

Submissions to the Commission on the limits of the continental shelf:

Practice and controversies

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ABSTRACT

The Commission on the Limits of the Continental Shelf (CLCS) has been analysing submissions for extension of the continental shelf for the last 20 years. As a scientific and technical body, the CLCS is mandated to examine the coastal states' submissions according to geological and geomorphological criteria, which sometimes implies a qualitative reasoning that allows this panel to carry out its functions. In some other instances, the CLCS faces situations which require an interpretation beyond geophysical factors. Under those circumstances, the CLCS refrains from making interpretations as certain issues go beyond a scientific–technical assessment.

KEYWORDS

Continental shelf; CLCS; submission; UNCLOS; recommendations; geomorphological

Introduction

It has been 40 years since the adoption of the United Nations Convention on the Law of the Sea (UNCLOS)¹ and questions related to the extension of the continental shelf continue to arise.

Since Russia made the first submission in 2001, the Commission on the Limits of the Continental Shelf (CLCS) has received 88 submissions (plus eight revised submissions)² and has issued 35 recommendations. These figures are sufficient to identify certain trends in the way in which states measure the outer limits of their respective continental shelves and in the

¹ Adopted on December 10, 1982, entered into force on November 16, 1994, United Nations Treaty Series (UNTS) 1833, p. 3.

² The Russian Federation in respect of the Okhotsk Sea and the Arctic Ocean; Brazil in respect of the Brazilian Southern Region, the Brazilian Equatorial Margin, and the Brazilian Oriental and Meridional Margin; and Barbados, Argentina, and Iceland in respect of the western, southern, and south-eastern parts of the Reykjanes Ridge.

treatment of submissions by the CLCS.

The submissions of the outer limits of the continental shelf are drawing a new maritime map. Despite the progress, the map is still far from conclusive. The CLCS' work is progressing slowly and to date, recommendations have been issued only for a third of the submissions.

The CLCS analyses the submissions according to the order of notification. However, not all of them are screened. A few of them are postponed, allowing time for provisional arrangements. It cannot decide on some submissions because they refer to an area under maritime or territorial dispute. In other cases, the Commission omits any reference to the disputed area, but partially considers the submission.

The CLCS' recommendations embody the technical analysis that leads this entity to confirm or reject the limits proposed by coastal states. To date, the CLCS has fully or partially validated most of the submissions already examined.

In this context, sometimes, one may find that the CLCS is carrying out a true exercise of interpretation that, although it may be considered reasonable, probably exceeds the original powers granted to that body. On the other hand, there are other situations in which the arguments of the coastal states do not have a geological and geomorphological basis but rather raise questions of a legal nature.

This article addresses the very different scope of interpretations on geophysical questions and on legal-political matters.

The scope of interpretation of geophysical issues

On analysing the content of the recommendations, we come across the main issues that the CLCS examines. In addition to the obvious observation of the location of the foot of the slope, the correct identification of the 200 nautical miles (M) lines, and the drawing of the formula and constraint lines, the CLCS pays attention to the peculiarities of each submission, individualising the treatment to be granted.

The location of the foot of the slope and the application of the formula lines according to Article 76(4) of the UNCLOS is the first step that the state must undertake to calculate its outer limit.³

³ Division for Ocean Affairs and the Law of the Sea, *Training Manual for Delineation of the Outer Limits of the*

This element serves as the basis for the right to the extended continental shelf and is, therefore, a key factor to be reviewed by the CLCS.

The general rule to calculate the foot of the slope is the maximum change in the gradient, only resorting to the evidence to the contrary when the geomorphological evidence does not allow it to be reliably located.⁴

Almost all states use the maximum change in the gradient. The presentation of “evidence to the contrary” as an alternative to locate the foot of the continental slope was invoked for the first time by Argentina, considering that the geomorphological and geological evidence given by the maximum change in the gradient did not allow it to be determined with certainty. The CLCS, aware of the peculiarities of the Argentine continental margin, validated this option:⁵

The morphology of the Argentine margin is very complex ... It includes a constant curvature slope (which makes it extremely difficult to define the point of maximum change in gradient), but also includes constant curvature slopes overprinted by erosional features, which create a series of local points of maximum change in gradient. So the maximum maximum is not always indicative of the foot of the slope at its base. Argentina provided geological and geophysical data and information in its justification for applying evidence to the contrary.

However, in the case of Barbados, the CLCS considered that the maximum change in the gradient, as the general rule, applies, rather than the alleged evidence to the contrary:⁶

[The Commission] did not agree with the methodology used in the Submission to determine the critical FOS points, based on evidence to the contrary. The subcommission was of the view that these FOS points could be determined on the basis of the general rule (maximum change in the gradient).

Regarding the formula lines, the CLCS ensures that the coastal states have carried out a right application of the sediment thickness formula (Gardiner formula) and the distance formula

Continental Shelf beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf (New York: United Nations, 2006), pp. 1–26.

⁴ Division for Ocean Affairs and the Law of the Sea, “Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf,” CLCS/11, May 13, 1999, para 6.1.3.

⁵ “Summary of the Recommendations,” adopted by the CLCS on March 11, 2016, para 42, https://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/2016_03_11_COM_SUMREC_ARG.pdf (last accessed on April 28, 2022).

⁶ “Summary of the Recommendations,” adopted by the CLCS on April 15, 2010, para 14, https://www.un.org/depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf (last accessed on April 28, 2022). The same applies to Suriname; see “Recommendations,” adopted by the CLCS on March 30, 2011, paras 15–19, https://www.un.org/depts/los/clcs_new/submissions_files/sur08/surrec.pdf (last accessed on April 28, 2022).

(Hedberg formula). The statement of understanding⁷ should not be forgotten as it might play an important role in calculating the outer limit of the shelf if a state, which satisfies the requirements, invokes it.

Gardiner formula is based on the continuity between the sediments at each of the fixed points and the sediments at the foot of the slope. Its application is complex for states with an irregular topography. In this regard, Barbados had to change points in its initial descriptions which contained inaccuracies.⁸ South Africa has, on its own initiative, modified the points that it had calculated in its original submission using Gardiner formula, replacing them with points resulting from Hedberg formula.⁹

It is also noteworthy that Kenya invoked the statement of understanding that modifies the sediment thickness rule to locate two of its points. Sri Lanka claimed that this formula is reserved for the southern part of the Bay of Bengal as reflected in paragraph 5 of the statement of understanding.¹⁰ However, Kenya reiterated its position, alluding to the fact that the method of the statement of understanding is of a general nature, as long as the continental margin of the state shows special characteristics and that the application of Article 76 of the UNCLOS causes inequity.

Regarding the constraint lines, it seems that there has been an unwarranted rejection of certain 2,500 metre (m) isobaths.¹¹ Although it is true that the “Scientific and Technical Guidelines” provide that the Commission may recommend the use of the first 2,500 m isobath when, as a result of geological and tectonic processes, the isobaths are repeated in multiples,¹² this

⁷ Annex II to the Final Act of the Third Conference on the Law of the Sea, https://www.un.org/depts/los/clcs_new/documents/final_act_annex_two.htm (last accessed on April 28, 2022).

⁸ “Summary of the Recommendations,” adopted by the CLCS on April 15, 2010.

⁹ “Executive Summary (Amendment) CLCS.31.2013.LOS.Add.1.”, https://www.un.org/depts/los/clcs_new/submissions_files/zaf31_09/zaf2013_amended_executive_summary.pdf (last accessed on April 28, 2022).

¹⁰ Note Verbale SRL-NOT-002-22.07.2009, July 22, 2009, para 5 of the statement of understanding, https://www.un.org/depts/los/clcs_new/submissions_files/ken35_09/lka_re_ken_clcs35.pdf (last accessed on April 28, 2022):

The Conference requests the Commission on the Limits of the Continental Shelf set up pursuant to Annex II of the Convention, to be governed by the terms of this Statement when making its recommendations on matters related to the establishment of the outer edge of the continental margins of these States in the southern part of the Bay of Bengal.</BQ>

¹¹ Andrew Serdy, “The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate,” *International Journal of Marine and Coastal Law* 26 (2011): 372.

¹² Division for Ocean Affairs and the Law of the Sea, “Scientific and Technical Guidelines,” para 4.4.2:

The selection of the most salient points along the 2,500 m isobath for the purpose of delineating the 100 M limit may be straightforward when isobaths are simple. However, when isobaths are complex or repeated in multiples, the selection of points along the 2,500 m isobath becomes difficult. Such situations arise as a result of geological and tectonic processes shaping the present continental margins. They can

interpretation is not specified in Article 76(5) of the UNCLOS and may result in the loss of part of the natural extension.¹³

Specifically, in its submission, Norway partially relied on a constraint line drawn from a 2,500 m isobath in the area of the international enclave of the Norwegian Sea, an area known as the “Banana Hole”. In general, the CLCS accepted the way in which Norway had combined the constraint criteria to establish the outer limits.¹⁴ However, as regards the southernmost part of the Banana Hole, the CLCS held that a small triangular area constituting the submerged extension of the territory of Jan Mayen lay beyond the distance constraint line and cannot be said to be part of the Norwegian continental shelf on the basis of the depth constraint criterion alone.¹⁵

Although the CLCS considered that the Jan Mayen microcontinent and the Iceland Plateau are submarine elevations that constitute natural components of the continental margin of Jan Mayen and that, therefore, the depth criterion is applicable, it was not able to verify that the isobaths used are landward of the foot of the continental slope and conform to the general configuration of the continental margin. Consequently, the CLCS recommended “these isobaths not be used as a basis to delineate the outer limits of the continental shelf” in that area.¹⁶ Norway was instead recommended to apply the distance constraint line.¹⁷ This recommendation results in the loss of a small area adjacent to the 200 M line from the Faroe Islands.

While it is true that for Norway this means little in practice, this is an exercise of interpretation by the CLCS not entirely consistent with the purpose of Article 76(5) of the UNCLOS.

The verification of the suitability of the 200 M line by the CLCS introduces the issue of the link (sometimes considered unjustified)¹⁸ between Article 76(4) of the UNCLOS and the 200 M

create multiple repetitions of the 2,500 m isobath, for example, by faulting, folding and thrusting along continental margins. Unless there is evidence to the contrary, the Commission may recommend the use of the first 2,500 m isobath from the baselines from which the breadth of the territorial sea is measured that conforms to the general configuration of the continental margin.

¹³ L.D.M. Nelson, “The Continental Shelf: Interplay of Law and Science,” in *Liber Amicorum Judge Shigeru Oda*, eds. Nisuke Ando, Edward McWhinney, and Rudiger Wolfrum (Leiden and Boston: Nijhoff, Brill, 2002), p. 1244.

¹⁴ Øystein Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy* (Leiden and Boston: Nijhoff, Brill, 2014), p. 84.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ “Summary of the Recommendations,” adopted by the CLCS on March 27, 2009, para 74 https://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (last accessed on April 28, 2022).

¹⁸ Serdy, “The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate,” pp. 373–75.

line. Most of the continental margins are characterised by their complexity and lack of uniformity. They are normally interrupted by ridges, plateaus, canyons, or other features. Under Article 76(7), the delineation might be simplified by drawing straight lines that do not exceed 60 M in length, connecting fixed points, defined by coordinates of latitude and longitude.

Several states, led by Australia, have used these lines to join fixed points of the formula line to fixed points of the 200 M line, increasing the area of extension.¹⁹ The CLCS considers this as an overreach of the terms of the Convention and states that:

the determination of the last segment of the outer limits of the continental shelf shall be established either by the intersection of the formula line, in accordance with article 76, paragraphs 4 and 7, and the 200 M limit from the baselines from which the breadth of the territorial sea is measured, or it shall be determined by the line of shortest distance between the last fixed formula point and 200 M limit. In all cases, the segment cannot exceed 60 M in length in accordance with article 76, paragraph 7.²⁰

In so doing, the CLCS rules against the “wings” that create “area of continental shelf that falls outside of the continental margin as defined in article 76, paragraphs 4 and 7”.²¹

Apparently, no impediment to Australia’s approach can be inferred from the wording of the Convention. A literal reading of Article 76(7) of the UNCLOS would suggest that the use of bridging lines is not allowed, so the refusal of the CLCS is certainly controversial.

However, the International Law Association (ILA) is aligned with the position of the CLCS in its interpretation:²²

all fixed points used to construct a line in accordance with article 76(7) in principle have to meet either one or the other of these requirements [those of Article 76(4)]. The employment of a fixed point which is located on the 200 nautical mile limit but does not meet these requirements cannot be used as one of the fixed points to delineate the outer limit of the continental shelf where the shelf extends beyond 200 nautical miles.

It has been suggested that this is a conflict of norms in which the CLCS’ position would be

¹⁹ This is regardless of whether the area extends beyond the continental margin defined under Article 76(4) of the UNCLOS. Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, p. 74.

²⁰ “Recommendations,” adopted by the CLCS on April 9, 2008, para 26, https://www.un.org/depts/los/clcs_new/submissions_files/aus04/Aus_Recommendations_FINAL.pdf (last accessed on April 28, 2022).

²¹ *Ibid.*, para 150.

²² ILA, “Legal Issues of the Outer Limits of the Continental Shelf,” Berlin Conference, 2004, p. 16, <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1221&StorageFileGuid=7534392b-da08-4477-aebc-646cb0167531> (last accessed on April 28, 2022).

victorious.²³ Article 76 of the UNCLOS provides that the legal continental shelf extends to the outer limit of the continental margin (76[1]) and does not include the deep ocean floor (76[3]). These provisions should prevail and be used as safety valves against the excessive use of Article 76(7).²⁴

However, Øystein Jensen has criticised the lack of legal reasoning to reject the Australian proposal since the CLCS just stated that the method used by Australia generates an area of continental shelf that falls outside the continental margin but does not explain why.²⁵ In addition, the CLCS concentrates its efforts on the last segment of the outer limits of the continental shelf, so that an interpretation *a contrario* would admit the bridging lines in other segments.

In short, this is again a true exercise of interpretation that, although it may be considered reasonable, lacks legal reasoning.

The issue of bridging lines is closely linked to that of the double-margin approach. Norway incorporates this new approach in its submission for the Banana Hole area. The Nordic country claimed a continental margin that is made up of two independent parts according to morphology but linked together through the submarine ridge that connects Iceland with the Faroe Islands within the 200 M zone of Iceland and the Faroe Islands. The CLCS has followed this approach.²⁶

Another recurring discussion is the classification of ridges as natural components or an integral part of the continental margin. Article 76(6) of the UNCLOS is conceived as a brake on the extension of the shelf, according to which the depth criterion does not apply to submarine ridges. Especially sensitive is the case of mountain ranges that culminate in islands (for example, Iceland, Costa Rica, or Ecuador), which in the absence of this restriction could extend their continental shelf over hundreds of miles.

The CLCS makes a generic distinction between submarine elevations, submarine ridges, and ocean ridges:

The distinction between the “submarine elevations” and “submarine ridges” or “oceanic ridges” shall not be based on their geographical denominations and names used so far

²³ Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, pp. 76–77.

²⁴ Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, p. 77.

²⁵ Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy*, p. 77.

²⁶ Division for Ocean Affairs and the Law of the Sea, “Scientific and Technical Guidelines,” para. 7.2.8: “Some ridges (including active spreading ridges) may have islands on them. In such cases it would be difficult to consider that those parts of the ridge belong to the deep ocean floor.”

in the preparation of the published maps and charts and other relevant literature. Such a distinction for the purpose of article 76 shall be made on the basis of scientific evidence taking into account the appropriate provisions of these Guidelines.²⁷

It adds:

the Commission feels that in cases of ridges its view shall be based on such scientific and legal considerations as natural prolongation of land territory and land mass, morphology of ridges and their relation to the continental margin as defined in paragraph 4, and continuity of ridges.²⁸

Australia can be taken as a case study. The CLCS rejected the application of the depth constraint line in the Joey Rise area on the grounds that the data submitted to prove that it is a submarine elevation was inconclusive.²⁹ Therefore, the Commission held that it is a submarine ridge, to which only the distance constraint line can be applied:³⁰

The Commission is of the opinion that the application of those parts of that combined constraint line which are based on the 2500 m isobaths on the Joey Rise is not justified since the nature of that submarine high with regard to article 76, paragraph 6, is not considered proven. The Commission recommends that the combined constraint line to be applied should be adjusted accordingly.

The CLCS reaches the same conclusion in the recommendations to France (Kerguelen Islands) regarding the Gallieni Ridge;³¹ to Norway regarding Vøring Spur;³² to Japan regarding the Ridge Part;³³ and to Iceland relative to the Reykjanes Ridge.³⁴

Andrew Serdy acknowledges that, strictly speaking, there is no provision in Article 76 that precludes this approach. However, in these cases, the burden of proof is shifted to the coastal state which must demonstrate to the CLCS that the relevant features beyond 350 M are not a submarine ridge.³⁵ In other cases, the CLCS has accepted that the alleged features are submarine

²⁷ Ibid., para 7.1.8.

²⁸ Ibid., para. 7.2.10.

²⁹ “Recommendations,” adopted by the CLCS on April 9, 2008, para 138.

³⁰ Ibid., para 223.

³¹ “Summary of the Recommendations,” adopted by the CLCS on April 19, 2012, para 87 https://www.un.org/depts/los/clcs_new/submissions_files/fra09/SUMREC_FRA1_19_04_2012.pdf (last accessed on April 28, 2022).

³² “Summary of the Recommendations,” adopted by the CLCS on March 27, 2009, para 76.

³³ “Summary of the Recommendations,” adopted by the CLCS on April 19, 2012, para 120 https://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf (last accessed on April 28, 2022).

³⁴ “Summary of the Recommendations,” adopted by the CLCS on March 10, 2016, para 78 https://www.un.org/depts/los/clcs_new/submissions_files/isl27_09/2016_03_10_sc_isl.pdf (last accessed on April 28, 2022).

³⁵ Serdy, “The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate,” p.

elevations; however, the impossibility of accessing all the data prevents the general public from checking the states' justification.³⁶

From the practice regarding the inclusion in one category or another – submarine ridge or elevation – it could be inferred that the Commission bases the classification as elevation on whether there is geological continuity.³⁷ Harald Brekke and Philip Symonds seem to confirm this position:³⁸

a submarine elevation that, along its entire length, shares geological characteristics and origin with the landmass of the coastal State, and that forms an integral part of the continental margin based on the foot of the continental slope may be categorised as being an elevation that is a natural component of the continental margin of that State.

The geomorphological nature of the seabed has also raised doubts. In some submissions, what the coastal states have outlined as part of the continental shelf in strict application of Article 76, the CLCS has deemed to be more related to the deep sea. In the recommendations to New Zealand in relation to the South Fiji Basin,³⁹ the CLCS agreed with the fixed points of the outer limit of the continental margin of New Zealand, but at the same time insisted that since part of the delineated area has the geomorphologic characteristics of the deep seabed, it cannot be part of the continental shelf.

In the case of Ascension Island, the United Kingdom (UK) regards the rift valley of the spreading axis and the deeps of associated fracture zones as parts of its continental slope. In the view of the CLCS, Ascension Island is not morphologically connected to any seafloor high, thus it concludes that there is no morphological, geological, geophysical, or geochemical basis, nor any other basis in Article 76 of the UNCLOS to justify the determination of the base of the

377; Ron Macnab, "Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76," *Ocean Development & International Law* 39, no. 2 (2008): 233.

³⁶ "Recommendations," adopted by the CLCS on March 27, 2009, para 75 https://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (last accessed on April 28, 2022); "Recommendations," adopted by the CLCS on August 22, 2008, para 164 https://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzlrec.pdf (last accessed on April 28, 2022); "Recommendations," adopted by the CLCS on April 19, 2012, para 119; "Recommendations," adopted by the CLCS on March 30, 2011, para 56 https://www.un.org/depts/los/clcs_new/submissions_files/musc08/smsrec.pdf (last accessed on April 28, 2022).

³⁷ Bjørn Kunoy, "The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate," *Leiden Journal of International Law* 25, no. 1 (2012): 119.

³⁸ Harald Brekke and Philip A. Symonds, "The Ridge Provisions of Article 76 of the UN Convention on the Law of the Sea," in *Legal and Scientific Aspects of Continental Shelf Limits*, eds. Myron H. Nordquist, John Norton Moore, and Tomas Heidar (Leiden: Brill, 2004), p. 189.

³⁹ "Summary of the Recommendations," adopted by the CLCS on August 22, 2008, para 148 https://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzlrec.pdf (last accessed on April 28, 2022).

slope and associated points in the location submitted by the UK.⁴⁰

The same applies to the recommendations to Japan regarding Mogi Seamount and Minami-Tori Shima Island.⁴¹ The Commission considers these regions as lying in the deep ocean, so they cannot extend their continental shelves. Some authors perceive an excess on the part of the CLCS, which should limit itself to determining whether the limit conforms to the formulas prescribed in Article 76, leaving aside discussions about the geomorphological character of the seabed.⁴²

Issues on which the CLCS does not pronounce itself

So far, in the analysed situations, the CLCS refutes the arguments of the coastal states based on geological and geomorphological criteria. Despite being a scientific and technical review panel, the CLCS resorts to interpretation as a means to carry out its function. However, at times, the Commission faces situations that require more than an interpretation of geophysical factors. Under these circumstances, the CLCS has refrained from expressing any opinion.

The inclusion of the Antarctic Sector in the Argentine submission prevents the CLCS from making any move. Argentina claimed the extension of the continental shelf corresponding to the Argentine Antarctic Sector. Said state informed the CLCS⁴³ that it had considered the circumstances of the region south of 60° south latitude and the special legal and political status of Antarctica under the provisions of the Antarctic Treaty.⁴⁴ Argentina substantiated its position by alluding to the fact that its aspirations do not affect the territory protected by the treaty, but rather the extension of the continental shelf that it projects.

The Argentine submission generated a wave of objections⁴⁵ alluding to the breach of 1959 Antarctic Treaty, by virtue of which the Antarctic region located south of 60° south latitude

⁴⁰ “Summary of the Recommendations,” adopted by the CLCS on April 15, 2010, paras 45–50 https://www.un.org/depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf (last accessed on April 28, 2022).

⁴¹ “Summary of the Recommendations,” adopted by the CLCS on April 19, 2012.

⁴² Finn Mørk, “Classification of Seafloor Highs in Accordance with Article 76 of UNCLOS – Consequences of the Commission on the Limits of the Continental Shelf Recent Modifications of its Interpretations,” *Ocean Development & International Law* 49, no. 4 (2018): 368–92; Serdy, “The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate,” p. 379.

⁴³ Note from the Permanent Mission of Argentina addressed to the Secretary-General of the United Nations accompanying the lodgement of Argentina’s submission, N.U.139/2009/600, April 21, 2009.

⁴⁴ Adopted on December 1, 1959, entered into force June 23, 1961, UNTS 5778, 402, p. 71.

⁴⁵ Notes Verbales 84/09, the United Kingdom, August 6, 2009; the United States, August 19, 2009; 2282/N, Russian Federation, August 24, 2009; NY/PM/443/1/2009, India, August 31, 2009; NYV/2009/2459, the Netherlands, September 30, 2009; SC/09/390, Japan, November 19, 2009; Chile, May 25, 2016.

shall be used for peaceful⁴⁶ and scientific⁴⁷ purposes, without admitting claims to sovereignty.⁴⁸

During the examination of the Argentine submission, the CLCS decided that, in accordance with the rules of procedure,⁴⁹ it was not in a position to consider and qualify the part of the submission that relates to the continental shelf appurtenant to Antarctica.⁵⁰ It is a matter of a legal, political, and procedural nature that the CLCS cannot assess.

The Japanese claim over Okinotorishima Island also creates problems, since the insular character in the sense of Article 121(1) of the UNCLOS is in question. China and Korea do not accept the qualification as an island and consider it a rock in the light of Article 121(3).⁵¹

Islands and rocks trigger different regimes regarding the continental shelf. An island projects all maritime zones like any other land territory, while a rock has no exclusive economic zone or continental shelf. The qualification as one or the other depends on the ability to sustain human habitation or economic life of their own.

The CLCS held that it was not in a position to formulate its recommendations. It rightly acknowledged that it had no role on matters relating to the legal interpretation of Article 121 of the UNCLOS.⁵² Its functions are limited to examining the data submitted by coastal states and issuing recommendations. Therefore, the consideration of submissions by the Commission concerned issues related only to Article 76 and Annex II of the UNCLOS and is without prejudice to the interpretation or application of other parts of the Convention.⁵³

It is a similar story for non-self-governing territories. It is evident that the CLCS cannot take sides in those cases in which a non-self-governing territory submits the outer limits of its continental shelf. The CLCS must abstain where there is a dispute regarding the sovereignty of

⁴⁶ The Antarctic Treaty, Article 1.

⁴⁷ Ibid., Article 2.

⁴⁸ Ibid., Article 4.

⁴⁹ Division for Ocean Affairs and the Law of the Sea, "CLCS/40/Rev.1 – Rules of Procedure of the Commission on the Limits of the Continental Shelf," April 17, 2008 <https://daccess-ods.un.org/tmp/7065259.21821594.html> (last accessed on April 28, 2022).

⁵⁰ Doc. CLCS/64 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/536/21/PDF/N0953621.pdf?OpenElement> (last accessed on April 28, 2022).

⁵¹ Notes Verbale: CML/2/2009, China, February 6, 2009; MUN/046/09, Republic of Korea, February 27, 2009; CML/31/2009, China, August 24, 2009; CML/59/2011, China, August 3, 2011; MUN/230/11, Republic of Korea, August 11, 2011; CML/25/2012, China, April 5, 2012; MUN/174/12, Republic of Korea, April 5, 2012.

⁵² Doc. CLCS/64.

⁵³ Ibid. Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles* (Leiden: Brill, Nijhoff, 2015) 69. Alexandre Pereira da Silva, "From Rocks to an Archipelago: The Brazilian Interpretation and Application of Article 121 of the United Nations Convention on the Law of the Sea with respect to the St. Peter and St. Paul Insular Features," *Ocean Development & International Law* 51, no. 4 (2020): 330–57.

such territories, as has occurred in the case of the Falkland Islands, South Georgia, and South Sandwich Islands.⁵⁴

In short, the very different scope of an interpretation on geophysical issues and another on legal–political issues is indisputable. The assessment of geological and geomorphological elements by the CLCS, although open to criticism, occurs as part of the normal performance of its functions. A pronouncement on legal factors would amount to a true irregularity.

Lessons learned

The recommendations (or, failing that, the summaries) of the CLCS reflect the technical analysis that leads this body to confirm or reject the limits proposed by coastal states. To date, the CLCS has fully or partially validated most of the submissions. The recipient states of recommendations that challenge their submissions have reacted differently. For example, Russia, Barbados, Argentina, and Cook Islands have made revised submissions and the UK (Ascension Island), which has shown its disappointment with the conclusions of the CLCS, has decided to await the outcomes of future submissions which raise similar issues instead of resubmitting.⁵⁵

It should be remembered that the CLCS is a technical body of conventional origin that cannot make its recommendations without taking legal considerations into account. At a theoretical level, one can realise that the CLCS’s powers of interpretation are a controversial issue. Can any interpretation exercise be found in the recommendations?

In some cases, the Commission has explicitly stated that it does not have the competence. This is the case in the recommendations regarding Okinotorishima Island, which would imply that the CLCS interprets Article 121(3) of the UNCLOS, or in the Argentine submission regarding the Antarctic Sector, which would force it to analyse the Antarctic Treaty.

However, when it comes to geophysical criteria, the CLCS develops a qualitative reasoning that allows it to carry out its mandate. Thus, the refutation of the limits presented by the UK for Ascension Island may lead one to think that the Commission has interpreted Article 76 by

⁵⁴ Ángeles Jiménez García-Carriazo, “La Ampliación de la Plataforma continental en el Atlántico Sur: El Enfrentamiento Marítimo entre Argentina y Reino Unido,” *Revista de Estudios Jurídicos* 17 (2017): 14.

⁵⁵ Note Verbale 08/11 from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland addressed to the Secretariat of the United Nations, January 11, 2011.

defining the depths of the sea (and the continental margin *a contrario*)⁵⁶ and by apparently ignoring the determination of the natural extension.⁵⁷

The submission of Kenya and the calculation of some points of the foot of the slope by virtue of the statement of understanding is also problematic. One might wonder whether the CLCS is competent to determine whether the statement of understanding is applicable to Kenya. It seems that this will be the case; at least, this is the message that emerges from the CLCS's mandate to the subcommission:⁵⁸

The Commission concluded that there was a difference of views as to the interpretation and applicability of the provisions relating to the implementation of the Statement of Understanding among States. It also acknowledged that States, not the Commission, interpreted the Convention. While recalling its need to be kept informed about any further developments on this matter, and bearing in mind the definition of its mandate contained in paragraph 1 (a) and (b) of article 3 of annex II to the Convention, the Commission instructed the subcommission to consider the submission made by Kenya on a scientific and technical basis under the provisions of article 76 of the Convention and the Statement of Understanding.

In short, the discussion on the CLCS's interpretative powers does not seem to have an easy solution. Practice shows two trends in the CLCS's evaluations. The Commission refrains from making interpretations on issues that go beyond the scientific–technical, but it does issue assessments on geophysical aspects. Time will tell whether this practice is confirmed.

The ideas given herein are a sample of the interpretations carried out by the CLCS. As the recommendations are published, it will be easier to identify patterns that allow states to anticipate how their submissions will be analysed.

⁵⁶ “Summary of the Recommendations,” adopted by the CLCS on April 15, 2010, pp. 6–7: “The deep ocean floor in the sense of article 76 is the area seaward of the outer edge of the continental margin. However, the opposite also applies, i.e. that the continental margin is the area landward of the deep ocean floor.”

⁵⁷ Robert Cleverly and Lindsay Parson, “Does Ascension Island have an Outer Continental Shelf?,” Advisory Board on the Law of the Sea, 2010, pp. 6–7 https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S9P3-P.pdf (last accessed on April 28, 2022).

⁵⁸ Doc. CLCS/90, para 21 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/297/39/PDF/N1529739.pdf?OpenElement> (last accessed on April 28, 2022).