

**The Exercise of Coastal State Rights on the Outer Continental Shelf pending
establishment of its Outer Limit**

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Introduction

Article 76(1) of the UN Convention on the Law of the Sea (hereafter UNCLOS)¹ provides that the continental shelf of a coastal State comprises the seabed and subsoil of the submarine area that extends throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to 200 miles from the baselines where the outer edge of the continental margin does not extend to that distance.² Paragraphs 4-6 of Article 76 lay down criteria for determining the outer edge of the continental margin for the purposes of UNCLOS where the margin extends beyond 200 miles from the baseline. In brief, these criteria are that the outer edge is the point where the thickness of the sedimentary rocks is at least one per cent of the distance from that point to the foot of the continental slope, or a point 60 miles from the foot of the slope. In each of these cases the outer edge must be within 350 miles from the baselines or within 100 miles from the 2,500 isobath. Article 76(8) and Annex II of UNCLOS require a State wishing to establish the limits of its continental shelf beyond 200 miles from the baseline to make a submission to the Commission on the Limits of the Continental Shelf (hereafter Commission). The Commission shall then make a recommendation to that State. Limits established on the basis of a Commission recommendation are ‘final and binding’. One of the reasons for requiring States to make submissions to the Commission is to try to ensure that they comply with the complex criteria of Article 74(4)-(6) when establishing the outer limit of their continental shelves beyond 200 miles from the baseline.

The continental shelf beyond 200 miles from the baseline is often referred to as the outer continental shelf, and will be so referred to for convenience in this paper. A coastal State has

¹ 1833 UNTS 1.

² All references to miles in this paper are to nautical miles.

a number of rights on its outer continental shelf. They include the exploration and exploitation of mineral resources and sedentary species, the authorisation of scientific research, the erection of artificial islands, installations and structures, the regulation of cables and pipelines laid by other States, and, arguably, the establishment of marine protected areas. The detailed content of each of these rights is discussed in the following sections of this paper.

As of 1 October 2012 61 submissions to establish the outer limit of the continental shelf beyond 200 miles had been made to the Commission. Preliminary information had been given of a further 39 planned submissions.³ In addition, it is likely that a few more submissions will be made by States for which the deadline for submissions of 10 years from ratification of UNCLOS has not yet expired. Thus, the total number of submissions is likely eventually to exceed 100. The Commission has so far issued 18 recommendations, including three in 2011 and four in 2012.⁴ Even taking account of the fact that from 2013 the Commission will be meeting more frequently,⁵ it is likely that a considerable number of coastal States will have to wait several years before receiving a recommendation from the Commission. Indeed, there are currently ? States that have not yet received a recommendation from the Commission even though it is five or more years since they made their submission. If States disagree with the Commission's recommendation (as almost inevitably some will), they must make a revised submission to the Commission.⁶ That will further prolong the period before the outer limit of the continental shelf can be definitively established.

This scenario raises the question of whether a coastal State may exercise its rights on the outer continental shelf before its outer limit has been established in accordance with the procedure described above. A coastal State's right to an outer continental shelf is not dependent on a recommendation from the Commission but exists independently of the submission and recommendation process. That follows from Article 77(3) of UNCLOS, which provides that the rights of a coastal State over its continental shelf 'do not depend on occupation, effective or notional, or on any express proclamation.' This accords with the

³ Information on the UN website at http://www.un.org/depts/los/clcs_new/clcs_home.htm.

⁴ Ibid.

⁵ Progress of Work in the Commission on the Limits of the Continental Shelf. Statement by the Chairman, UN Doc. CLCS/76 5 September 2012, paras 10-17, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/498/91/PDF/N1249891.pdf?OpenElement> <6 November 2012>.

⁶ UNCLOS, Annex II, Art. 8.

statement of the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases* that a coastal State's right to a continental shelf 'exist[s] *ipso facto* and *ab initio* by of its sovereignty over the land.'⁷ Article 77(3) does not distinguish between the inner and outer continental shelf, so it must be assumed to apply equally to the outer continental shelf.⁸ Thus, in theory a coastal State should be entitled to exercise the full range of its continental shelf rights, outlined above, on the outer continental shelf pending establishment of its outer limit in accordance with the procedure laid down in Article 76 and Annex II of UNCLOS. However, if a coastal State does so, it risks exercising its rights in an area that may subsequently, following the Commission's recommendation, turn out not to be a part of its outer continental shelf but instead part of the International Seabed Area (the Area) or possibly the outer continental shelf of another State, thereby violating the rights of other States or the International Seabed Authority (ISA). UNCLOS does not suggest how this potential dilemma should be resolved. So far there appears to have been little discussion of this issue in the literature.⁹

The aim of this paper is to attempt to explore the matter in detail and to address the dilemma posed by UNCLOS. To do so, it will consider each of the coastal State's continental shelf rights in turn and suggest the degree to which a coastal State may exercise those rights without violating international law. As will be seen, the position varies, depending on the right concerned. So as not to complicate the position unduly, the paper will assume that if part of what the coastal State considers to be its outer continental shelf turns out not to be so following a Commission recommendation, that area is part of the International Seabed Area, rather than possibly being another State's continental shelf.

2. The Exploration and Exploitation of Mineral Resources

⁷ *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 3 at 23.

⁸ Cf. the statement by the International Tribunal for the Law of the Sea (ITLOS) in the *Bangladesh/Myanmar* case that in accordance with Article 77 a coastal State 'exercises exclusive sovereign rights in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit': *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment of 14 March 2012, para 361, available at [add]. Likewise the arbitral tribunal in the *Barbados/Trinidad and Tobago* case stated that there is 'in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf': *Arbitration between Barbados and Trinidad and Tobago*, Decision of 11 April 2006, XXVII RIAA 147 at 208-9 (para. 213).

⁹ Owen raises the issue, but does not pursue it further: see D. Owen, p.45. No discussion in Cook and Carleton or Nordquist, Moore and Heidar.

A coastal State has sovereign rights for the purpose of exploring and exploiting the natural resources of its continental shelf, which include mineral and other non-living resources.¹⁰ Those rights are exclusive in the sense that no other State may explore or exploit those resources without the consent of the coastal State.¹¹ There has probably been no comprehensive global survey of the mineral resources of the outer continental shelf but they are likely to include hydrocarbons (oil and gas) and manganese nodules. [see Carleton book]

The question of whether a coastal State may exploit the mineral resources of its outer continental shelf pending the establishment of its outer limit in accordance with Article 76(8) and Annex II is in many ways analogous to the question of whether a coastal State may exploit the mineral resources of its continental shelf where the latter overlaps with the continental shelf of another State and no boundary to delimit the overlap has yet been agreed. This situation is addressed in Article 83(3) of UNCLOS, which provides that pending agreement on a continental shelf boundary, the States concerned shall make every effort ‘not to jeopardize or hamper the reaching’ of an agreement. In the *Guyana/Suriname* case the arbitral tribunal observed that this obligation is ‘an important aspect of the [Law of the Sea] Convention’s objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area’.¹² In the case of hydrocarbon exploration and exploitation, permissible unilateral actions would be those that ‘do not cause a physical change to the marine environment’, such as seismic exploration.¹³ Thus, it found that Guyana’s authorization of seismic testing in the disputed area was not a breach of Article 83(3), but that its authorization of exploratory drilling was.¹⁴ The tribunal’s views also accord with the order of the ICJ in the *Aegean Sea Continental Shelf* case not to prescribe provisional measures to prevent Turkey from engaging in seismic testing in an area of continental shelf that was also claimed by Greece because there was no risk of physical damage to the seabed, testing was of a transitory character, and no appropriation or other use of natural resources were involved.¹⁵

¹⁰ UNCLOS, Art. 77(1) and (4).

¹¹ UNCLOS, Art. 77(2).

¹² *Arbitration between Guyana/Suriname*, ? RIAA ?, para. 465. [complete]

¹³ *Ibid.*, para. 467.

¹⁴ This appears to be the conclusion that follows from the rather opaque wording of para. 482.

¹⁵ *Aegean Sea Continental Shelf case (Greece v. Turkey)*, Interim Measures of Protection [check], [1976] ICJ Rep. 3 at para. 30.

The above discussion would suggest that applying Article 83(3) by analogy, a coastal State should refrain from exploiting the mineral resources of its outer continental shelf pending the definitive determination of its outer limit, and also from any exploratory activity that involves drilling or the removal of resources (such as manganese nodules) from the seabed. Thus, the only exploratory activity that would seem permissible would be seismic and similar testing in the case of hydrocarbon resources, and prospecting in the case of manganese nodules.¹⁶ However, doubt on the correctness of this conclusion is cast by the *Bangladesh/Myanmar* case. In this case the ITLOS found that it was competent to delimit the boundary between the outer continental shelves of the two States, provided that each party did indeed have a continental shelf beyond 200 miles that overlapped with that of the other. At the time of the judgment Myanmar had made a submission to the Commission but had not received a recommendation, while Bangladesh had not made a submission. Nevertheless, the ITLOS found that each party did have an outer continental shelf because of the thickness of the sediment covering the bed of the Bay of Bengal, which meant that one of the criteria for an outer continental shelf under Article 76 was satisfied.¹⁷ The case therefore suggests that where there is good reason to believe that an area of seabed is outer continental shelf, a coastal State would be entitled to explore and exploit its resources pending the definitive establishment of its outer limit in accordance with UNCLOS. **[Is there any practice to support this?]** However, States should not perhaps be too ready to assume that a particular area is part of their continental shelf. Indeed, there have already been several occasions where the Commission has disagreed with a submitting State about whether particular areas are part of the outer continental shelf.¹⁸ Only where there is no real doubt over the location of the foot of the continental slope and/or the thickness of the sedimentary rocks would it be reasonable for States to assume that the area in question is part of their outer continental shelf. In relation to the thickness of sedimentary rocks criterion especially, in only a few places will the position be as clear-cut as in the Bay of Bengal. Where there is any doubt about the location of the foot of the slope or the thickness of the sedimentary rocks, and therefore doubt as to whether an area is outer continental shelf – and it should be noted that a coastal State would be well advised to limit its activities to the non-intrusive forms of exploration suggested above. In any case if there is any doubt as to the coastal State's title to the area in question, oil and mineral companies (at least those that are not owned by the coastal State) are unlikely

¹⁶ Under Part XI there is freedom of prospecting in the Area: see Nodule Regs Art 7 Sulphide Regs, Art 7

¹⁷ *Bangladesh/Myanmar* case, note 7 above, paras. 443-449.

¹⁸ See the Commission's recommendations made in respect of Australia and Russia [and others?]. The Commission's recommendations may be found at ??

to be prepared to engage in exploitation because they will not want to risk the security of their investment.

Where, however, a coastal State does exploit the mineral resources of an area that eventually turns out not to be part of its outer continental shelf but instead part of the Area, it will have breached Article 137 of UNCLOS, which provides that no State may exploit minerals in the Area other than in accordance with Part XI of UNCLOS. This raises the question of whether the ISA or another State could obtain an order of provisional measures to restrain a coastal State from exploiting mineral resources in an area of seabed that was believed might be part of the Area, pending a recommendation from Commission, in rather the same way that Greece sought to do in respect of Turkey's activities on the Aegean Sea continental shelf. Article 187(b)(i) provides that the Sea-Bed Disputes Chamber of the ITLOS has jurisdiction in respect of disputes between the ISA and a State party concerning acts by a State party alleged to be in violation of Part XI. This would seem to cover the situation under consideration here as the argument would be that the coastal State would be violating Article 137, which is found in Part XI. Likewise, the Chamber has jurisdiction under Article 187(a) in respect of disputes between two States parties concerning the application of Part XI. Article 25(1) provides that the Chamber has the power to prescribe provisional measures in accordance with Article 290. Thus, it would appear that both the ISA and another State could seek to obtain an order of provisional measures from the Sea-Bed Disputes Chamber to prevent a coastal State from exploiting mineral resources in an area of seabed that was believed to be part of the Area. Such an order could also be obtained in respect of the more intrusive forms of exploration.

Conversely, if the ISA or another State attempted to engage in intrusive exploration or exploitation in an area that a coastal State was absolutely convinced was part of its outer continental shelf, they would potentially be in breach of Article 77(2), which, as seen, provides that the exploration and exploitation of mineral resources may only take place with the consent of the coastal State. The coastal State would be able to seek an order of provisional measures under Article 290 of UNCLOS to restrain such exploration and exploitation.

Where a request is made to the Seabed Disputes Chamber or the ITLOS for an order of provisional measures, whether by the coastal State, another State or the ISA, and the

Chamber or the ITLOS is uncertain whether the area concerned is part of the coastal State's outer continental shelf or part of the Area, it would be well advised to make an order restraining all parties from engaging in exploration or exploitation.

3. The Exploitation of Sedentary Species

The natural resources of the continental shelf in respect of which a coastal State has sovereign rights of exploration and exploitation include sedentary species.¹⁹ The latter are defined as 'organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'²⁰ They include mussels, oysters, clams, various species of crustaceans, and some of organisms found around hydrothermal vents.²¹ If a coastal State exploits sedentary species in area which it presumes to be its outer continental shelf and that presumption proves eventually not to be correct, such exploitation of sedentary species will nevertheless still be justified, but on the basis of the high seas freedom of fishing rather than continental shelf rights. Provided that the coastal State has acted with 'due regard' for the high seas rights of other States and for rights with respect to activities in the Area, as required by Article 87(2) of UNCLOS, there will be no question of it violating the rights of other States or the ISA.

However, if a State attempts to regulate or prohibit the exploitation of sedentary species by other States in an area that turns out not to be part of its outer continental shelf, it will have violated the right of those States freely to fish on the high seas. It would seem, following the *Aegean Sea Continental Shelf* case (discussed above), that those other States would be able to obtain an order of provisional measures under Article 290 of UNCLOS to restrain the coastal State from attempting to regulate or prohibit the exploitation of sedentary species by other States pending a recommendation from the Commission. On the other hand, if the area in question does turn out to be part of the coastal State's outer continental shelf, other States exploiting the area would have violated the coastal State's rights, since, as pointed out above, under Article 77(2) of UNCLOS a coastal State's rights in respect of the natural resources of its continental shelf are exclusive and other States may not explore or exploit them without its

¹⁹ UNCLOS, Art. 77(4).

²⁰ Ibid.

²¹ As to what vent organisms may be sedentary species, see C. H. Allen(20??) 13 *Georgetown International Environmental Law Review* 618

express consent. It would seem that in such a situation a coastal State could also apply for provisional measures under Article 290 to prevent such exploitation. In the light of the *Bangladesh/Myanmar* case discussed above, it would seem that a court or tribunal faced with a request for provisional measures, whether from the coastal State or another State, ought to consider the likelihood of the area in question being part of a coastal State's outer continental shelf. If it considers that the area is almost certainly part of the coastal State's outer continental shelf, it should act in favour of the coastal State in deciding whether or not to make an order of provisional measures. If it is at all uncertain as to the legal status of the area in question, it would be well advised to make an order restraining the coastal State from attempting to regulate the exploitation of sedentary species.

The question of a coastal State seeking to prevent nationals of another State from fishing for sedentary species in an area that it believes to be its outer continental shelf, but in respect of which no recommendation has been made by the Commission, has arisen at least once in practice. In July 1994 Canada arrested two US vessels fishing for scallops on the Grand Banks more than 200 miles from the baselines. The USA protested Canada's action. However, the incident provides no real guidance on the point at issue here as the basis for the US protest was apparently that scallops are not a sedentary species.²² In any case UNCLOS was not in force at the time of the incident.

4. The Authorisation of Scientific Research

Under Article 246 of UNCLOS research 'on' the continental shelf requires the consent of the coastal State.²³ The latter must normally grant consent for pure research, but has a discretion as to whether to grant consent for applied research.²⁴ On the outer continental shelf, however, the coastal State must not withhold its consent for applied research outside those specific areas which it 'may at any time publicly designate as areas in which exploration or detailed exploratory operations focussed on those areas are occurring or will occur within a

²² The incident is discussed in J. M. Van Dyke, 'Modifying the 1982 Law of the Sea: New Initiatives on Governance of High Seas Fisheries Resources: The Straddling Stocks Negotiations' (1995) 10 IJMC 219 at 221-2.

²³ As to what is meant by research 'on' the continental shelf, see ??

²⁴ UNCLOS does not use the terms 'pure' and 'applied research', but they are often used by commentators as a convenient shorthand.

reasonable period of time.’²⁵ A coastal State’s right to regulate research on its outer continental shelf is therefore intimately linked with its right to explore and exploit the natural resources of its outer continental shelf. It follows from what was said above that a coastal State should only attempt to exercise its powers under Article 246(5) in areas where there can be virtually no doubt that they are part of the coastal State’s outer continental shelf. Otherwise, a coastal State will risk violating other States’ freedom of research on the high seas and in the Area under Articles 87 and 143(3), respectively. The discussion in section 2 above about applying for provisional measures will apply *mutatis mutandis*.

5. The Erection of Artificial Islands and Installations

[to be added]

6. The Regulation of Cables and Pipelines laid by Other States

Under Article 79(1) other States have the right to lay cables and pipelines on a coastal State’s continental shelf. Article 79(2) provides that the coastal State may not impede the laying or maintenance of such cables and pipelines, subject to its right to take ‘reasonable measures’ for the exploration of the shelf and the exploitation of its natural resources (which, it must be remembered, include sedentary species) and the prevention and control of pollution from pipelines. UNCLOS gives no indication of what measures might be ‘reasonable’ in this context. Under Article 79(3) the ‘delineation of the course for the laying’ of pipelines (though not cables) is subject to the consent of the coastal State.

These provisions raise the question of whether a coastal State may exercise its rights under Article 79(2) and (3) to impede the laying of cables and pipelines and to prescribe the route of a pipeline on its outer continental shelf pending the establishment of the outer limit in accordance with Article 76 and Annex II of UNCLOS. It follows from the discussion earlier that where the area that a coastal State is minded to exercise its rights is almost certainly outer continental shelf, it will be able to exercise those rights. If, however, the coastal State purports to exercise its rights in an area that subsequently turns out not to be part of its outer continental shelf but is instead part of the high seas/Area, it will have infringed other States’

²⁵ UNCLOS, Art. 246(5).

rights under Articles 87 and 112 of UNCLOS to lay submarine cables and pipelines on the bed of the high seas. In that situation, the points made in previous sections about other States being able to seek an order of provisional measures under Article 290 will apply.

8. The Establishment of Marine Protected Areas

There is no doubt that a coastal State is entitled to establish a marine protected area (MPA) on the outer continental shelf that is applicable only to its own nationals. The more important, and difficult, question is whether a coastal State may establish an MPA on the outer continental shelf that is applicable to the nationals of other States. Where an area is beyond any reasonable doubt an area of outer continental shelf because the location of the foot of slope and/or the thickness of sedimentary rocks is not subject to significant disagreement, it will be permissible for the coastal State to establish an MPA. The question then becomes what activities the coastal State may regulate or prohibit in such an area. It follows from what was said above that within an MPA a coastal State could prohibit the exploration for and exploitation of mineral resources and sedentary species and the erection of artificial islands, installations and structures. It could also regulate the laying of cables and pipelines. On the other hand it could not regulate the conduct of marine scientific research as the MPS was not intended to be used for resource exploitation for the foreseeable future. The question also arises as to whether the coastal State may regulate bioprospecting (certainly it could insofar as bioprospecting was aimed at sedentary species) and bottom trawling (probably insofar as bottom trawling affected sedentary species, which might include cold-water coral reefs).

Where there was doubt as to whether the area where the proposed MPA was to be located was outer continental shelf, a coastal would be well advised not to establish an MPA because of the risk of infringing other States' rights.

The issue of establishing MPAs on the outer continental shelf is not an academic one. Portugal has already four such MPAs. Their acceptance within the OSPAR has proved controversial.

[This section requires further development]

9. Conclusions