

# The Regime for Marine Scientific Research in the Arctic: Implications of the Absence of Outer Limits of the Continental Shelf beyond 200 Nautical Miles

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## I. Introduction

Coastal States have the right to regulate marine scientific research in their maritime zones. All coastal States are entitled to a 200 nm exclusive economic zone. The continental shelf also extends at least to this distance. The determination of the 200 nm limit is a relatively straightforward process. It only requires measuring a distance of 200 nm from the baselines of the coastal State.<sup>1</sup> The continental shelf may also extend beyond the 200 nm limit. In this case, the establishment of the outer limit is much more complex. Art. 76 United Nations Convention on the Law of the Sea ('UNCLOS')<sup>2</sup> requires a coastal State to gather and pro-

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<sup>1</sup> Difficulties may arise if the coastal State and third States disagree over the legality of the baselines of the coastal State. For instance, third States may consider that straight baselines are not in conformity with international law or that an island of a coastal State is not entitled to an exclusive economic zone and continental shelf.

<sup>2</sup> United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

cess complex data sets and submit information on its outer limits to the Commission on the Limits of the Continental Shelf ('CLCS'). Only after the CLCS has reviewed this information and issued recommendations, a coastal State is in a position to establish the outer limits of the continental shelf beyond 200 nm on the basis of the Commission's recommendations. As Art. 76(8) UNCLOS indicates, these limits shall be final and binding.

Art. 76 is also highly relevant for the Arctic. A significant part of the Arctic Ocean is beyond the 200 nm limit of the five coastal States, Canada, Denmark, Norway, the Russian Federation and the United States of America. The geographical North Pole is over 170 nm from the nearest 200 nm limit and certain areas are more than 300 nm from the 200 nm limit. The water column of the entire area beyond 200 nm is governed by the freedom of the high seas, which includes the freedom of scientific research. However, most of this area may be part of the continental shelves of the coastal States. All five coastal States are engaged in gathering the data which is required to determine outer limits of the continental shelf beyond 200 nm in accordance with Art. 76 UNCLOS. Available information suggests that most of the seabed of the Arctic Ocean is part of the continental shelves of the five coastal States.

Experience with the implementation of Art. 76 to date indicates that it may take a couple of decades for all States Parties to the Convention to establish final and binding limits. It is likely that this will also be true for the Arctic Ocean. Thus far only Norway has received recommendations from the CLCS which allow it to establish final and binding limits.<sup>3</sup> The Russian Federation made a submission to the Commission in December 2001.<sup>4</sup> The submission concerned four areas, the largest of which is located in the Arctic Ocean. The Commission recommended

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<sup>3</sup> Commission on the Limits of the Continental Shelf, 'Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission Made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006' (27 March 2009), see <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_rec\\_summ.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf)> (2 August 2011).

<sup>4</sup> Russian Federation, Continental Shelf Submission, Executive Summary, attached to Commission on the Limits of the Continental Shelf, 'Receipt of the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf' (20 December 2001) CLCS.01.2001.LOS (Continental Shelf Notification), see <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_rus.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm)> (2 August 2011).

that the Russian Federation make a revised submission as regards the Arctic Ocean, based on the findings contained in its recommendations.<sup>5</sup> The Russian Federation has since gathered additional data and has indicated that it intends to make a further submission to the Commission. According to a recent report, the Russian Federation intends to resubmit information in 2014.<sup>6</sup>

At present there are some 40 submissions waiting to be considered by the Commission. The Rules of Procedure of the Commission<sup>7</sup> do not indicate how the Commission will queue new or revised submissions resulting from recommendations to the coastal State. The provision on the queuing of submissions contained in Rule 51 suggests that a new or revised submission would be queued after the last submission in the line. The other Arctic coastal States have not yet made a submission to the Commission. Canada and Denmark are in principle required to make their submission by 2013 and 2014 respectively. The United States is not a party to the Convention and is not entitled to employ the procedure for establishing the outer limits of the continental shelf involving the Commission, but will be able to do so if it accedes to UNCLOS. These submissions will be queued at the end of the line of submissions before the Commission. The projected time line for dealing with submissions by the Commission indicates that submissions by the Arctic coastal States may only be considered in the 2030s.

The absence of final and binding limits raises the question of what legal regime applies to the continental shelf beyond 200 nm in the meantime. Is a coastal State entitled to exercise rights over this part of the continental shelf before final and binding limits have been established? To answer this question, section II of this paper will first briefly consider the relevant UNCLOS provisions, after which it will discuss State practice and jurisprudence. As will become apparent, no clear answer emerges from this analysis. Section III of this paper will seek to suggest how this issue might be addressed by coastal States and third States. In this connection, two questions will be addressed. First, what rules exist to determine the extent of the continental shelf beyond 200 nm before the

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<sup>5</sup> UNGA, 'Oceans and Law of the Sea: Report of the Secretary-General: Addendum' (8 October 2002) UN Doc. A/57/57/Add.1, para. 41.

<sup>6</sup> RIA Novosti, 'Russia Uses New Research Data to Enhance Arctic Territorial Claim', Press release (13 November 2010), see <<http://en.rian.ru/russia/20101113/161323182.html>> (12 September 2011).

<sup>7</sup> The current version of the Rules of Procedure is contained in CLCS, 'Rules of Procedure' (17 April 2008) CLCS/40 Rev.1.

Art. 76 process has been finalized? Second, what regime is applicable to this area? Section IV looks at the implications of the findings of the preceding sections for the regime of marine scientific research in the Arctic Ocean.

## **II. The Regime Applicable to the Continental Shelf beyond 200 Nautical Miles in the Absence of Final and Binding Limits**

### **1. The UN Convention on the Law of the Sea**

The Convention does not explicitly address the question of whether or not a coastal State is entitled to exercise its rights over the continental shelf beyond 200 nm before final and binding limits have been established. However, a number of provisions support the former view. Art. 77(3) UNCLOS provides that the ‘rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation.’ In other words, the rights of the coastal State do not depend on the process of establishing the outer limits of the continental shelf in accordance with Art. 76 UNCLOS. Secondly, Art. 76 itself points to this same conclusion. Art. 76(1) provides that the continental shelf extends to the outer edge of the continental margin or to a distance of 200 nm where the outer edge of the continental margin does not extend to that distance. Art. 76(4) requires the coastal State to determine the outer edge of the continental margin wherever the continental margin extends beyond 200 nm. It is this process of establishing the outer edge of the continental margin which is the subject of the procedure involving the CLCS. As Art. 76(4) indicates, this process is premised on the presence of a pre-existing continental shelf entitlement. The task of the Commission is not to validate the entitlement to the continental shelf beyond 200 nm, but only to determine whether the outer limits of this entitlement have been established in accordance with Art. 76. The entitlement either exists or does not exist. Obviously, in the latter case the Commission should conclude that it cannot recommend that a coastal State establish outer limits beyond 200 nm.

Art. 76(2) also supports the view that the entitlement to the continental shelf is not dependent upon the establishment of outer limits on the basis of the recommendations of the CLCS. Para. 2 provides that the continental shelf of a coastal State shall not extend beyond the limits provi-

ded for in Art. 76(4)-(6). Para. 2, which does not refer to paras 7 to 9 of Art. 76, thus indicates that a continental shelf entitlement already exists up to the limits contained in paras 4 to 6, before a coastal State has implemented paras 7 to 9.

## 2. State Practice and Jurisprudence

Relatively little information is readily available on State practice with respect to the regime of the continental shelf beyond 200 nm in the absence of final and binding limits. The legislation of many States defines the continental shelf by reference to the two criteria contained in Art. 76(1) UNCLOS. Such legislation does not seem to make a distinction between the two parts of the continental shelf as far as the exercise of rights is concerned. An example from an Arctic State is provided by the Federal Law on the Continental Shelf of the Russian Federation of 30 October 1995.<sup>8</sup> Art. 1 of the Law refers to the 200 nm limit and provides that where the continental margin extends beyond that distance ‘the outer edge of the continental shelf coincides with the outer edge of the continental margin determined in accordance with the rules of international law’. As regards marine scientific research, the Federal Law contains a provision which is explicitly applicable to the continental shelf beyond 200 nm. Art. 25(6) of the Law implements Art. 246(6) UNCLOS for the Russian Federation. There is no indication that this provision does not apply in the absence of final and binding limits to the continental shelf of the Russian Federation.

Canada has taken a similar position on the relationship between the regime of the continental shelf and the absence of final and binding limits. Information from the Department of Foreign and International Trade of Canada indicates that Canada’s rights over its continental shelf do not depend upon its submission to the CLCS. According to the Department, the UNCLOS continental shelf regime is a codification of customary international law, and both now and before ratifying the Convention ‘Canada exercises continental shelf jurisdiction over the

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<sup>8</sup> Federal Law of the Russian Federation No. 187- FZ (30 November 1995) promulgated on 7 December 1995 in the “Rossiyskaya Gazeta” No. 237; English translation available at <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1995\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf)> (12 September 2011).

full extent of its continental shelf both within and beyond 200 miles'.<sup>9</sup> Canada has granted licenses for the exploration of petroleum resources on the continental shelf beyond 200 nm on the Grand Banks.<sup>10</sup> Canada at present does not seem to exercise jurisdiction over marine scientific research on the continental shelf beyond 200 nm.<sup>11</sup>

The United States' position in respect of the continental shelf beyond 200 nm is expressed in a policy statement, which was adopted by an Interagency Group on the Law of the Sea and Ocean Policy in November 1987.<sup>12</sup> It states that the United States 'has exercised and shall continue to exercise jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2) and (3)' UNCLOS.<sup>13</sup> The policy statement indicates that the determination of the outer limits of the continental shelf of the United States will be deferred to a later date. In order to ensure that the United States' practice is consistent with international law before these outer limits are determined, the policy requires that:

an agency planning any leasing or licensing activity on the continental shelf beyond 200 nautical miles [...] shall provide notice to the Department of State for transmittal to the Interagency Group with a brief description of the location and type of activity. [...] The Interagency Group shall have 45 days to comment on the proposed action.<sup>14</sup>

The purpose of this process would seem to be to avoid that a United States' agency would exercise continental shelf jurisdiction in areas

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<sup>9</sup> Canada's extended continental shelf; Frequently asked questions, see <[http://www.international.gc.ca/continental/faq.aspx?lang=eng&menu\\_id=24](http://www.international.gc.ca/continental/faq.aspx?lang=eng&menu_id=24)> (12 September 2011).

<sup>10</sup> *Ibid.*

<sup>11</sup> Oceans Act, SC (1996) ch 31 (Canada), sections 13-14, 17-18 and 44, see <<http://laws.justice.gc.ca/PDF/Statute/O/O-2.4.pdf>> (12 September 2011); see also A Anand, *Marine Scientific Research Governance in the Arctic Ocean* (2008) 124 et seq.

<sup>12</sup> See 'United States Policy Governing the Continental Shelf of the United States of America' (17 November 1987), attachment to a Memorandum from Assistant Secretary of State John D. Negroponte to Deputy Legal Adviser Elizabeth Verville, reproduced in JA Roach and RW Smith, *United States Responses to Excessive Maritime Claims*, 2<sup>nd</sup> edn (1996) 201-202.

<sup>13</sup> *Ibid.*, 201.

<sup>14</sup> *Ibid.*, 202.

beyond the potential outer limits of the continental shelf. The United States has allowed oil and gas activities in certain areas beyond 200 nm.<sup>15</sup>

The United States' policy is to encourage marine scientific research.<sup>16</sup> The current policy of the United States requires prior consent for marine scientific research in a number of specified cases.<sup>17</sup> These cases do not cover the continental shelf of the United States beyond 200 nm. As is indicated by the leasing and licensing policy of the United States, the United States does consider that it can exercise jurisdiction over the continental shelf beyond 200 nm in the absence of final and binding limits based on recommendations of the CLCS.

An interesting exchange of views on the regime of the continental shelf beyond 200 nm in the absence of final and binding limits has taken place in the context of the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic ('OSPAR Convention').<sup>18</sup> The parties to the OSPAR Convention have been working on the designation of a number of marine protected areas ('MPAs') in areas beyond national jurisdiction. After Iceland lodged a submission with the CLCS in 2009 it became apparent that one of these areas, the proposed Charlie Gibbs Fracture Zone MPA, overlapped to a considerable extent with the continental shelf of Iceland.<sup>19</sup> This raised the question of how

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<sup>15</sup> See for instance the map 'BOEMRE Gulf of Mexico OCS Region: Blocks and Active Leases by Planning Area' (1 October 2011), prepared by the Bureau of Ocean Energy Management, Regulation and Enforcement of the Department of the Interior, see <[http://www.gomr.boemre.gov/homepg/lseale/mau\\_gom\\_pa.pdf](http://www.gomr.boemre.gov/homepg/lseale/mau_gom_pa.pdf)> (4 October 2011). The map identifies a number of active leases in an area beyond 200 nm in the Western Gulf of Mexico.

<sup>16</sup> Statement by President Reagan accompanying the 'United States: Proclamation on an Exclusive Economic Zone' (10 March 1983), reprinted in (1983) 22 ILM 461.

<sup>17</sup> Ocean and Polar Affairs ('OPA') within the Department's Bureau of Oceans and International Environmental and Scientific Affairs ('OES'), 'Marine Scientific Research Authorizations', see <<http://www.state.gov/g/oes/ocns/opa/rvc/index.htm>> (12 September 2011).

<sup>18</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (signed 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67.

<sup>19</sup> The outer limits of the Reykjanes Ridge in Iceland's 2009 submission extend more than 700 nm from Iceland's baselines. Iceland had previously taken the position that its continental shelf in this area did not extend beyond 350 nm.

the parties to the OSPAR Convention should proceed with the designation of the proposed Charlie Gibbs Fracture Zone MPA. After an extensive discussion, the OSPAR Commission designated an MPA for the part of the Charlie Gibbs Fracture Zone beyond the outer limits of the continental shelf contained in the submission of Iceland to the CLCS.<sup>20</sup>

In the discussions concerning the consequences of the overlap of the proposed MPA with Iceland's continental shelf, the parties to the OSPAR Convention set out their views on the relationship between the regime of the continental shelf beyond 200 nm and the establishment of its outer limits. Belgium, Spain and Germany submitted that a coastal State cannot claim continental shelf rights beyond 200 nm before the outer limits of that area have been established in accordance with the procedure set out in Art. 76 UNCLOS.<sup>21</sup> Belgium indicated that until that time the area concerned would fall beyond the limits of national jurisdiction. In a similar vein, Germany considered that until such time a coastal State is not in a position to claim rights beyond 200 nm 'since that would result in a situation where substantial parts of the seabed of the high seas could not be used by third states or the international community regardless of the 200 [nm] boundary'.<sup>22</sup> Germany submitted that protective measures for such an area could be taken by the international community and not by the coastal State.<sup>23</sup> On the other hand, Spain stressed that any decision in the framework of the OSPAR Con-

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The proposed Charlie Gibbs Fracture Zone MPA lay beyond 350 nm from Iceland's baselines. Iceland had not informed the other parties to the OSPAR Convention of the overlap between the proposed MPA and Iceland's continental shelf before it lodged its submission.

<sup>20</sup> See e.g. OSPAR Commission, 'Decision 2010/2 on the Establishment of the Charlie-Gibbs South Marine Protected Area' (2010) OSPAR 10/23/1-E, Summary Record of the Meeting of the OSPAR Commission (20-24 September 2010) Annex 36.

<sup>21</sup> See OSPAR Commission, 'Spain – Position on Icelandic Submission for Extension of its Continental Shelf in Relation to OSPAR Projected MPA BNJ (Charlie Gibbs)', Ad Hoc Working Group Charlie 09/01 Add.1-E (11 November 2009); OSPAR Commission, 'Compilation of Responses from Contracting Parties on the Way Forward with Respect to the Charlie Gibbs Fracture Zone Presented by Secretariat', Ad Hoc Working Group Charlie 09/01 Rev.1 (11 November 2009) Annex 1 – Belgium; Annex 4 – Germany, para. 11.

<sup>22</sup> *Ibid.*, Annex 4 – Germany, para. 10.

<sup>23</sup> *Ibid.*, para. 11.



vention should take into account the future potential rights of Iceland.<sup>24</sup> This latter view was also expressed by France: the designation of an MPA should not prejudice Iceland's potential sovereign rights.<sup>25</sup> The Netherlands, while recognizing that the rights of the coastal State were inherent and not potential, stressed that 'the exercise of these rights [...] can only take place [...] after the coastal State has established final and binding limits on the basis of the recommendations of the CLCS'.<sup>26</sup> The Netherlands also submitted that an area under consideration by the CLCS remained an area beyond national jurisdiction:

What other purpose would the CLCS procedure have? Is it not to protect the Area and avoid indiscriminate, unilateral actions by individual coastal states claiming sovereign rights by way of an extended continental shelf?<sup>27</sup>

Other parties to the OSPAR Convention took the opposite view. They observed that the right of the coastal State over the continental shelf is inherent and does not depend on the recommendations of the CLCS.<sup>28</sup> Portugal observed that the fact that a coastal State had not yet received recommendations from the Commission did not mean that it could only exercise sovereign rights up to the 200 nm limit.<sup>29</sup> However, in further elaborating its views, Portugal significantly curtailed this conclusion:

the coastal state, and obviously any other state or international organization, shall refrain to take any economic activity beyond

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<sup>24</sup> OSPAR Commission, 'Spain – Position on Icelandic Submission for Extension of its Continental Shelf in Relation to OSPAR Projected MPA BNJ (Charlie Gibbs)', see note 21.

<sup>25</sup> OSPAR Commission, 'Compilation of Responses from Contracting Parties on the Way Forward with Respect to the Charlie Gibbs Fracture Zone Presented by Secretariat', see note 21, Annex 3 – France.

<sup>26</sup> OSPAR Commission, 'Comments on Document JL(2) 10/3/1 submitted by the Netherlands', JL(2) 10/3/Info.2 submitted to the Group of Jurists/Linguists ('JL'), London (25-26 August 2010) 4.

<sup>27</sup> OSPAR Commission, 'Report of the WG-Charlie Meeting in November 2009', Ad Hoc Working Group Charlie 10/1 (15 February 2010), para. 3.7.

<sup>28</sup> See e.g. OSPAR Commission, 'Compilation of Responses from Contracting Parties on the Way Forward with Respect to the Charlie Gibbs Fracture Zone Presented by Secretariat', see note 21, Annex 8 – Norway; Annex 11 – Portugal, paras 3-4; see also *ibid.*, Annex 5 – Iceland.

<sup>29</sup> See *ibid.*, Annex 11 – Portugal, para. 3.

200 [nm] concerning the exploitation of the resources as referred to in UNCLOS article 133 until favorable recommendations are granted by the CLCS.<sup>30</sup>

At the same time, Portugal considered that a coastal State had the right and the duty to protect and conserve ecosystems and biodiversity in accordance with international law and for the purpose of the future exploitation of this area.<sup>31</sup>

The OSPAR Commission has designated a number of high seas MPAs which overlap with the continental shelf as defined in the submission of a coastal State to the CLCS. The decisions on the management of these MPAs recognize that the coastal State is competent to establish the programs, measures and agreements which are necessary for the achievement of the conservation vision and conservation objectives regarding the seabed of the MPA concerned. The decisions also provide that the designation does not create any precedent regarding the establishment by the Commission of other MPAs in waters superjacent to areas of the seabed subject to submission to the CLCS or prejudice the sovereign rights and obligations of coastal States regarding the continental shelf.<sup>32</sup>

The rights of the coastal State over the continental shelf beyond 200 nm have also been addressed in a number of resolutions of the General Assembly of the United Nations and decisions of the Meetings of States Parties to UNCLOS. A number of instruments in addressing the work of the CLCS refer to the language contained in Art. 77(3) UNCLOS.<sup>33</sup> These general references to Art. 77(3) do not explicitly address the exercise of rights over the continental shelf beyond 200 nm by the coastal State in the absence of final and binding limits. An explicit reference to the exercise of jurisdiction is however contained in the General As-

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<sup>30</sup> *Ibid.*, para. 6.

<sup>31</sup> *Ibid.*

<sup>32</sup> See e.g. OSPAR Commission, 'Decision 2010/5 on the Establishment of the Josephine Seamount High Seas Marine Protected Area' (2010) OSPAR 10/23/1-E, Summary Record of the Meeting of the OSPAR Commission (20-24 September 2010) Annex 42.

<sup>33</sup> See e.g. UNGA, 'Oceans and the Law of the Sea' (4 December 2009) UN Doc. A/RES/64/71, para. 40; 'Decision Regarding the Workload of the Commission on the Limits of the Continental Shelf and the Ability of States, Particularly Developing States, to Fulfil the Requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, para. (a)' (20 June 2008) SPLOS/183, second consideration.

sembly resolutions on fisheries adopted in 2008 to 2010. Para. 104 of the 2008 resolution provides that the General Assembly:

Recalls that nothing in paragraphs 83 to 86 of resolution 61/105 is to prejudice the sovereign rights of coastal States over their continental shelf or the exercise of the jurisdiction of coastal States with regard to that shelf under international law as reflected in the Convention.<sup>34</sup>

Resolution 61/105 did not include this without prejudice provision. In the debate on the draft of the 2008 resolution, Argentina explained that:

it considered it to be appropriate, at this moment, to urge the inclusion of paragraph 104 of the draft resolution on sustainable fisheries so as to prevent any interpretation seeking to ignore the exclusive nature of the rights of coastal States over the areas of their continental shelf situated beyond the 200-mile limit.<sup>35</sup>

The International Court of Justice ('ICJ') and arbitral tribunals have in a number of instances considered the relationship between continental shelf entitlement and the process of establishing the outer limits beyond 200 nm. The court of arbitration in the case concerning *Delimitation of Maritime Areas (St Pierre and Miquelon)* refrained from delimiting the continental shelf beyond 200 nm.<sup>36</sup> After referring to the Art. 76 pro-

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<sup>34</sup> UNGA, 'Sustainable Fisheries, Including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments' (5 December 2008) UN Doc. A/RES/63/112, para. 104; a similar paragraph is contained in UNGA, 'Sustainable Fisheries, Including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments' (4 December 2009) UN Doc. A/RES/64/72, para. 115 and UNGA, 'Sustainable Fisheries, Including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments' (7 December 2010) UN Doc. A/RES/65/38, para. 119. The latter two resolutions explicitly refer to Art. 77 UNCLOS.

<sup>35</sup> UNGA Plenary Meeting (4 December 2008) GAOR Sixty-third Session 63<sup>rd</sup> Plenary Meeting, UN Doc. A/63/PV.63, 4.

<sup>36</sup> Case concerning *Delimitation of Maritime Areas (Decision)* Court of Arbitration for the Delimitation of Maritime Areas between Canada and France (10 June 1992) (1992) 31 ILM 1149 (1171-1173, paras 75-82).

cess, the award indicates that its refusal to pronounce itself on this issue 'cannot signify nor may be interpreted as prejudging, accepting or refusing the rights that may be claimed by France, or by Canada, to a continental shelf beyond 200 nautical miles'.<sup>37</sup> This finding seems to imply that according to the court of arbitration, the rights over this part of the continental shelf do not exist prior to the completion of the Art. 76 process.

The tribunal in *Barbados v. Trinidad and Tobago* considered itself to be in a position to address the delimitation of the continental shelf beyond 200 nm in the absence of outer limits established in accordance with Art. 76.<sup>38</sup>

In its judgment of 2007 in the maritime delimitation case between Nicaragua and Honduras, the ICJ observed:

The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82<sup>nd</sup> meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.<sup>39</sup>

This finding of the Court may be open to different interpretations. Interestingly, this matter was not argued by the parties and in view of the geography of the area does not seem to have practical relevance. It could well be argued that the Court holds that it cannot pronounce itself on the delimitation of the continental shelf beyond 200 nm before the Art. 76 process has been completed. Another reading would be that the Court considered that the parties to the case cannot use the delimi-

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<sup>37</sup> *Ibid.*, paras 79-80.

<sup>38</sup> *Barbados and the Republic of Trinidad and Tobago (Award) Permanent Court of Arbitration* (11 April 2006) 45 ILM 800, para. 368. The tribunal did not establish a boundary in the area beyond 200 nm because it concluded that the circumstances of the case mandated a boundary which ended at 200 nm of the baselines of Trinidad and Tobago and within 200 nm of the baselines of Barbados, see paras 381-382 and 385.

<sup>39</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, para. 319.

tation effected by the Court as a basis to claim rights that do not exist under Art. 76 UNCLOS.

State practice does not reveal a similar hesitance in dealing with the delimitation of the continental shelf beyond 200 nm in the absence of outer limits. A recent example is provided by the 2010 agreement between Norway and the Russian Federation, which is concerned with the Barents Sea and the Arctic Ocean.<sup>40</sup>

### III. Dealing with the Uncertainties Resulting from the Absence of Final and Binding Outer Limits

#### 1. Determination of the Extent of the Continental Shelf beyond 200 Nautical Miles

The first question to consider is whether continental shelf rights exist beyond 200 nm in the absence of final and binding limits. The judgment of the ICJ in the maritime delimitation case between Nicaragua and Honduras and the award in the arbitration between France and Canada both suggest that this is not the case, although the former judgment is open to different interpretations. A similar view has been adopted by a number of parties to the OSPAR Convention in the discussion concerning the potential overlap between a proposed MPA and Iceland's continental shelf beyond 200 nm. Other parties to the Convention have taken the position that rights to the continental shelf beyond 200 nm are inherent and that the coastal State can exercise these rights in the absence of final and binding outer limits. The decisions of the OSPAR Commission on the designation of a number of MPAs which are located within continental shelf limits submitted to the CLCS also reflect this view. It is also reflected in the 2008 to 2010 General Assembly resolutions on fisheries.

The view that continental shelf rights beyond 200 nm do not exist in the absence of final and binding limits is unconvincing for a number of reasons. First of all, it mischaracterizes the process involving the coastal

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<sup>40</sup> Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (done 15 September 2010, entered into force 7 July 2011), reprinted in T Henriksen and G Ulfstein, 'Maritime Delimitation in the Arctic: The Barents Sea Treaty', *Ocean Development and International Law* 42 (2011) 1 et seq. (11-17).

State and the CLCS. As was explained previously, this process is concerned with establishing the outer limits of the continental shelf beyond 200 nm and not with validating a claim to this area. Secondly, as was also set out above, Arts 76(2) and 77(3) UNCLOS indicate that the entitlement to the continental shelf is not dependent on the establishment of outer limits. This latter point is confirmed by the definition of the continental shelf in Art. 1 Convention on the Continental Shelf<sup>41</sup> and in customary law as defined by the International Court of Justice in the *North Sea continental shelf cases*.<sup>42</sup> Both imply the existence of an entitlement beyond 200 nm and do not require the determination of final and binding outer limits for the entitlement to exist. There is no indication that UNCLOS intended to diverge from established law in this respect. It could be argued that State practice also confirms this view. There is a significant amount of practice in respect of the continental shelf beyond 200 nm. However, certain States take the view that these continental shelf rights do not exist prior to the establishment of outer limits in accordance with Art. 76 UNCLOS. A more detailed analysis of State practice would be required to determine its significance with greater certainty.

If the rights to the continental shelf beyond 200 nm do not depend on the establishment of final and binding outer limits, the next question is how the extent of this part of the continental shelf can be defined provisionally. One possible approach was suggested by Portugal in the discussions relating to the Icelandic submission in the framework of the OSPAR Convention. Portugal observed that in most cases in which the CLCS had issued recommendations, the outer limits contained therein were very close to the outer limits contained in the submission and in some areas were even more favorable to the coastal State. Portugal submitted that there should be a presumption that in the absence of final and binding limits, the outer limits of the continental shelf of a coastal State shall be considered to be the limits contained in the submission to the Commission.<sup>43</sup> As was also observed by Portugal, the estab-

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<sup>41</sup> Convention on the Continental Shelf (done 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

<sup>42</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3.

<sup>43</sup> OSPAR Commission, 'Compilation of Responses from Contracting Parties on the Way Forward with Respect to the Charlie Gibbs Fracture Zone Presented by Secretariat', see note 21, Annex 11 – Portugal, paras 5-6.

ishment of maritime zones 'is a matter of sovereignty to be carried out in accordance with international law.'<sup>44</sup>

At first sight, Portugal's suggestion might seem to offer a reasonable solution. Matters are however not as straightforward as is suggested by Portugal. In a number of cases the CLCS has not adopted the limits submitted by the coastal State. In 2002, the Russian Federation was recommended to make a revised submission in respect of the outer limits of its continental shelf in the Arctic Ocean.<sup>45</sup> The Russian submission had included outer limit lines extending a couple of hundred nautical miles beyond the 200 nm limit. In respect of the continental shelf of Ascension Island, the Commission in its recommendations concluded that the submission of the United Kingdom did not provide a basis for establishing outer limits beyond 200 nm.<sup>46</sup> The United Kingdom had submitted outer limits of up to 350 nm from Ascension.

Secondly, as Portugal implicitly indicated by its reference to international law, the establishment of maritime zones is not a wholly unilateral process. The establishment of the outer limits of the maritime zones of a coastal State is a two-stage process. This is expressed as follows in a well-known observation made by the ICJ in the *Anglo-Norwegian Fisheries case* concerning the straight baselines Norway had established along its coast:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.<sup>47</sup>

Put differently, other States have a right to reject the limits of maritime zones established by the coastal State. This also applies if a coastal State

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<sup>44</sup> *Ibid.*, para. 4.

<sup>45</sup> UNGA, 'Oceans and Law of the Sea: Report of the Secretary-General: Addendum', see note 5, para. 41.

<sup>46</sup> Commission on the Limits of the Continental Shelf, 'Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008' (15 April 2010), see <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/gbr08/gbr\\_asc\\_isl\\_rec\\_summ.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf)> (4 October 2011), para. 54.

<sup>47</sup> *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 132.

invokes the limits it has submitted to the CLCS as the provisional limits of its continental shelf pending the outcome of the consideration of its submission by the Commission. There is no obligation for other States to accept such provisional outer limits.<sup>48</sup> The conclusion that coastal States are entitled to determine and apply provisional limits does not detract from their obligation to determine the outer limits of the continental shelf beyond 200 nm in accordance with the procedure set out in Art. 76(8). This obligation is explicitly spelled out in Art. 7 Annex II to the Convention.

## 2. The Exercise of Rights over the Continental Shelf by the Coastal State

Is the coastal State entitled to exercise rights over the continental shelf beyond 200 nm in the absence of final and binding limits? Art. 77 UNCLOS is the principal article defining the rights of the coastal State over the continental shelf. Art. 77 does not make a distinction between the continental shelf within and beyond 200 nm and Art. 77 explicitly refers to the *exercise* of these rights. There thus does not seem to be scope for other States to object to the exercise of these rights by the coastal State over the continental shelf beyond 200 nm as such. This however is not the end of the matter.

Other States may object if a State is exercising continental shelf rights in an area which they consider to be beyond the outer limits of the continental shelf. A corollary of this position of these other States is that under their view marine scientific research in the area concerned is a freedom of the high seas and they may decide to exercise these freedoms without seeking the consent of the State claiming continental shelf rights. Whether this is an attractive option is questionable. A conflict with the claimant State may negatively impact on the execution of the research concerned.

What legal consequences would a dispute over the exercise of continental shelf rights by a State have? In the absence of final and binding limits, it will first of all be up to the States concerned to seek a solution to such a dispute. In the case of overlapping continental shelf entitle-

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<sup>48</sup> The options for dealing with a dispute between a coastal State and other States concerning the outer limits of the continental shelf beyond 200 nm are briefly considered in section III.2 below.



ments, the coastal States concerned have an obligation, pending agreement on a final delimitation, to make every effort to enter into provisional arrangements and not to jeopardize or hamper the reaching of the final agreement.<sup>49</sup> This obligation does not exist when one State claims an area as a part of its continental shelf and another State rejects such a claim. It is moreover to be expected that a claimant State will in general not be willing to accept limitations on the exercise of its sovereign rights. If negotiations do not result in a solution, UNCLOS offers States the possibility of submitting a dispute to compulsory dispute settlement. A court or tribunal in essence will be required to decide if continental shelf rights exist in the area concerned. There is one important limitation to address this issue. A court or tribunal would not be competent to deal with matters falling within the competence of the CLCS and would not be in a position to make recommendations to coastal States. On the other hand, a court or tribunal would be competent to deal with other questions in respect of Art. 76. A court or tribunal may also be expected to take into account the stage reached by the Art. 76 process for the specific coastal State. For instance, has that State complied with its obligation to make a submission? Have recommendations been made, and what is their content? Has the State made a new or revised submission within a reasonable time and if not, what are the reasons for the absence of a new or revised submission? If a dispute has been submitted to a court or tribunal, a party could also request the indication of provisional measures pending a final decision in accordance with Art. 290 UNCLOS.

After the outer limits of the continental shelf have been determined in accordance with Art. 76 UNCLOS, it could become clear that a State has exercised continental shelf rights in an area beyond these outer limits. This would constitute an unlawful act, which, depending on the circumstances of the case, could give rise to a requirement for reparation. For instance, if a State has exploited the mineral resources of a claimed continental shelf area, which is subsequently established to be part of the Area, the International Seabed Authority would be entitled to claim damages.<sup>50</sup>

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<sup>49</sup> Art. 83(3) UNCLOS.

<sup>50</sup> See Art. 137 UNCLOS.

#### IV. The Regime for Marine Scientific Research in the Absence of Final and Binding Outer Limits of the Continental Shelf in the Arctic Ocean

Location is the primary determinant for the regime of marine scientific research. Most of the Arctic Ocean is located within the exclusive economic zone and continental shelf of the five Arctic coastal States. Within the bounds set by international law, these coastal States are free to determine the regime of marine scientific research within their maritime zones. As the example of the United States and Canada shows, coastal States may opt not to make use of all the limitations on research that international law allows them to apply.

The extent of the continental shelf in the Arctic Ocean at present is still uncertain. Only Norway has received recommendations from the CLCS which allow it to establish final and binding limits in accordance with Art. 76 UNCLOS. Recommendations to the other four coastal States may not be forthcoming in the next couple of decades. In the absence of final and binding limits coastal States are entitled to determine the extent of their continental shelf in accordance with the substantive provisions of Art. 76. They are entitled to exercise their rights as coastal States in this area, including rights in respect of marine scientific research. Other States are not obliged to accept the outer limits a coastal State has defined unilaterally if they consider that these outer limits are not in accordance with the substantive provisions of Art. 76 and also need not accept the exercise of jurisdiction by that State in the area they consider to be beyond the outer limits resulting from the application of Art. 76. As noted in the preceding analysis, the means of settling a dispute over these matters are limited. Such a dispute may also have a negative impact on the conduct of marine scientific research.

The conveners of this conference posed a number of questions in relation to the legal consequences of uncertainty about the extent of the continental shelf in the Arctic Ocean: Would the enlarged continental shelf lead to a *de facto* limitation for science in the Arctic Ocean? Does a 'legal science *acquis*' exist, which might prevail in the future? And does the Arctic Ocean represent an area '*sui generis*' for marine science?<sup>51</sup>

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<sup>51</sup> Programme (preliminary draft as of 22 October 2011 [sic]), Arctic Science, International Law and Climate Change – Legal Aspects of Marine Science in the Arctic Ocean –, International Conference at the Federal Foreign Office in

The answer to the first of these questions has already been provided above. Coastal States at present already have the right to regulate marine scientific research on their entire continental shelf in accordance with international law. The second question suggests that this coastal State right may have been modified for the Arctic Ocean by the existing practice in respect of marine scientific research. A final answer to this question would require more information on this practice. However, it is considered highly unlikely that the regime contained in UNCLOS is not applicable unabridged to the Arctic Ocean. There is no obligation for coastal States to exercise these rights. Even if there were practice indicating that Arctic coastal States have not exercised certain rights to regulate marine scientific research, this would not preclude them from exercising those rights in the future. The practice of the United States illustrates this point. The United States does not exercise its right to assert jurisdiction over marine scientific research beyond the outer limits of its exclusive economic zone, but there is no reason to assume that it has waived these rights.

The third question posed by the conveners of the conference suggests that the characteristics of the Arctic Ocean provide a rationale for a more liberal regime for marine scientific research than that applicable to other parts of the globe. The significance of the Arctic Ocean for understanding the global climate comes to mind in this respect. In that context, international cooperation and access to this area for researchers are of key importance. The attainment of these goals stands little to gain from attempts by third States to unsettle the regime for marine scientific research contained in UNCLOS. Rather, the Convention should provide the basis for further developing a regime which will allow to effectively take advantage of the synergies of international cooperation. Questions relating to the definition of the outer limits of the continental shelf by the Arctic coastal States should rather be dealt with in the context of the implementation of Art. 76 UNCLOS and should not unnecessarily burden the debate concerning the development of the international regime for marine scientific research.

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cooperation with the Ministry of Foreign Affairs of Finland, Berlin (17 – 18 March 2011) 3 (on file with the author).