, the starting point for establishing these points is the foot of the continental slope. Article 76(3) of the Convention indicates that the 'continental slope' is one of the elements of the continental margin. The Convention does not further define the foot of the slope. The two approaches to determining the foot of the slope contained in article 76(4)(b) allow drawing some conclusions in this respect. The determination of the foot of the slope as the maximum change in gradient at its base implies that the foot of the slope will be defined by reference to its geomorphological characteristics. The reference to evidence to the contrary indicates that the method of determining the maximum change in gradient may not always accurately establish the foot of the slope and that foot of the slope is not defined solely by geomorphological characteristics. There may be difficulties with the determination of the location of the base of the slope. Furthermore, the area in which the foot of the slope is located may be characterized by a transition from predominantly continental crust to predominantly oceanic crust.²⁵ Under the evidence to the contrary rule the foot of the slope may be placed in this zone of transition.²⁶

The reference to two criteria to determine the foot of the slope makes it necessary to establish their relationship. The *Virginia Commentary* observes in this respect that

[t]he phrase "in the absence of evidence to the contrary" implies that there may be special circumstances requiring the application of alternative means for determining the foot of the continental slope.²⁷

²² See also Brekke and Symonds, note 21 at 194-195; Brown, note 19 at 27; J. Saura Estapà *Delimitación Jurídica Internacional de la Plataforma Continental* (Editorial Tecnos, Madrid: 1996); Antunes and Pimentel, note 14 at 22.

²³ This explanatory note takes into account the discussion contained in section 6.2 of the First Report.

²⁴ The article reads "[i]n the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base".

²⁵ See e.g. H.D. Hedberg *National-International Jurisdictional Boundary of the Ocean Floor* (Occasional Paper No. 16, Law of the Sea Institute, University of Rhode Island: 1972) 5; Antunes and Pimentel, note 14 at 15-16; P.A. Symonds, O. Eldholm, J. Mascle and G.F. Moore "Characteristics of Continental Margins" in Cook and Carleton, note 13, 25-63 at 56-58; *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* (hereafter Scientific and Technical Guidelines) (Doc. CLCS/11 of 13 May 1999; Doc. CLCS/11/Add.1 of 3 September 1999; Doc. CLCS/11/Corr.1 of 24 February 2000) paras 6.2-6.4.

²⁶ See also the references in the previous footnote.

²⁷ *Virginia Commentary*, note 13 Vol. II, 876.

The Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (CLCS) suggest that as a rule it will be possible to define the foot of the slope by establishing the maximum change in gradient and that the provision concerning evidence to the contrary is complementary to this general rule.²⁸

Interpreting the evidence to the contrary rule as a residual rule would imply that a coastal State making a submission would have to prove that there are circumstances which make the maximum change in gradient rule inapplicable and that only if that is the case a coastal State may apply the evidence to the contrary rule. The wording of article 76(4)(b) indicates a different relationship between the two rules. The maximum change in gradient rule is applicable in the absence of evidence to the contrary. If the latter type of evidence on the location on the foot of the slope exists, the maximum change in gradient rule is not applicable. The wording of article 76(4)(b) in three of the other authentic languages of the Convention confirms this interpretation.²⁹

Conclusion No. 5: The linking of the outer limit of the continental shelf beyond 200 nautical miles to the outer limit of the continental shelf at 200 nautical miles

There are cases in which the outer limit of the continental shelf beyond 200 nautical miles has to be connected with the outer limit of the continental shelf at 200 nautical miles. This situation raises the question whether a coastal State is required to select a fixed point that meets the requirements contained in article 76(4) to 76(6) and is either located at the 200 nautical mile limit or within that distance from the baseline (in the latter case, the outer limit line of the continental shelf beyond 200 nautical miles may be connected to the outer limit line at 200 nautical miles at the point at which both lines intersect). A second view would be that a coastal State can use any point at the 200 nautical mile outer limit that can be connected to a fixed point beyond 200 nautical miles that meets the requirements of article 76(4) to (6). In the above cases a choice between these two positions depends on the interpretation of articles 76(4) and 76(7)

*Explanatory Note*³⁰

Parts of the continental shelf of a State may extend to a distance of 200 nautical miles and other parts beyond that distance. This raises the question whether a fixed point which meets the requirements of article 76(4) to 76(6) may be linked to a point on the 200 nautical mile limit, which does not meet these requirements. States Parties in their submissions to the CLCS have not taken a uniform approach in this respect. The submissions of Brazil and the Russian Federation suggest that a fixed point beyond 200 nautical miles which meets the requirements of article 76(4) to 76(6) may not be linked to a point on the 200 nautical mile limit, which does not meet these requirements.³¹ The information contained in the submission of Australia might suggest that the other approach is followed. At the time of writing of this report the CLCS has not issued any recommendations addressing this issue.

Article 76(4) and article 76(7) contain references to conditions fixed points that define outer limits of the continental shelf beyond 200 nautical miles have to meet. One possible interpretation of these provisions is that the requirements for fixed points contained in article 76(4) are only applicable to fixed points beyond 200 nautical miles from the baseline. Under this interpretation, a point at 200 nautical miles does not have to meet these requirements as it already can be used as part of the outer limit of the continental shelf on the basis of the distance criterion contained in article 76(1).

²⁸ Scientific and Technical Guidelines, note 25 at paras 6.1.1 *et seq.*

²⁹ The French text provides “Sauf preuve du contraire ...”, the Spanish text provides “Salvo prueba en contrario ...” and the Russian text provides “Если нет доказательств об обратном ...” (If there is no evidence to the contrary).

³⁰ This explanatory note takes into account the discussion contained in section 6.3.1 of the First Report.

³¹ The information contained in the executive summary of both submissions indicates that in a number of cases the outer limit of the continental shelf beyond 200 nautical miles is linked to the outer limit at 200 nautical miles by a straight line measuring less than 60 nautical miles.

The other interpretation of articles 76(4) and 76(7) finds support in the wording of article 76(4)(a). Both subparagraphs of this article require that the coastal State shall establish the outer edge of the continental margin, wherever the margin extends beyond 200 nautical miles by a line delineated in accordance with paragraph 7 *by reference to* fixed points that meet one of the requirements of article 76(4)(a). This language indicates that all fixed points that are used to delineate the continental shelf under article 76(7) have to meet one of these requirements.

Under the latter interpretation, where there is a need to connect an outer limit line beyond 200 nautical miles with the outer limit line at that distance, the coastal State has to select a fixed point that meets the abovementioned requirements and is either located at the 200 nautical mile limit or within that distance from the baseline. In the latter case, the outer limit line of the continental shelf beyond 200 nautical miles can be connected to the outer limit line at 200 nautical miles at the point at which both lines intersect.

Conclusion No. 6: The meaning and implications of the term ‘outermost’ in article 76(4)(a)(i)

Article 76(4)(a)(i) of the Convention refers to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope. A point also meets the requirements of article 76(4)(a)(i) if there is a continuity of sedimentary rock between the foot of the slope and the point, but not along the straight line of shortest distance.

*Explanatory Note*³²

Article 76(4)(a)(i) of the Convention provides that the outer limit of the continental shelf can be established by

a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope.

In certain cases sedimentary rocks will not be distributed evenly.³³ In such a case there may be more than one point on a profile line that meets the 1 per cent criterion. The inclusion of the word ‘outermost’ in paragraph 4(a)(i) indicates that a coastal State is not obliged to select the point that meets the 1 per cent criterion that is situated most landward, but may select any other point that meets the 1 per cent criterion seaward of that most landward point.

There may be circumstances in which there is no continuous sedimentary rock between the foot of the slope and a point at which the thickness of sediment is 1 per cent of the shortest distance to the foot of the slope along a straight line. This may for instance be the case where the sedimentary rock has been eroded locally by a transverse channel or the topography of the basement is highly irregular.³⁴ A point qualifies for selection under article 76(4)(a)(i) if there is continuity of sedimentary rocks along another pathway.

Conclusion No. 7: The selection of the 2,500 meter isobath under article 76(5)

Article 76(5) of the Convention imposes two constraints on the fixed points that result from the application of article 76(4). In the case of the 2,500 meter isobath a coastal State may have a choice between two or more isobath lines. The only requirement such a line has to meet is that it

³² This explanatory note takes into account the discussion contained in section 6.3.2 of the First Report, which also discusses the Scientific and Technical Guidelines of the CLCS.

³³ See *e.g.* Scientific and Technical Guidelines, note 25 at para. 8.5.2.

³⁴ See also L.D.M. Nelson “The Continental Shelf: Interplay of Law and Science” in N. Ando et al. (eds) *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, The Hague: 2002) 1235-1253 at 1244.

is located inside the natural prolongation of the land territory of the coastal State on features that are components of the continental margin.

*Explanatory Note*³⁵

Article 76(5) of the Convention imposes two constraints on the fixed points that result from the application of article 76(4). The fixed points comprising the line of the outer limits of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meter isobath. For any continental margin, there will only be one line at 350 nautical miles from the baselines. However, there are areas of the seabed where a number of consecutive 2,500 meter isobaths occur.

The text of article 76 sheds some light on this issue. The reference to the 2,500 meter isobath in article 76(5) is not in any way qualified. Article 76(6) supports the proposition that an isolated 2,500 meter isobath can be employed under article 76(5). This paragraph excludes use of the 2,500 meter isobath along submarine ridges, but allows its use if it is located along other seafloor highs.³⁶ This interpretation of article 76(5) is supported by the consideration that it limits the continental shelf that the coastal State could otherwise establish by applying the criteria of article 76(4). This requires an interpretation of article 76(5) that is least onerous for the coastal State.

The drafting history of article 76 indicates that proposals to include a reference to water depth in the article in general were justified by the argument that they could be used to establish the extent of the continental shelf or the natural prolongation of the land territory.³⁷ A number of publications support the interpretation that a 2,500 meter isobath can only be employed by a State if it is situated inside the natural prolongation of its land territory on features that are components of the continental margin.³⁸

Conclusion No. 8: Submissions to the CLCS concerning areas wholly surrounded by 200 nautical mile zones

A coastal State has to submit information to the Commission on an area beyond 200 nautical miles that is wholly surrounded by 200 nautical mile zones if its continental margin extends into such an area. This obligation also applies in a case in which all of the area is part of the continental shelf and there are no outer limits delineated in accordance with articles 76(7).

Explanatory Note

A number of relatively small areas beyond 200 nautical miles are wholly surrounded by 200 nautical mile zones of one or a limited number of coastal States.³⁹ Some of these areas probably are continental shelf in their entirety. In such a case there is no outer limit of the continental shelf and a coastal State cannot delineate the outer limits of its continental shelf in accordance with article 76(7). Consequently, a coastal State cannot submit information on outer limits delineated in accordance with article 76(7) to the CLCS

³⁵ This explanatory note takes into account the discussion contained in section 6.4 of the First Report.

³⁶ See also Oxman [1981], note 19 at 227.

³⁷ See e.g. *Third United Nations Conference on the Law of the Sea; Official Records* Vol. II, 144, para. 14, 146, para. 41, 156, para. 4, 161, para. 9, Doc. A/CONF.62/L.8. Rev.1, Appendix I, Provision 81 (*ibid.*, Vol. III, 119), Doc. A/CONF.62/C.2/L.25, article 1 (*ibid.*, 202), Second Committee informal proposal (Austria) of 11 April 1976 (Platzöder, note 16, Vol. IV, 320), Second Committee informal proposal (Soviet Union) [1976] (*ibid.*, 322); see also P.R.R. Gardiner "Reasons and Methods for Fixing the Outer Limits of the Legal Continental Shelf beyond 200 Nautical Miles" (1978) *Iranian Review of International Relations* No. 11-12, 145-173 at 154-155. Hedberg refers to the fact that various water depths have been proposed to indicate the base of the slope (Hedberg, note 10 at 62).

³⁸ Symonds *et al.*, note 25 at 58. See also V. Prescott "National Rights to Hydrocarbon Resources of the Continental Margin Beyond 200 Nautical Miles" in G.H. Blake, M.A. Pratt and C.H. Schofield (eds) *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, The Hague: 1998) 51-81 at 64.

³⁹ Such areas are commonly referred to as donut holes.

under article 76(8). This raises the question how a coastal State is to implement its obligations under article 76 in respect of an area wholly surrounded by 200 nautical mile zones.

Article 76(4) provides that “the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles”. This obligation is applicable to all of the continental margin beyond 200 nautical miles and does not provide for any exceptions. This obligation is to be implemented by applying the criteria contained in article 76(4) to 76(7). In a case in which an area beyond 200 nautical miles is wholly surrounded by 200 nautical mile zones, the application of these criteria will either result in outer limit lines of the continental shelf beyond 200 nautical miles or a finding that all of the area concerned is located inside the outer edge of the continental margin as defined in article 76(4) to 76(7).

Article 76(8) addresses the submission of information to the Commission. A coastal State is obliged to submit information “on the limits of the continental shelf beyond 200 nautical miles”. The obligation to submit information is formulated broadly. It is not limited to submitting information on the outer limits of the continental shelf delineated in accordance with articles 76(4) to 76(7).⁴⁰ The obligation of the coastal State under article 76(4) indicates that in a case where the continental margin extends beyond 200 nautical miles but cannot be delineated by straight lines in accordance with article 76(4) to 76(7) a coastal State is required to submit information establishing that all of the area concerned is located inside the outer edge of the continental margin as defined in accordance with article 76(4) to 76(7).⁴¹

Conclusion No. 9: The functions and competence of the CLCS

In its work the CLCS has to deal with questions which touch upon the interpretation or application of article 76 and other provisions of the Convention. To understand the role of the CLCS in this respect it is necessary to assess its functions and competence.

The CLCS is charged with the assessment of scientific and technical data. As article 3(1)(a) of Annex II to the Convention provides, this assessment has to be carried out ‘in accordance with article 76 of the Convention’. The CLCS is thus bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State.

In carrying out its functions the CLCS may be confronted with different interpretations of provisions of article 76. The Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it. This implicit competence of the CLCS does not replace the competence of the States Parties to interpret the Convention. The CLCS should accept a reasonable interpretation of relevant provisions of the Convention provided by a coastal State making a submission. If the Commission considers that the submission of the coastal State cannot reasonably be considered to be in accordance with the Convention, the Commission may make recommendations accordingly.

The competence of the CLCS is not to be interpreted restrictively as far as the evaluation of scientific and technical data submitted by the coastal State is concerned. The Commission has the function to make an independent assessment of such scientific and technical data. This implies a power to establish whether the scientific and technical data submitted by a coastal State prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met.

⁴⁰ It can be noted that article 76(8) formulates the mandate of the Commission in comparable terms (the Commission shall make recommendations related to the establishment of the outer limits of the continental shelf of coastal States).

⁴¹ The kind of information to be provided would depend on the characteristics of the area concerned. For instance, if such an area is wholly situated landward of the foot of the slope, it would probably suffice to provide the Commission with data indicating that the foot of the slope is located seaward of the area concerned.

The submission of the Russian Federation contained information on four areas wholly surrounded by 200 nautical mile zones. The executive summary of the Russian Federation’s submission indicates that the Russian Federation in three of these cases submitted information indicating that the outer limit of its continental shelf did not border on the Area.

The Commission has adopted Rules of Procedure and Scientific and Technical Guidelines. The Commission is competent to establish rules on its internal procedures. Such rules have to be complied with by States in their dealings with the Commission. Such rules can only be objected against on the ground that the CLCS has overstepped the limits of its competence or that these rules are invalid for other reasons. The Commission has the function to make an independent assessment of such scientific and technical data. This implies a power to set out the procedures it will adopt in making such an assessment.

The Commission is required to act in accordance with article 76 and it has to establish how this requirement is to be given effect. Actions of the Commission to implement the obligation to act in accordance with article 76 do not curtail the competence of the States Parties to interpret the Convention.

*Explanatory Note*⁴²

Article 3 of Annex II to the Convention sets out the functions of the CLCS. This provision indicates that these functions are concerned with the consideration of scientific and technical data and other material submitted by coastal States concerning the outer limits of the continental shelf and to make recommendations to coastal States on matters related to the establishment of the outer limits of the continental shelf.

Although the functions of the CLCS are concerned with the assessment of scientific and technical data, this assessment has to be carried out 'in accordance with article 76 of the Convention'.⁴³ This wording indicates that the CLCS is bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State.

In order to make recommendations to coastal States, the Commission has to make an independent evaluation of the submissions of coastal States in respect of the outer limits of their continental shelf.⁴⁴ The Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it.⁴⁵ This conclusion also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes an assessment of the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit lines it proposes. At times, this may involve a choice between different interpretations of specific provisions of article 76. The Commission will have to make its own assessment of whether the interpretation a coastal State has (implicitly) adopted in its submission actually is in accordance with article 76.⁴⁶ At the same time, the requirement to consider submissions and make recommendations in accordance with article 76 indicates a limit on the scope for independent action by the Commission.

The competence to interpret article 76 of the Convention rests in the first place with its States Parties.⁴⁷ The Commission is only competent to deal with the interpretation of the provisions of article 76 and other provisions of the Convention to the extent this is necessary to carry out the functions which have been assigned to it under the Convention. As a consequence, this competence has to be interpreted

⁴² This explanatory note takes into account the discussion contained in sections 3.2 and 3.3 of the First Report.

⁴³ Convention, Annex II, article 3(1)(a). The Commission, in making recommendations, shall also do this in accordance with the Statement of Understanding adopted on 29 August 1980 by UNCLOS III. In addition, the Commission is instructed that its actions shall not prejudice matters relating to the delimitation of boundaries between States (Convention, Annex II, article 9).

⁴⁴ See also the document *The Continental Shelf* (6 May 1975), footnote to art. 1, para. 5 (reproduced in Platzöder, note 16, Vol. XI, 501). This text was prepared by the Informal Group of Juridical Experts (Evensen Group).

⁴⁵ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949; [1949] ICJ Reports 174 at 180 and 182).

⁴⁶ For the view that the CLCS should refrain from making an independent assessment of provisions of the Convention and the problems involved in such an approach see First Report at 779, note 25.

⁴⁷ See further the discussion in Antunes and Pimentel, note 14 at 8.

restrictively.⁴⁸ The competence of the CLCS does not replace the competence of the States Parties to interpret the Convention.⁴⁹

The requirement that the competence of the CLCS to interpret article 76 and other provisions of the Convention has to be interpreted restrictively has a number of consequences. The CLCS should not interpret these provisions in such a way that they place additional obligations on coastal States. On the other hand, neither should the Commission reduce the obligations resting on coastal States under the Convention. Secondly, the CLCS should accept a reasonable interpretation of relevant provisions of the Convention provided by the coastal State making a submission. If the Commission considers that the interpretation of the coastal State cannot reasonably be considered to be in accordance with the Convention, the Commission may make recommendations accordingly.⁵⁰

The competence of the CLCS is not to be interpreted restrictively as far as the evaluation of scientific and technical data submitted by the coastal State is concerned. The Commission has the function to make an independent assessment of the scientific and technical data submitted by a coastal State. This implies a power to establish whether the scientific and technical data submitted by a coastal State prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met.⁵¹

The Rules of Procedure⁵² and the Scientific and Technical Guidelines of the CLCS implement or provide an interpretation of provisions of the Convention. To assess to what extent provisions contained in the documents adopted by the Commission carry legal consequences for States Parties to the Convention a threefold distinction has to be made between rules on the internal procedure of the Commission, the consideration of scientific and technical data by the Commission and the interpretation of substantive provisions of the Convention.⁵³ The Commission is competent to establish the rules applicable to its own internal procedures.⁵⁴ Such rules have to be complied with by States in their dealings with the Commission. Such rules can only be objected against on the ground that the CLCS has overstepped the limits of its competence or that these rules are invalid for other reasons.⁵⁵ The Commission has the function to make an independent assessment of such scientific and technical data. This implies a power to set out the procedures it will adopt in making such an assessment.

⁴⁸ See also *Venue of Meetings of the Committee on the Elimination of Racial Discrimination: Opinion of the Legal Counsel Dated 9 May, 1986*, paras 5 and 6 (reproduced in B.G. Ramcharan (ed) *The Principle of Legality in International Human Rights Institutions; Selected Legal Opinions* (Martinus Nijhoff Publishers, The Hague: 1997) 113-114).

⁴⁹ In this connection, it should be noted that the assessment of scientific and technical data, which is one of the functions of the CLCS, has to be distinguished from the interpretation of scientific and technical terms in connection with the interpretation of provisions of article 76 of the Convention. A number of terms included in the Convention have been derived from the field of natural sciences. This fact does, however, not place their interpretation beyond the legal realm. The general rules on the competence of the CLCS to interpret provisions of the Convention are applicable to this case.

⁵⁰ The consideration of a submission by the Commission allows for an exchange of views with the submitting State. Such an exchange of views may contribute to identifying and addressing differences concerning the interpretation or application of the Convention.

⁵¹ This concerns the questions whether: a) the scientific and technical data submitted by the coastal State actually support the conclusions which are drawn from them (e.g. do submitted data indicate the existence of a specific sediment thickness); and b) these conclusions are in accordance with article 76 (e.g. when the data indicate that the sediment thickness at a specific point is 0.5% of the shortest distance of the foot of the slope, the specific point cannot be used to establish the outer limit of the continental shelf beyond 200 nautical miles).

⁵² *Rules of Procedure of the Commission on the Limits of the Continental Shelf* (Doc. CLCS/40 of 2 July 2004).

⁵³ This section discusses this matter in general terms. In addition, in looking at the status of a specific provision, it will be necessary to look at the practice existing in its respect. A provision that in itself would not have been binding on States, may become so due to their practice.

⁵⁴ See e.g. Ramcharan, note 48 at 57.

⁵⁵ See e.g. R. Bernhardt "Ultra Vires Activities of International Organizations" in J. Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague: 1996) 599-609 at 602; and K.H. Kaikobad *The International Court of Justice and Judicial Review* (Kluwer Law International, The Hague: 2000) 36, who also refers to *inter alia* procedural irregularities and material error as grounds for invalidity.

The Commission is required to act in accordance with article 76 and it has to establish how this requirement is to be given effect. Actions of the Commission to implement the obligation to act in accordance with article 76 do not curtail the competence of the States Parties to interpret the Convention.

Conclusion No. 10: The meaning and implications of the term ‘on the basis of’ contained in article 76(8)

Article 76(8) of the Convention provides that outer limits established ‘on the basis of’ the recommendations of the Commission shall be final and binding. The term ‘on the basis of’ circumscribes the freedom of action of a coastal State which intends to establish the outer limits of its continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention.

The recommendations of the Commission should be formulated in such a way that the coastal State can assess if these recommendations are in accordance with article 76. This assures the coastal State that, in acting on the basis of the recommendations of the Commission, it also acts in accordance with article 76. The requirement that the coastal State shall establish the outer limits of its continental shelf in conformity with the provisions of article 76(8) is a procedural guarantee to assure that the coastal State establishes the outer limits of its continental shelf beyond 200 nautical miles in accordance with article 76.

The Commission is not competent to assess whether a coastal State has established the outer limits of the continental shelf ‘on the basis of’ its recommendations. Other States may indicate that they consider that the coastal State has not acted on the basis of the recommendations of the Commission.

*Explanatory Note*⁵⁶

Article 76(8) of the Convention provides that outer limits established ‘on the basis of’ the recommendations of the Commissions shall be final and binding. The term ‘on the basis of’ defines the freedom of action of a coastal State which intends to establish the outer limits of the continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention.

Article 76 and Annex II to the Convention set out the kind of information a coastal State is to submit to the Commission and requirements for recommendations of the Commission. This information and these requirements assist in establishing the meaning of the term ‘on the basis of’. A coastal State is to submit information on the outer limits of its continental shelf to the CLCS where that shelf extends beyond 200 nautical miles.⁵⁷ The Commission is “to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea”.⁵⁸ Article 76 and the Statement of Understanding establish substantive requirements applicable to the definition of the outer limits of the continental shelf beyond 200 nautical miles. The information a coastal State is to submit is intended to prove that the outer limit lines contained in its submission are in accordance with these requirements. Similarly, to act in accordance with article 76, the Commission has to act in accordance with that article’s substantive requirements.

The main purpose of the submission of information and the making of recommendations is this thus to assure that the outer limits of the continental shelf of a coastal State are established in accordance with article 76. In order to meet this purpose the recommendations of the Commission should be formulated in such a way that the coastal State can assess if these recommendations are in accordance with article 76. This assures the coastal State that, in acting on the basis of the recommendations of the Commission, it also acts in accordance with article 76.

The requirement contained in article 7 of Annex II that the coastal State is to act on the basis of the recommendations of the Commission if it establishes the outer limits of the continental shelf beyond 200 nautical miles indicates that it cannot establish these outer limits on the basis of information that has not been considered by the Commission.

⁵⁶ This explanatory note takes into account the discussion contained in section 6.6 of the First Report.

⁵⁷ Convention, article 76(8).

⁵⁸ *Ibid.*, Annex II, article 3(1)(a).

The Convention does not entrust the CLCS with a role in respect of the process of establishing the outer limits of the continental shelf once it has issued its recommendations and the coastal State does not make a new or revised submission. The Commission is not competent to assess whether a coastal State has established the outer limits of the continental shelf 'on the basis of' its recommendations.⁵⁹

Other States may indicate that they consider that the outer limit of the continental shelf of a State has not been established on the basis of the recommendations of the Commission.⁶⁰ A dispute over the interpretation or application of the term 'on the basis of' can be settled by the States concerned under Part XV of the Convention.

Conclusion No. 11: The meaning and consequences of the term 'final and binding' contained in article 76(8)

Article 76(8) of the Convention provides that the limits of the continental shelf established by a coastal State on the basis of the recommendations of the CLCS shall be 'final and binding'. The term 'final' means that the outer limits shall no longer be subject to change. The term 'binding' implies an obligation to accept the outer limits as established. If the outer limits of the continental shelf have been established in accordance with the substantive and procedural requirements of article 76 they will be final and binding on the coastal State concerned and other States Parties to the Convention. Outer limits lines that have not been established in accordance with these requirements will not become binding on other States.

*Explanatory Note*⁶¹

Article 76(8) of the Convention provides that the limits of the continental shelf established by a coastal State on the basis of the recommendations of the CLCS shall be 'final and binding'. The coastal State is under an obligation not to change an outer limit line which has become final and binding.⁶² Any other interpretation would contradict the provision that the outer limit is final, that is, not subject to change. Other States Parties to the Convention may no longer challenge an outer limit line that has become final and binding, even if the parameters on which it is based, such as the baseline, change. This follows from the fact that the outer limit line becomes final and binding on the coastal State. Only the coastal State is competent to establish the outer limit of its continental shelf. It would thus be impossible for an outer limit line that is final and binding on the coastal State not to be binding on other States or be subject to change.

A further question in respect of the term 'final and binding' is at what moment in time it becomes effective for the coastal State and other States Parties to the Convention. Only the coastal State is competent to establish the outer limits of its continental shelf and the outer limit lines can only become final and binding on the coastal State once that State has established those outer limit lines. The coastal State is under an obligation to deposit charts and information describing the outer limits of its continental shelf with the Secretary-General of the United Nations.⁶³ This deposit signifies the completion of the process of establishment of the outer limits of the continental shelf beyond 200 nautical miles by the coastal State, and these limits are from that moment final and binding on the coastal State, unless they are challenged by other States Parties to the Convention and this challenge is successful.

Article 76(8) provides a specific ground for challenging an outer limit line established by a coastal State. The article provides that to be final and binding, outer limit lines have to be established 'on the

⁵⁹ See also T.L. McDorman "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17 *International Journal of Marine and Coastal Law* 301-324 at 315.

⁶⁰ See also De Marffy Mantuano, note 6 at 413.

⁶¹ This explanatory note takes into account the discussion contained in section 6.7 of the First Report.

⁶² This conclusion is confirmed by article 76(9) of the Convention, which 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.

⁶³ Convention, article 76(9).

basis' of the recommendations of the Commission.⁶⁴ Furthermore, article 76 establishes substantive rules and a procedure for the establishment of the outer limits of the continental shelf beyond 200 nautical miles. If the outer limits of the continental shelf have not been established in accordance with the substantive and procedural requirements of article 76 this issue may be raised by other States Parties under Part XV of the Convention.⁶⁵

The operation of article 76(10) of the Convention precludes an outer limit line from becoming final and binding in an area where a continental shelf claim of another State exists.⁶⁶

Conclusion No. 12: The meaning of the term 'outer limits of its continental shelf' in article 76(9)

Article 76(9) of the Convention provides that the coastal State shall deposit information permanently describing the outer limits of its continental shelf. It is concluded that the term 'outer limits of its continental shelf' refers to the outer limits of the continental shelf beyond 200 nautical miles. It should be noted that several members of the Committee advanced the view that article 76(9) applies also to the outer limit of the continental shelf at 200 nautical miles.

*Explanatory Note*⁶⁷

Article 76(9) of the Convention 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.⁶⁸ This provision does not specify if it is applicable to the outer limit of all of the continental shelf of the coastal State or only to that part of this limit which is situated beyond 200 nautical miles.⁶⁹

The view that the term 'outer limits' in article 76(9) only concerns the outer limits beyond 200 nautical miles is supported by a number of arguments. Article 76(9) has to be read in conjunction with the preceding and subsequent paragraphs of article 76, all of which are applicable to the outer limit of the continental shelf beyond 200 nautical miles. Reference can also be made to the parallel existence of articles 76(9) and 84(1) of the Convention. Both these articles refer to the outer limits of the continental shelf, but the latter provision does not contain a reference to the permanency of the outer limit lines on the continental shelf. The acceptance that article 76(9) is applicable to all of the outer limit of the continental shelf would mean that article 84(1) has no known application as far as the reference to the outer limit lines of continental shelf are concerned.

A consequence of a permanently fixed 200 nautical mile limit of the continental shelf is that it could lead to non-coincident outer limits for water-column and sea-bed jurisdiction, as the outer limit of

⁶⁴ On the term 'on the basis of' see Conclusion No. 10.

⁶⁵ On this latter issue see Conclusions No. 20 and 21.

⁶⁶ On the implications of article 76(10) see further Conclusion No. 14.

⁶⁷ This explanatory note takes into account the discussion contained in section 6.9 of the First Report.

⁶⁸ The English text of article 76(9) refers to 'outer limits' in articles 76(8) and 76(9), the French, Russian and Spanish texts refer to 'outer limits' in article 76(8) and 'outer limit' in article 76(9). The different language texts also differ in their use of the term outer limits in other instances. For instance, the Spanish text of article 84(1) also refers to outer limit in the singular and the English text of article 84(1) refers to 'outer limit lines of the continental shelf'.

⁶⁹ Publications are not unanimous on the interpretation of article 76(9). Some sources have advanced the view that article 76(9) is applicable to the outer limits beyond 200 nautical miles (see R.R. Churchill and A.V. Lowe *The law of the sea* 3rd (Manchester University Press, Manchester: 1999) at 149; M. Hayashi "The Role of the Secretary-General under the LOS Convention and the Part XI Agreement" (1995) 10 *International Journal of Marine and Coastal Law* 157-164 at 159; *Commission on the Limits of the Continental Shelf: Its Functions and Scientific and Technical Needs in Assessing the Submission of a Coastal State* (Doc. SPLOS/CLCS/INF/1 of 10 June 1996) 11, para. 43; *Oceans and Law of the Sea; Report of the Secretary General* (Doc. A/57/57 of 7 March 2002) at 18, para. 78). Other sources submit that article 76(9) is applicable to all of the outer limit of the continental shelf (see *The Law of the Sea*, note 13 at 23, para. 67; Oxman [1981], note 19 at 230; A.H.A. Soons "The Effects of a Rising Sea Level on Maritime Limits and Boundaries" (1990) 37 *Netherlands International Law Review* 207-232 at 216-217; *Virginia Commentary*, note 13 Vol. II, 882). If the term 'outer limits' in article 76(9) applies to all of the outer limits of the continental shelf, the obligation contained in article 76(9) applies to all States Parties to the Convention whose continental shelf borders on the Area, and not only to States Parties with a continental shelf beyond 200 nautical miles.

the exclusive economic zone established by the coastal State does not become permanent, but may shift if the baseline from which it is measured changes. This raises the question whether the possibility of such non-coincident outer limits was intended when the provisions concerned were drafted.⁷⁰ The parallel existence of articles 75(1) and 84(1) points to a presumption that the boundaries of the exclusive economic zone and continental shelf coincide.

State practice concerning the deposit of information under articles 75(1), 76(9) and 84(1) of the Convention does not allow drawing clear conclusions in respect of the scope of application of article 76(9) and its relationship to article 84(1). Ten States Parties to the Convention have submitted information that is relevant to the consideration of this issue.⁷¹ Of these States, eight have only submitted information under article 75(1) on the outer limits of their EEZ. Two States have submitted information under articles 75(1) and 84(1).⁷² No State has submitted information under article 76(9).

The drafting history of article 76(9) indicates that the precursor of this provision was applicable to all of the outer limit of the continental shelf. A first reference to permanent continental shelf limits was included in a proposal of the United States from 3 May 1975,⁷³ paragraph 6 of which provides: “[a] boundary established in accordance with the provisions of this Article shall be described on appropriate charts which descriptions shall be permanent”. The preceding paragraph in this proposal concerned a Boundary Commission. This Commission was to look at all of the outer limit of the continental shelf. A proposal of the Informal Group of Juridical Experts (the so-called Evensen Group) group dated 6 May 1975,⁷⁴ which is in large part based on the US proposal, contains a similar provision on permanent limits, which is also applicable to all of the outer limit of the continental shelf. However, the preceding paragraph, also based on the US proposal, only gives a role to the Boundary Commission for the outer limit beyond 200 nautical miles. A proposal by Ireland from April 1976, which reportedly drew on elements of the proposals of the US and the Evensen Group, contains a paragraph 6 similar to what is now article 76(9).⁷⁵ However, the preceding paragraph of the Irish proposal refers to the role of the Commission in a way which is dissimilar to article 76(8). The paragraph refers to ‘delineation pursuant to this Article’ and the ‘seaward boundary so fixed’. There is no reference to the ‘outer limit’ in this paragraph. The other paragraphs of the proposal indicate that such delineation only concerns the seaward boundary of the shelf beyond 200 nautical miles. The official records of UNLOS III do not include any further discussion concerning the scope of application of the term outer limits in article 76(9). The above proposals were discussed at a time when the precursors of articles 75(1) and 84(1) were not yet included in the negotiating text at the Conference. The later inclusion of these provisions should be taken into consideration in establishing the meaning of the term ‘outer limits’ in article 76(9).⁷⁶

Conclusion No. 13: The implications of the term ‘permanently’ in article 76(9)

Article 76(9) of the Convention 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. The coastal State may no longer change these outer limit lines, unless another State has successfully challenged the outer limit lines concerned.

⁷⁰ Addressing the implications of such non-coincident boundaries is beyond the scope of this report. It should be observed that such non-coincident boundaries may in any case also arise if article 76(9) were to be found to be only applicable to the outer limit beyond 200 nautical miles. Where the outer limit beyond 200 nautical miles and the outer limit at 200 nautical miles are close, a relatively minor shift in the baseline would place the outer limit of the exclusive economic zone beyond the permanently fixed outer limit of the continental shelf beyond 200 nautical miles.

⁷¹ This analysis is based on the summary of information deposited by States Parties available at the website of the Division for Ocean Affairs and the Law of the Sea of the United Nations Secretariat (<www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm>).

⁷² For one of these States this only seems to concern the outer limits of the exclusive economic zone and the continental shelf in areas where they border on the same zones of neighboring States.

⁷³ Platzöder, note 16 Vol. XI, 500.

⁷⁴ *Ibid.*, 501.

⁷⁵ This proposal is reported in Gardiner, note 37 at 160 and Figure 4; *Virginia Commentary*, note 13 Vol. II, 852.

⁷⁶ See further *supra*.

*Explanatory Note*⁷⁷

Article 76(9) of the Convention 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. Once a coastal State has established the outer limits of its continental shelf in conformity with article 76(8) it has to deposit information on these limits under article 76(9). However, the possibility cannot be excluded that a coastal State deposits information on outer limit lines that have not been considered by the Commission or outer limit lines that have not been established on the basis of the Commission's recommendations. Under article 76(9), the Secretary General is not authorized to review the information deposited by the coastal State.⁷⁸

On the basis of these considerations, it is submitted that the inclusion of the term 'permanently' in article 76(9) does not necessarily mean that the limits of the continental shelf become permanently fixed by the mere fact that the coastal State has deposited the required information. If other States do not protest outer limit lines that have not been established in conformity with article 76(8), such outer limit lines may eventually become permanently fixed.⁷⁹ For the coastal State, the inclusion of the reference to 'permanently' implies that once it has deposited information under article 76(9) it can no longer change these outer limit lines, apart from the case in which another State has successfully challenged the outer limit lines established by the coastal State.⁸⁰

Article 76(9) has to be interpreted in the light of article 76(10). The deposit of information under article 76(9) is without prejudice to the delimitation of the continental shelf between States.

Conclusion No. 14: The meaning and implications of the 'without prejudice' provision contained in article 76(10)

Article 76(10) of the Convention provides that the provisions of article 76 are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. Article 76(10) implies that the provisions of Article 76(8) and 76(9) concerning the final and binding and permanent nature of outer limits of the continental shelf may not be invoked against another State where the delimitation of the continental shelf between neighboring States is concerned.

Other States have to consider whether or not to accept the consideration of a submission of a coastal State involving a land or maritime dispute by the Commission taking into account article 76(10) of the Convention.

*Explanatory Note*⁸¹

Article 76(10) of the Convention provides 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. This provision confirms that article 76 is concerned with entitlement to and the establishment of the outer limits of the continental shelf and not the delimitation of overlapping entitlements between neighboring States, which is addressed in article 83.⁸² Article 76(8) of the Convention provides that the outer limits established by the coastal State on the basis of the recommendations of the Commission shall be final and binding. Article 76(9) requires the coastal State to submit information to the Secretary-General of the United Nations permanently describing the outer limits of its continental shelf. Article 76(10) precludes

⁷⁷ This explanatory note takes into account the discussion contained in section 6.8 of the First Report. Conclusion No. 13 and this Explanatory Note have to be read in light of, and are without prejudice to, the interpretation adopted with respect to the issues dealt with in Conclusion No.12.

⁷⁸ See also McDorman, note 59 at 316.

⁷⁹ See also *ibid.* 317.

⁸⁰ See also Conclusion No. 21.

⁸¹ This explanatory note takes into account the discussion contained in section 6.10 of the First Report.

⁸² See also *Virginia Commentary*, note 13 Vol. II, 883.

these provisions from being invoked by a coastal State to argue that any further change to such outer limit lines is excluded in areas of overlapping continental shelf entitlement.

The implications of article 76(10) are addressed in the Rules of Procedure of the CLCS. Rule 46(1) provides:

In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

Paragraph 5 of Annex I provides that the Commission will not consider and qualify a submission in a case where a land or maritime dispute exists unless all States that are parties to the dispute have given their prior consent. The submission before the Commission and its recommendations shall not prejudice the position of States which are parties to the land or maritime dispute.⁸³

In order to assess the implications of paragraph 5 of Annex I it has to be considered in the light of the relevant provisions of the Convention. In acting on the provisions contained in Annex I to the Rules of Procedure, States Parties to the Convention

shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.⁸⁴

As was discussed above, article 76(10) of the Convention has as a result that the provisions in articles 76(8) and 76(9) concerning the final and binding and permanent nature of outer limits of the continental shelf cannot be invoked against another State where the delimitation of the continental shelf is concerned. In the light of this provision, other States should in principle accept the consideration of a submission by a coastal State that raises issues of delimitation of the continental shelf, as its consideration and subsequent recommendations will not prejudice their rights.⁸⁵

Conclusion No. 15: Implications of the time limit for making a submission to the CLCS contained in article 4 of Annex II

Article 4 of Annex II to the Convention provides that a coastal State shall make a submission to the Commission as soon as possible but in any case within 10 years of the entry into force of the Convention for that State. This is an obligation resting on States Parties, which they have to fulfill in good faith. Article 4 of Annex II does not indicate the consequences of non-compliance with the 10-year limit contained in it.

Non-compliance with the time limit contained in article 4 of Annex II does not have any consequences for the entitlement of the coastal State over its continental shelf.

*Explanatory Note*⁸⁶

Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles it shall make a submission to the CLCS “as soon as possible but in any case within 10 years of the

⁸³ Rules of Procedure, Annex I, para. 5(b).

⁸⁴ LOS Convention, article 300. A number of States which are not a Party to the Convention have provided observations on submissions. Although article 300 is not directly applicable to these States, in exercising a right to comment on a submission they must be considered to bound by the same conditions for its exercise as States Parties to the Convention (see Vienna Convention, article 36).

⁸⁵ State practice in respect of Annex I points out that States in general have accepted the consideration of a submission by a coastal State involving the delimitation of the continental shelf between neighboring States. (for a discussion see C. Johnson *et al. Submissions to the CLCS in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the LOS Convention* (Paper presented at SLS and BIICL Symposium on the Law of the Sea, London, 22 and 23 March 2005, to be published in the proceedings of the Symposium).

⁸⁶ This explanatory note takes into account the discussion contained in section 6.11 of the First Report.

entry into force of this Convention for that State”.⁸⁷ This is an obligation resting on States Parties,⁸⁸ which they have to fulfill in good faith.⁸⁹ If a State intends to establish the outer limit of its continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention, it has to comply with the 10-year time limit.⁹⁰ The requirement that a coastal State has to make a submission within 10 years of the entry into force of the Convention for that State has been considered by the Meeting of States parties to the Convention. Since 1994, there had been a gradual realization of the problems faced by especially developing States in complying with this requirement.⁹¹ To address this issue, the Meeting took a decision on 29 May 2001, which provides that for States parties for which the Convention entered into force before 13 May 1999, the 10-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on that date.⁹² It was furthermore decided to keep the general ability of States to fulfill the requirements of article 4 of Annex II under review.⁹³

Article 4 of Annex II does not spell out what consequences attach to non-compliance with the 10-year limit contained in it. Non-compliance with this time limit does not have any consequences for the entitlement of the coastal State over its continental shelf.⁹⁴ The absence of outer limit lines could leave considerable doubt about the exact extent of the continental shelf in certain cases.⁹⁵

Conclusion No. 16: The meaning of the term ‘State’ in article 4 of Annex II

Article 4 of Annex II to the Convention provides that a coastal State shall make a submission ‘as soon as possible but in any case within 10 years of the entry into force of this Convention for that State’. Although article 4 does not explicitly refer to a coastal State Party to the Convention, the right to make a submission to the CLCS, and the concomitant right to establish final and binding outer limits on the basis of the recommendations of the Commission, only exist for States Parties to the Convention.

*Explanatory Note*⁹⁶

Article 4 of Annex II to the Convention provides that a coastal State shall make a submission ‘as soon as possible but in any case within 10 years of the entry into force of this Convention for that State’. The question has been raised whether the reference to ‘coastal State’ only concerns States Parties to the Convention or whether a State that is not a Party to the Convention also has the right to make a submission to the Commission.⁹⁷

Rights under a treaty can be accorded to non-parties by the Parties to the treaty.⁹⁸ Such a right has to be stated in a sufficiently clear manner and there has to be an intention on the part of the States that have drawn up the instrument concerned to accord a right, and an acceptance of the right by the third

⁸⁷ Convention, Annex II, article 4.

⁸⁸ See also Nelson, note 34 at 1248-1249; Smith and Taft, note 13 at 21-22.

⁸⁹ Convention, article 300.

⁹⁰ Paragraph 3 of Annex I to the Rules of Procedure of the CLCS implies that in certain instances the 10-year time limit becomes inoperative.

⁹¹ See e.g. *Decision regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea* (Doc. SPLOS/72 of 29 May 2001), preamble.

⁹² *Ibid.*, para. (a).

⁹³ *Ibid.*, para. (b).

⁹⁴ See further Conclusion No. 1.

⁹⁵ *Ibid.*

⁹⁶ This explanatory note takes into account the discussion contained in section 6.12 of the First Report.

⁹⁷ See e.g. *Letter Dated 12 March 1998 from the Chairman of the Commission on the Limits of the Continental Shelf Addressed to the President of the Eighth Meeting of States Parties* (Doc. SPLOS/26 of 12 March 1998), para. 5). The Meeting of States Parties considered this question during its Eighth Meeting but refrained from answering it (see *Report of the Eighth Meeting of States Parties* (Doc. SPLOS/31 of 4 June 1998) 12, para. 52).

⁹⁸ See Vienna Convention, article 36.

State. As was observed by the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case:

It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.⁹⁹

The language of article 4 of Annex II indicates that the time frame for the making of a submission is linked to the date of entry into force of the Convention for a State.¹⁰⁰ This suggests that it was not intended to accord this right to States that are not parties to the Convention.¹⁰¹ The language of article 4 in any case does not seem to meet the criteria set out by the Permanent Court in the *Free Zones* case.

The drafting history of the Convention provides support for the interpretation that article 4 of its Annex II was not intended to accord a right to third States. The acceptance of the compromise concerning the extent of the continental shelf in article 76 was based on the inclusion in the Convention of article 82 on revenue sharing in respect of the continental shelf beyond 200 nautical miles.¹⁰² Article 82 has not created an obligation for third States.¹⁰³ It should not be presumed that it was intended to accord States not parties to the Convention certain rights without imposing at the same time the concomitant obligations.

Conclusion No. 17: The implications of the obligation to make a new or revised submission in case of disagreement by the coastal State with the recommendations of the Commission contained in article 8 of Annex II

Article 8 of Annex II to the Convention provides that the coastal State, in the case of disagreement with the recommendations of the Commission shall make a new or revised submission. The rules generally applicable to submissions are also applicable to a new or revised submission by the coastal State.

If a coastal State is considering making a new or revised submission, it has to consider in good faith the recommendations of the Commission. The coastal State is to decide the consequences of such a consideration for its new or revised submission.

The Convention does not indicate how a continued disagreement between a coastal State and the Commission is to be resolved. A coastal State might establish the outer limit lines of its continental shelf in accordance with the information contained in its submission. In such a case the outer limits will not have been established in conformity with article 76(8) of the Convention and this is a matter that may be raised by other States Parties under Part XV of the Convention. In assessing the implications of a disagreement between a coastal State and the Commission in that context, the considerations set out in Conclusion No. 9 are relevant.

⁹⁹ [1932] *Permanent Court of International Justice, Series A/B* No. 46, at 147.

¹⁰⁰ As is observed by De Marffy Mantuano: '[l']adjectif démonstratif «cet» renvoie à l'Etat côtier mentionné au début de la phrase, établissant ainsi le lien entre l'Etat côtier et l'Etat partie' (De Marffy Mantuano, note 6 at 407).

¹⁰¹ A number of authors have suggested that it might be desirable for the Commission to entertain submissions by third States, *inter alia* because this would create certainty about the limits between areas under national jurisdiction and the Area (see T.A. Clingan, Jr. "The Law of the Sea in Prospective: Problems of States not Parties to the Law of the Sea Treaty" (1987) 30 *German Yearbook of International Law* 101-119 at 112; S. Karagiannis "Observations sur la Commission des Limites du Plateau Continental" (1994) 8 *Espaces et Ressources Maritimes* 163-194 at 181, note 62; McDorman, note 59 at 303-304.

¹⁰² See *e.g.* *Virginia Commentary*, note 13, Vol. II, 932.

¹⁰³ Article 35 of the Vienna Convention provides:

An obligation arises for a third State from a provision of a treaty if the Parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts the obligation in writing.

*Explanatory Note*¹⁰⁴

Article 8 of Annex II to the Convention provides that the coastal State, in the case of disagreement with the recommendation of the Commission shall make a new or revised submission. The rules generally applicable to submissions are also applicable to a new or revised submission. Article 8 of Annex II is the only provision referring to 'a new or revised submission'. Following a new or revised submission, the CLCS will consider it and issue its recommendations to the coastal State, which can either agree with the recommendations or remain in disagreement. In the latter case, the coastal State can again avail itself of its right to make a new or revised submission. Although this process can in theory continue without end, it is to be expected that in such a case it may emerge that the disagreement between the coastal State and the CLCS cannot be resolved already after the first revised or new submission.

The Convention does not indicate how such a difference is to be resolved. The coastal State is to fulfill the obligations assumed under article 76 of the Convention in good faith.¹⁰⁵ If a coastal State is considering making a new or revised submission, it has to consider in good faith the recommendations of the Commission. The coastal State is to decide the consequences of such a consideration for its new or revised submission. A coastal State may conclude not to revise the outer limit lines or their justification contained in its original submission and set out the reasons why it does not bring them in line with the recommendations of the Commission. An obligation for the coastal State to accept the recommendations of the Commission would make the recommendations binding on the coastal State, an effect that is not envisaged under the Convention. The Commission is not obliged to accept the outer limit lines contained in a new or revised submission if it considers that these are not established in accordance with article 76. The dispute settlement procedures entailing binding decisions under Part XV of the Convention are not available to resolve such a difference. The CLCS does not have standing to be a party to such procedures.¹⁰⁶

Legal writings have presented two views concerning the implications of a continued disagreement between a coastal State and the Commission. Some authors have suggested that the process involving the Commission and the coastal State could go on indefinitely.¹⁰⁷ Other authors have suggested that in the case of a continued difference between the Commission and the coastal State, the latter might eventually establish the outer limits of its continental shelf in accordance with its submission.¹⁰⁸ However, as is pointed out by Caflisch and Treves, in this case the outer limits will not be opposable to other States.¹⁰⁹ Article 76(8) only provides that outer limit lines established on the basis of the recommendations of the Commission shall be final and binding.¹¹⁰ The article does not spell out any other consequences in a case where the outer limit of the continental shelf has not been established on the basis of the recommendations of the Commission. Outer limit lines, which have not been established on the basis of the recommendations of the Commission, may not as easily attract international recognition as outer limit lines established on the basis of such recommendations.¹¹¹

¹⁰⁴ This explanatory note takes into account the discussion contained in sections 6.6 and 6.13.2 of the First Report.

¹⁰⁵ Convention, article 300.

¹⁰⁶ See further Conclusion No. 20.

¹⁰⁷ See e.g. McDorman, note 6 at 178; McDorman, note 59 at 306; Nelson, note 34 at 1239; Smith and Taft, note 13 at 20.

¹⁰⁸ See L.C. Caflisch "The Settlement of Disputes relating to Activities in the International Seabed Area" in C.L. Rozakis and C.A. Stephanou (eds) (Elsevier Science Publishers B.V., Amsterdam: 1983) 303-334 at 324; Treves, note 19 at 438; Y. Yokota "The Boundary between Deep Seabed and Continental Shelf" in *The Frontier of the Seas; The Problems of Delimitation* (The Ocean Association of Japan, Tokyo: 1981) 36-38 at 37.

¹⁰⁹ See also L. Caflisch "Les Zones Maritimes sous Jurisdiction Nationale, leurs Limites et leur Délimitation" in D. Bardonnet and M. Virally *Le Nouveau Droit International de la Mer* (Éditions A. Pedone, Paris: 1983) 35-116 at 106; Treves note 19 at 438.

¹¹⁰ In addition, article 7 of Annex II provides that coastal States shall establish the limits of the continental shelf in conformity with article 76(8).

¹¹¹ See also Treves, note 19 at 438.

The suggestion that the coastal State might establish outer limits that are not based on recommendations of the Commission should not be taken to imply that the coastal State is not bound by its other obligations in respect of the establishment of the outer limit of its continental shelf under article 76 of the Convention. This especially concerns article 76(2) which provides that the continental shelf *shall* not extend beyond the limits provided for in paragraphs 4 to 6 of article 76.

Where the outer limits of the continental shelf have not been established in conformity with article 76(8), as is required by article 7 of Annex II to the Convention, other States may raise this matter under Part XV of the Convention.¹¹² In such a case, in assessing the implications of a disagreement between a coastal State and the Commission, the considerations set out in Conclusion No. 9 are relevant.

Conclusion No. 18: The meaning of the term 'reasonable time' contained in article 8 of Annex II

Article 8 of Annex II to the Convention provides that the coastal State, in the case of disagreement with the recommendations of the Commission shall make a new or revised submission within a reasonable time. What constitutes a reasonable time will depend on an assessment of the circumstances of the particular case. Article 8 does not indicate the consequences of non-compliance with the requirement to make a new or revised submission within a reasonable time. Similar considerations as set out in Conclusion No. 15 would seem to apply.

*Explanatory Note*¹¹³

Article 8 of Annex II to the Convention provides that in the case of disagreement with the recommendations of the Commission the coastal State shall make a new or revised submission to the Commission within a reasonable time. What constitutes a reasonable time will depend on an assessment of the circumstances of the particular case. For instance, a reasonable time may be a considerable period of time if the recommendations of the Commission imply that a coastal State will have to gather further data on its continental shelf.

Just as in the case for compliance with the time limits in article 4 of Annex II to the Convention, article 8 does not indicate what consequences attach to non-compliance with the requirement to make a new or revised submission within a reasonable time. Similar considerations would seem to apply to both cases.¹¹⁴

Conclusion No. 19: Information available to States other than the State or States making a submission in respect of a submission, its consideration by the Commission and recommendations by the Commission

The Convention only imposes an obligation on the coastal State, under articles 76(9) and 84(2), to make public information on the outer limits of the continental shelf. The Convention does not address the publication of information concerning the submission of a coastal State or the recommendations issued by the Commission.

Article 5 of Annex II to the Convention provides that a coastal State which has made a submission may send its representatives to participate in the relevant proceedings of the Commission. No such right is accorded to other States.

Additional information concerning the submission by a coastal State, its consideration by the Commission and the recommendations of the Commission, may be of interest to other States. Such information might assist other States to assess if a coastal State has established the outer limits of its continental shelf in accordance with article 76. Such information may also assist other States in preparing their own submissions to the CLCS.

A number of means are available to guarantee that these interests of other States are safeguarded. For instance, article 9 of Annex II provides that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States. This provision of-

¹¹² See further Conclusions No. 20 and No. 21.

¹¹³ This explanatory note takes into account the discussion contained in section 6.13.2 of the First Report.

¹¹⁴ See further Conclusion No. 15.

fers the possibility of requiring the coastal State making a submission to make available certain information on its proposed outer limits. Such requirements have to be proportional to the end they intend to accomplish and have to be in accordance with the Convention.

*Explanatory Note*¹¹⁵

Article 76(8) of the Convention provides that the coastal State shall submit information on the limits of the continental shelf beyond 200 nautical miles to the Commission. The recommendations of the Commission shall be submitted to the coastal State which made the submission and the Secretary-General of the United Nations.¹¹⁶ The Convention further requires the coastal State to deposit charts and the relevant information on the outer limits based on the recommendations of the Commission with the Secretary-General of the United Nations and the Secretary-General of the ISBA.¹¹⁷ The coastal State and the Secretary-General of the United Nations shall give due publicity to the information concerned.¹¹⁸ The Convention does not require that any information on a submission, its consideration by the CLCS, or the recommendations made by the CLCS upon a submission has to be made public. Article 5 of Annex II to the Convention provides that a coastal State which has made a submission may send its representatives to participate in the relevant proceedings of the Commission. No such right is accorded to other States.

The lack of detailed information on submissions to and recommendations of the Commission may make it difficult for other States to establish whether the coastal State has established the outer limits of its continental shelf on the basis of the recommendations of the CLCS.¹¹⁹ States preparing a submission might benefit from information on the consideration of earlier submissions by the Commission. Such information can provide indications on the amount of data the Commission requires and how it has constructed specific data requirements under provisions of article 76.

A number of means are available to guarantee that these interest of other States are safeguarded. Article 9 of Annex II provides that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States. This provision offers the possibility of requiring a coastal State making a submission to make available certain information on its proposed outer limits. Rule 51 of Rules of Procedure the CLCS requires the Secretary-General of the United Nations to make public the executive summary of a submission after its receipt.¹²⁰ The circulation of this material gives other States an indication of the provisions of article 76 which have been applied in connection with a submission by a coastal State. Rule 46 and Annex I to the Rules of Procedure establish rights and obligations of the submitting State and other States in respect of land and maritime disputes.¹²¹

The Commission has also addressed potential concerns of States having an interest in determining whether the coastal State had established the outer limits of its continental shelf on the basis of the recommendations of the Commission through an amendment of its Rules of Procedure. The present Rule 54(3) provides that upon giving due publicity to the charts and relevant information permanently describing the outer limits of the continental shelf deposited by the coastal State, the Secretary-General of the United Nations shall also give due publicity to the recommendations of the Commission which in the view of the Commission are related to those limits.

The Convention does not provide detailed indications on the kind of information a coastal State is to include in a submission to the CLCS. The CLCS has addressed this issue in its Scientific and Technical Guidelines. The Guidelines provide that they aim to clarify the scope and depth of admissible scientific

¹¹⁵ This explanatory note takes into account the discussion contained in section 5 of the First Report.

¹¹⁶ Convention, article 76(8) and Annex II, article 6(3).

¹¹⁷ Convention, articles 76(9) and 84(2).

¹¹⁸ *Ibid.*

¹¹⁹ Where a dispute exists between a coastal State and another State concerning the legality of outer limit lines and this is submitted to third party dispute settlement, the coastal State cannot invoke the confidentiality of data or other information to have a case dismissed or the issue decided in its favor (see further First Report, section 5.4).

¹²⁰ Rules on the format of the executive summary of submissions are contained in paragraph 9.1.4 of the Scientific and Technical Guidelines.

¹²¹ See further Conclusion No. 14.

and technical evidence to be examined by the Commission during its consideration of submissions. This contributes to making States aware of the kind of information the CLCS expects to be included in a submission and can prevent the collection of unnecessary data or the need to gather additional information after the initial submission has been made. The consideration of a submission by the Commission may reveal that the Guidelines require further clarification or elaboration. If such a case presents itself, the CLCS can decide to issue an addendum or revision to the Guidelines.

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

Another possibility for a coastal State to obtain information in connection with the preparation of a submission is provided by Article 3(1)(b) of Annex II to the Convention. This article provides that a coastal State can request scientific and technical advice during the preparation of the data it is to submit to the Commission.¹²²

Conclusion No. 20: The question of recourse to Part XV of the Convention concerning issues arising under article 76

Disputes concerning the interpretation or application of article 76 between States Parties to the Convention can be settled by recourse to Part XV of the Convention. Other States Parties can be considered to have a legal interest in the definition of the outer limits of the continental shelf by the coastal State. As is discussed in Conclusion No. 21, the procedure for establishing the outer limits of the continental shelf under article 76 places certain restrictions on the matters that can be addressed under the procedures of Part XV of the Convention.

*Explanatory Note*¹²³

Part XV of the Convention provides that States Parties shall settle any dispute between them concerning the interpretation or application of the Convention by peaceful means.¹²⁴ Section 1 of Part XV, which is concerned with dispute settlement mechanisms other than procedures entailing binding decisions, is applicable to any dispute between States Parties concerning the interpretation or application of the Convention. These mechanisms, which are available to States Parties,¹²⁵ provide a first avenue for settling disputes concerning the interpretation or application of article 76.

Where no settlement has been reached by recourse to section 1 of Part XV of the Convention, any dispute concerning the interpretation or application of the Convention can be submitted at the request of any party to the dispute to compulsory dispute settlement.¹²⁶ Section 3 of Part XV establishes certain limitations on and exceptions to the applicability of compulsory dispute settlement procedures. Article 76 is not covered by these limitations and exceptions.¹²⁷

Some publications have expressed doubt about whether States have the right to challenge the claim of another State to an area of continental shelf beyond 200 nautical miles in the framework of the proce-

¹²² See also rule 55 of the Rules of Procedure of the Commission, which lays down the modalities of such advice to a coastal State.

¹²³ This explanatory note takes into account the discussion contained in section 4.2 of the First Report.

¹²⁴ Convention, article 279.

¹²⁵ An exception in this respect, which is not relevant for the present discussion, is contained in article 285 of the Convention.

¹²⁶ Convention, article 286.

¹²⁷ See also McDorman, note 59 at 318. Disputes concerning the outer limits of maritime zones will be excluded from Section 2 of Part XV to the Convention to the extent they require the prior resolution of matters not covered by that Part, such as a dispute concerning sovereignty over land territory.

dures established in Part XV of the Convention.¹²⁸ A reason that has been advanced to support this position is that recourse to Part XV would serve to protect the collective interest in the Area and that this kind of *actio popularis* has not been provided for by the Convention or any other instrument.¹²⁹ However, although the Area and its resources are the common heritage of mankind as a whole, on whose behalf the ISBA shall act,¹³⁰ States individually have an interest in the exploration for and exploitation of the resources of the Area. In addition, States can exercise certain high seas freedoms in the sea-bed and subsoil beyond the limits of national jurisdiction as specified in article 87 of the Convention. The existence of this interest in the resources of the Area and these high seas freedoms can be considered to give individual States a legal interest in the definition of the outer limits of the continental shelf.¹³¹ A State may consider that these limits have not been established in accordance with the substantive or procedural requirements of article 76. This would constitute a dispute for the purposes of article 279 of the Convention.

The dispute settlement mechanisms entailing binding decisions of Part XV are only open to entities other than States Parties as specifically provided for in the Convention.¹³² There is no explicit reference to the CLCS in any provision of the Convention addressing the access to these mechanisms. However, article 20(2) of Annex VI to the Convention, containing the Statute of the ITLOS provides:

The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

It is not clear whether this provision also covers an agreement between the CLCS and a State Party conferring jurisdiction on the Tribunal to decide on the interpretation or application of a provision of the Convention.¹³³ An observation on article 20(2) of the *Virginia Commentary* suggests that this may not be the case.¹³⁴

Apart from the States Parties to the Convention, the ISBA has an interest in the extent of the Area.¹³⁵ The Convention defines the Area as the sea-bed and ocean floor and its sub-soil beyond the limits of national jurisdiction. The establishment of these limits in accordance with Part VI of the Convention is the responsibility of the coastal State and does not involve the ISBA.¹³⁶ This implies that the ISBA cannot be a party to proceedings concerning a dispute over the outer limits of the continental shelf.¹³⁷ The ab-

¹²⁸ See e.g. Karagiannis, note 101 at 189; *The Law of the Sea*, note 13 at 29, para. 87. For a discussion of this issue see also McDorman, note 59 at 317-318. Other authors hold that article 76 is in principle not excluded from the procedures of Part XV of the Convention (see e.g. D.H. Anderson *Maritime Boundaries and Limits: Some Basic Legal Principles* (paper presented at the Conference “Accuracies and Uncertainties in Maritime Boundaries and Outer Limits”, Monaco 18 and 19 October 2001) at 8; Brown, note 19 at 32).

¹²⁹ See Karagiannis, note 101 at 189; see also *Virginia Commentary*, note 13 Vol. VI, 110, note 14.

¹³⁰ Convention, articles 136 and 137(2).

¹³¹ As has been observed by the ICJ:

it may be said that a legal right or interest need not necessarily relate to anything material or “tangible”, and can be infringed even though no prejudice of a material kind has been suffered. [...] [S]uch rights or interest, in order to exist must be clearly vested in those who claim them, by some text or instrument or rule of law; (*South West Africa* cases (Ethiopia v. South Africa; Liberia v. South Africa) second phase, Judgment of 18 July 1966; [1966] ICJ Reports 3 at para. 44).

¹³² Convention, article 291(2).

¹³³ In any case, it can be questioned whether the participation of the CLCS as a party in proceedings before a court or tribunal would be either desirable or practically feasible in the light of its nature and functions.

¹³⁴ *Virginia Commentary*, note 13 Vol. V, 375. The Commentary further observes that this interpretation is confirmed by the legislative history (see *ibid.*, 375 *et seq.*).

¹³⁵ The Area and its resources are the common heritage of mankind, on whose behalf the ISBA shall act (Convention, articles 136 and 137).

¹³⁶ *Ibid.*, articles 1(1)(1) and 134.

¹³⁷ See *supra* note 131; see also the dissenting opinion of Arbitrator Weil in the *Delimitation of Maritime Areas between Canada and France Arbitration* ((1992) 31 ILM 1215, para. 42).

sence of a role for the ISBA is confirmed by the fact that the Convention does not give it rights to the Area as such, but charges it to organize and control activities in the Area.¹³⁸

As to the Seabed Disputes Chamber of the ITLOS it has been observed that:

since its jurisdiction is confined to disputes with respect to activities in the Area (Article 187, preamble), it will most probably be beyond its competence to give an advisory opinion on matters relating to the establishment of the limits of the outer continental shelf.¹³⁹

Conclusion No. 21: The relationship between dispute settlement mechanisms entailing binding decisions and the procedure involving the CLCS

A court or tribunal is competent to exercise jurisdiction in a contentious case between two States in which there is a dispute concerning the interpretation or application of the provisions of the Convention relating to the outer limits of the continental shelf by a coastal State, which also involves acts of the CLCS. A court or tribunal is competent to establish whether the Commission has acted within the limits of its competence or not.

*Explanatory Note*¹⁴⁰

A court or tribunal seized of a dispute between States Parties to the Convention concerning the interpretation or application of article 76 will have to consider how the procedure involving the CLCS may impact on its jurisdiction.¹⁴¹ As a general rule, a court or tribunal is not excluded from exercising its jurisdiction in contentious case between two States in which the validity of a decision of an international body is being impugned.¹⁴²

The rules that generally apply to the exercise of jurisdiction in a contentious case involving the incidental consideration of acts by an international body apply to a case involving the interpretation or application of article 76. A court or tribunal is competent to establish whether or not the Commission has

¹³⁸ Convention, articles 137 and 157; see also S. Mahmoudi *The Law of Deep Sea-Bed Mining* (Almqvist and Wiksell International, Stockholm: 1987) 77; L.D.M. Nelson "Claims to the Continental Shelf beyond the 200-Mile Limit" in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber Amicorum Günther Jaenicke – Zum 85 Geburtstag* (Springer Verlag, Berlin: 1998) 573-588 at 575; *Virginia Commentary*, Vol. VI, p. 85.

¹³⁹ Nelson, note 34 at 1251 (footnote omitted); see also Caflisch note 108 at 324-325. Under article 191 of the Convention, the Seabed Disputes Chamber shall give advisory opinions at the request of Assembly or the Council of the ISBA. In this case a similar conclusion would seem to apply as in respect of article 187 (see further *Virginia Commentary*, note 13 Vol. VI, 644). For the view that the Seabed Disputes Chamber has jurisdiction to consider issues concerning the limits of the Area see Yokota, note 108 at 37.

It has been suggested that the Authority might cooperate with the CLCS under article 3(2) of Annex II to the Convention, which provides that the Commission may cooperate with competent international organizations with a view to exchanging scientific and technical information which might be of assistance in discharging the Commission's responsibilities (*Virginia Commentary*, note 13, Vol. VI, 85). Such cooperation is especially necessary in order to avoid that the Authority may grant an area to a contractor, which later is found to be wholly or partly within the national jurisdiction of a coastal State (*ibid.*).

¹⁴⁰ This explanatory note takes into account the discussion contained in section 4.3 of the First Report.

¹⁴¹ There are a number of issues of interpretation or application of article 76 which do not raise this question. For instance, the Commission is not competent to indicate whether a coastal State has established the outer limits of the continental shelf on the basis of its recommendations.

¹⁴² For a discussion of this issue see Kaikobad, note 55 at 69 *et seq.* It could also be argued that the recommendations of the Commission upon a submission by a coastal State are not decisions which are binding upon that State or other States Parties to the Convention. Only the coastal State is competent to decide what follow-up it will give to the recommendations of the Commission and to establish the outer limits of its continental shelf. This indicates that, also in cases in which the coastal State has established the limits of its continental shelf on the basis of the recommendations of the Commission, it is the coastal State which is responsible for the interpretation and application of the relevant provisions of article 76. A dispute concerning the interpretation or application of article 76 would thus constitute a dispute between the coastal State and the other State(s) concerned.

overstepped the bounds of its competence as defined in the Convention.¹⁴³ A court or tribunal may conclude that the Commission has acted within the limits of its competence or *ultra vires*, or that an act of the Commission is invalid for other reasons, such as procedural irregularities or material error.

Conclusion No. 22: The consequences of a judgment concerning article 76

A court or tribunal may, in a judgment on a dispute between States Parties to the Convention, find that a recommendation or another act of the CLCS is invalid. The CLCS will not have been a party to the proceedings before the court or tribunal, will not be bound by a judgment and cannot revise its recommendations *proprio motu*. The outer limits of the continental shelf established by the coastal State on the basis of invalid recommendations will not be opposable to other States. In such a situation, a coastal State might consider making a new or revised submission to the CLCS.

The Commission should take a judgment bearing on its acts into account in the future in order to prevent that its acts may be challenged on the same grounds as those indicated in an earlier judgment.

*Explanatory Note*¹⁴⁴

As was noted in Conclusion No. 21 a court or tribunal, in dealing with a dispute between States Parties to the Convention, may find that a recommendation or another act of the CLCS is invalid. The CLCS will not have been a party to the proceedings before the court or tribunal and will not be bound by its judgment.¹⁴⁵ Where a recommendation is concerned, the Commission cannot revise its recommendations *proprio motu*. The outer limits of the continental shelf established by the coastal State on the basis of invalid recommendations will not be opposable to other States. One way to deal with this issue would be for the coastal State to make a new or revised submission to the CLCS. A tribunal that has ruled on an issue will have indicated the reasons for its decision. In making its recommendations on the new or revised submission the Commission should take into consideration the reasons indicated by the Court.

Although the CLCS is not formally bound by a judgment, it would seem to be appropriate for the Commission to take it into account in the consideration of its future work. Otherwise, the outer limits established on the basis of the recommendations of the Commission are open to challenge on the same grounds as those indicated in that earlier judgment.¹⁴⁶

3. CONCLUDING REMARKS

This Second Report of the Committee finalizes the work of the Committee on the rules of the Convention of relevance to the establishment of the outer limits of the continental shelf. The Committee proposes to continue its studies on other issues within its mandate, including questions concerning the interpretation and application of article 82 of the Convention.¹⁴⁷

¹⁴³ See e.g. M. Bos, "The Interpretation of Decisions of International Organizations" (1981) 28 *Netherlands International Law Review* 1-13 at 7. On the role of the international judiciary in reviewing decisions of international bodies generally see Kaikobad, note 55.

¹⁴⁴ This explanatory note takes into account the discussion contained in section 4.5 of the First Report.

¹⁴⁵ See also Kaikobad, note 55 at 45.

¹⁴⁶ Under Part XV of the Convention a court or tribunal is to apply the Convention and other rules of international law not incompatible with it (Convention, article 293(1)). An issue of interpretation should in principle not vary between cases concerned with the same points of law (see also R.Y. Jennings and A. Watts (eds) *Oppenheim's International Law, 9th edition* (London, Longman: 1992) 1268, note 5).

¹⁴⁷ The future work of the Committee will be discussed at the 72nd Conference of the ILA in Toronto in June 2006.