

## EXPLOITATION OF THE CONTINENTAL SHELF IN DISPUTED AREAS AN EXAMPLE OF THE ARCTIC OCEAN

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*This paper aims to examine the legal regime related to define the outer limits of the continental shelf beyond 200 NM. Firstly, special focus will be on the development of the legal concept of the continental shelf. Relevant provisions of the LOS Convention and Article 76 in particular will be scrutinized. Subsequently there is an assumption on which the principles of the Arctic outer continental margin delimitation will be conducted in relation of hypothetic application during the practice of an international adjudicative body. The delimitation within 200 NM and beyond 200 NM will be compared. The fourth chapter will be concentrated on the role of the Commission as an important participant of delimitation process. Also there will be a general overview of the state practice concerning the establishment of the outer continental margin in the Arctic, the reaction of other Arctic States and recommendations of the Commission.*

*It will be concluded that 'there are some difficulties in implementing the Article 76 (locating the foot of the slope and dealing with ridge issues), however it is possible to delimit the continental margin of the world based on the Article 76.' Difficulties in implementing and some discrepancies in provisions of the Article 76 do not constitute grounds for considering of a new legal approach. Discrepancies are mainly contained in the Rules of Procedure and in the Scientific and Technical Guidelines of the Commission. They can be disposed practically without considering the legal concept. In case of unresolved land or maritime dispute the cooperation among coastal states is the best way to avoid conflicts while delimiting the outer continental margin.*

*Keywords: Delimitation under the Law of Sea; Article 76 of LOS; Commission and function under LOS; Continental shelf and resource management; exploitation of Arctic.*

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## Table of Contents

- 1. Introduction**
  - 1.1. Premise*
  - 1.2. Indication of its Importance and Relevance*
- 2. Legal Concept of the Continental Shelf**
  - 2.1. Legal and Historical Background*
  - 2.2. The Third United Nations Convention on the Law of the Sea*
  - 2.3. The Article 76 of the LOS Convention: Four Rules, Two Formulas and Two Constraints*
- 3. Problems of Delimitations. Methods and Criteria to Establish an Equitable Solution**
  - 3.1. Principles of Arctic delimitation*
  - 3.2. The Determination of Title to the Arctic Continental Margin*
- 4. The Role of the Commission on the Limits of the Continental Shelf**
  - 4.1. Functions and Constitutive Structure of the Commission*
  - 4.2. The Process of Submission*
  - 4.3. Submission of Coastal States to the Commission in Cases of Unresolved or Maritime Disputes*
- 5. State Practice Concerning the Establishment of the Outer Continental Margin in the Arctic**
  - 5.1. The Submission of the Russian Federation*
  - 5.2. The Submission of Norway*
  - 5.3. Other Arctic States position: Canada, Denmark, the United States*
- 6. Conclusion**

### 1. Introduction

The adoption of the Convention on the Law of the Sea (hereinafter LOS Convention) and approaching of deadlines for Arctic Coastal States signalized a new stage in struggle for the huge oil and gas reserves of the Arctic seabed. A new claim to the parts of the Arctic outer continental margin brings new challenges to the international law related to the continental shelf in general, and delimitation of the outer continental margin in particular. With the depletion of oil and gas reserves onshore and in traditional offshore provinces within 200 nautical miles the Arctic attracts much more attention of the world-wide community. Such heightened attention could be explained by the fact that the Arctic consists of 1/4 of world's undiscovered hydrocarbon resources. As it was suggested by Young that 'the world was entering the 'Age of the Arctic' during which the Arctic region would begin to play a dominant role in international affairs.'<sup>1</sup>

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<sup>1</sup> Donald Rothwell, *The Polar Regions and the Development of International Law* 224 (Cambridge University Press 1996).

### **1.1. Premise**

In legal literature dedicated to the Law of the Sea and with Arctic problems a great attention has been paid to the issues of Arctic outer continental margin delimitation and the role of the Commission on the Limits of the Continental Shelf (hereinafter Commission). Some provisions of the LOS Convention concerning the delimitation of the outer continental margin have been criticized a lot for the complexity of its rules and difficulties in its implementing. Thus, it is important to find out whether the international law corresponds to the new claims to the Arctic or a new legal approach should be considered.

### **1.2. Indication of its Importance and Relevance**

The outer continental margin delimitation is a very long and complicated process which is based on different scientific-technical and legal aspects which are 'very much intertwined and not easily separated'. It becomes more complicated when the claims of the coastal states overlap. There is a provision in the Rules of Procedure of the Commission (hereinafter the Rules of procedure)<sup>3</sup> which contemplates the procedure for such cases: the Commission 'shall not consider and qualify a submission made by any of the States concerned in Dispute.'<sup>4</sup> The Rules of Procedure also involve several options to avoid conflict such as: 'the delimitation may be made by two or more coastal States by an agreement' Despite this the expectation of litigation on Arctic disputes is high. It is essential to mention the fact that 'from a review of continental shelf areas beyond 200 NM worldwide, there are only a few of such areas which form the prolongation of only one coastal State.' Thus, Prescott in inventory, exercised in 1998, found '29 such areas, 22 of which involve more than one State and only 7 involve just one.' Until the International Court of Justice (hereinafter referred to as ICJ) pronounces a judiciary decision on Arctic disputes, it is hard to say on which principles the Arctic delimitation will be applied.

Another important feature of the delimitation process is a time limitation. According to Annex II, Article 4 of the LOS Convention a coastal State has to make a submission within 10 years of entry into force of the LOS Convention. Thus, it should be borne in mind that for the Russian Federation the deadline has been 2009, for Canada 2013, for Denmark 2014. Technological developments and climate change which results in ice caps melting should also be mentioned as the other factors which increase the tension in the Arctic disputes, making the exploitation possible. According to Peter Croker, there will be 'somewhere between 27 and 47 submissions in the next six years.'

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<sup>2</sup> Thomas H. Heidar, *Legal Aspects of Continental Shelf Limits*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 19 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>3</sup> *Rules of Procedure of the Commission on the Limits of the Continental Shelf*. CLCS/3/Rev.2 (United Nations, New York 1998).

<sup>4</sup> Rules of procedure, Annex 1 Rule 5 (1).

## 2. Legal Concept of the Continental Shelf

### 2.1. Legal and Historical Background

Until the 20th century the continental shelf did not attract much attention of coastal States. With the developments in technology, which make it feasible to exploit the continental shelf the situation changed. Speaking about the history of the claims to the continental shelf, the Proclamation made by President Truman of the United States in 1945 should be mentioned as a first significant phenomenon. The Truman Proclamation declared that 'the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control.'<sup>5</sup> It was the first claim to the resources of the continental shelf which lay down the basis for many others. Another example was the Santiago Declaration in 1952, when Chile, Ecuador and Peru 'which have no real continental shelf in the physical sense claimed full sovereignty over the seabed and subsoil for a distance of 200 NM from their coasts.'<sup>6</sup>

For the first time the doctrine of the continental shelf was established at the Geneva Conference on the Law of the Sea in 1958. Article 1 of the Convention on the Continental Shelf (hereinafter the Geneva Convention)<sup>7</sup> in 1958 defined the continental shelf as: 'The seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas...' Thus, the Geneva Convention established two criteria to define the outer limit of the continental shelf: the depth (200 m) and the exploitability.

The next stage in development of legal concept of the continental shelf was the *North Sea Continental Shelf Cases*<sup>8</sup> in 1969. The relevant provisions of the Geneva Convention were confirmed to represent a customary law. The International Court of Justice stressed that 'More fundamental than the notion of proximity appears to be the principle ... of the natural prolongation or continuation of the land territory ...'<sup>9</sup> Subsequently, this conclusion had a great influence on the farther development of the continental shelf legal concept at the third United Nations Conference on the Law of the Sea in 1982.

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<sup>5</sup> Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. Reproduced in the Code of Federal Regulations 1943–1948 Comp. 3, at 67.

<sup>6</sup> Thomas H. Heidar, *Id.* at 21.

<sup>7</sup> *Convention on the Continental Shelf*, 29 April (Geneva 1958). In force June, 10 1964. 499 UNTS 311.

<sup>8</sup> *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal republic of Germany v. Netherlands)*, 3 ICJ Reports (1969).

<sup>9</sup> *Id.*

## 2.2. The Third United Nations Convention on the Law of the Sea

To date, the LOS Convention is the basic source of the modern law of the sea or 'a constitution for the oceans',<sup>10</sup> which was finally adopted at the third United Nations Conference on the Law of the Sea in 1982. It should be mentioned that the negotiating process took a long time and 'from a very early stage became a singularly undemocratic and non-transparent.'<sup>11</sup> Decisions were mainly taken on the basis of consensus. Many compromises are another characteristic of the LOS Convention.

The Part VI (articles 76–85) of the LOS Convention concerned the continental shelf. One of the basic achievements of the LOS Convention was the new definition of the continental shelf with the provision that 'every coastal state has an inherent right to the continental shelf *ipso facto*. According to the Article 76 (1) of the LOS Convention a definition of the continental shelf is 'the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'<sup>12</sup>

Nowadays some scholars state that the Article 76 of the LOS Convention defines 'the continental shelf in a manner which is scientifically based, legally defensible and politically acceptable.'<sup>13</sup> The provisions of the Article 76 have been criticized a lot for the difficulties in its implementing and for the complexity of its rules. Furthermore, according to Macnab 'it is generally agreed that the Article 76 with its simplifying assumptions and its ambiguous terminology constitutes an uncomfortable mix of law and science that makes it difficult under some circumstances to achieve clear and unequivocal conclusions.'<sup>14</sup> The difficult aspects were also highlighted by Gudlaugsson. In his opinion 'the main sources of interpretational difficulties and controversy associated with the definition of the continental shelf are the following:

– Disagreement, without mentioning the confusion of consciousness, over the meaning of the concept of natural prolongation. This includes leakage from the concept of natural components of a continental margin used in defining constraints on the maximum seaward extent of the continental shelf in the provisions defining and implementing its outer limit.

<sup>10</sup> Hans Corell, *International Oceans Governance and the Challenge of Implementation*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 461 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>11</sup> Gudmundur Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 252 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>12</sup> LOS Convention. Article 76 (1).

<sup>13</sup> R.W. Smith and G. Taft, *Legal Aspects of the Continental Shelf*, in *Continental Shelf Limits: The Scientific and Legal Interface* 17 (P.J. Cook and C.M. Carleton eds.) (New York, Oxford University Press 2000).

<sup>14</sup> Ron Macnab, *The Outer Limit of the Continental Shelf in the Arctic Ocean*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 308 (Leiden, Martinus Nijhoff Publishers 2004).

– The interplay between the natural complexity of continental margins and ambiguity in the Article 76.

– Differences of opinions regarding the role should be given to a geological evidence, especially an evidence based on deep-seated geological formations and geological origin relative to a geomorphologic evidence in determining the outer edge of the continental margin and also regarding the proper channel for presenting such evidence.

– Lack of care not to break with the principle of neutrality of the Article 76 with respect to the status of a coastal state as an island or a continent.

– A tendency to take a scientific point of view of the Article 76 rather than a juridical one.<sup>15</sup>

Besides the above-mentioned interpretational difficulties, he also highlighted many strengths of the definition of the continental shelf. Thus, Gudlaugsson stated that in general 'the concepts used in its construction are fairly simple, well-understood and not likely to arouse as much controversy as many others probably would have done.'<sup>16</sup>

Concerning the operational difficulties, Gudlaugsson offered some solutions in order to overcome the complexity with the Article 76:

1) 'to avoid the use of natural prolongation in a way that conflicts with its geomorphologic nature;

2) to refrain from the claims on the basis of arguments that amount to jumping or leakage from the concept of natural components of the continental margin; and

3) to present a geological evidence as opposed to a geomorphologic evidence referring to all but the shallowest geological formations beneath the seafloor and relating to the determination of the outer edge of the continental margin through the evidence-to-the-contrary mechanism of paragraph 4 (b).'<sup>17</sup>

Finally, Gudlaugsson concluded that it is doubtful that any other approach 'based on other data and yardsticks could be any better than the present Article 76. The definition is practical in the sense that it is operational in nature.'<sup>18</sup> This opinion was also supported by Moore who declared that 'there are some difficulties in implementing the Article 76 (locating the foot of the slope and dealing with ridge issues); however, it is possible to delimit the continental margin of the world based on the Article 76.'<sup>19</sup>

<sup>15</sup> S.T. Gudlaugsson, *Natural Prolongation and the Concept of the Continental Margin*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 80 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>16</sup> *Id.* at 64.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Moore, *Concluding Remarks* 457.

Thus, it can be concluded that despite the fact that many provisions of the Article 76 of the LOS Convention has been criticized for the difficulties in its implementation, the current legal approach allows the demarcation of the continental margins in the world to avoid potential conflicts.

The another important provision in the current legal approach should be mentioned. Taking into account the interest of the non-coastal States as a compromise the LOS Convention assigned financial obligation on a coastal State 'to make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles.'<sup>20</sup> These payments should be distributed to States Parties of the LOS Convention 'on the basis of equitable sharing criteria.'<sup>21</sup>

### **2.3. The Article 76 of the LOS Convention: Four Rules, Two Formulas and Two Constraints**

As it was said, the process of negotiating of the LOS Convention was very complicated and took a long time, especially concerning the Article 76. Each group of States pursues its own purpose according their strategic interests and the continental shelf. It was described by Miles: 'For the superpowers, the oil and gas interests were competitive with security interests in terms of narrow shelves as possible and, in any case, clearly defined outer limits.'<sup>22</sup> It must be stressed that the LOS Convention makes it possible for Coastal states to claim for the continental shelf beyond 200 NM, whereas the Geneva Convention did not provide such a possibility. The Article 76 (4) (a) stated that 'the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'<sup>23</sup> The another significant provision of the LOS Convention concerning the continental shelf is that 'the sovereign rights of the coastal State are exclusive in the sense that if it does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without an agreement of the coastal State.'<sup>24</sup>

In respect of outer limit delimitation, the Article 76 (4) of the LOS Convention introduces 'four rules, two formulas and two constraints based on the concepts of geodesy, geology, geophysics and hydrography which govern the legal contours of the extension of the continental margin to the area beyond 200 NM.'<sup>25</sup> Two formulas for the

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<sup>20</sup> LOS Convention. Article 82 (1).

<sup>21</sup> *Id.* Article 82 (4).

<sup>22</sup> E.L. Miles, *Global Ocean Politics* 382 (The Hague, Martinus Nijhoff, 1998).

<sup>23</sup> LOS Convention. Article 76 (4)(a).

<sup>24</sup> *Id.* Article 77 (2).

<sup>25</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin*, 76 *Nordic J. of Int'l L.* 468 (2007). DOI: 10.1163/090273507X257058.

establishing of the outer limits of the continental shelf are 'Irish' and 'Hedberg'. These formulas can be applied alternatively in different portions. Thus, the first one is based on the thickness of sedimentary material – 'a line delineated in accordance with the paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope.'<sup>26</sup> The latest is based on a line up to 60 NM from the foot of the continental slope – 'a line delineated in accordance with the paragraph 7 by reference to fixed points no more than 60 nautical miles from the foot of the continental slope.'<sup>27</sup> It is very important in this regard to mention that, the determination of the foot of the continental slope is primary in any delimitation because 'the foot of the continental slope is an essential feature that serves as a basis for entitlement to the extended continental shelf and the delineation of its outer limits.'<sup>28</sup>

Two alternative constraints are: 'the fixed points comprising the line of the outer limits of the continental shelf on the sea-bed drawn in accordance with the paragraph 4 (a) (i) and (ii) either shall not exceed 350 NM from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 NM from 2,500 meter isobaths which is a line connecting the depth of 2,500 meters.'<sup>29</sup>

McDorman criticized the provisions of the Article 76 in a way that: 'the criteria are not easily applicable in any given situation because of the technical and definitional difficulties of determining thickness of sediment, foot of the continental shelf, the 2,500 meter isobaths and distinguishing among submarine ridges, oceanic ridges and submarine elevations that are natural components of the continental margin.'<sup>30</sup> This point of view was supported by many other authors (Kunoy, Macnab, Nelson and Zinchenko). However, it must be stressed that the difficulties in implementing are mostly concerned with the complexity of the sphere of application.

Finally, it should be mentioned that according to the Article 121 of the LOS Convention the 'continental shelf of an island is determined in accordance with the provisions of this Convention applicable to other land territory.'<sup>31</sup> Thus, there is no special rule provided to the islands.

Each coastal State claiming to the extension of the outer continental margin must collect and submit data to the Commission to prove that the outer continental margin is a natural prolongation of the continental shelf.

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<sup>26</sup> LOS Convention. Article 76 (4)(a).

<sup>27</sup> *Id.*

<sup>28</sup> Scientific and Technical Guidelines of the CLCS, point 5.1.1.

<sup>29</sup> *Id.*, point 2.1.7.

<sup>30</sup> T.L. McDorman, *The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime*, 10 Int'l J. of Marine and Coastal L.165 (1995). DOI: 10.1163/157180895X00033.

<sup>31</sup> LOS Convention. Article 121 (2).



### **3. Problems of Delimitations. Methods and Criteria to Establish an Equitable Solution**

#### **3.1. Principles of Arctic delimitation**

As it can be seen, the Rules of Procedure provide many possibilities of peaceful settlement of the disputes. However the probability of the litigation is high. Until ICJ states a decision on Arctic disputes, it is hard to say on which principles the Arctic delimitation will be affected. To answer this question it is important to take into account the relevant cases in which maritime disputes on delimitation within 200 NM were resolved such as: *the North Sea Continental Shelf Cases*,<sup>32</sup> *Tunisia v. Libyan Arab Jamahiriya*,<sup>33</sup> *the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*.<sup>34</sup> It can be assumed that these cases will have a great impact on the delimitation of the outer continental margin in the Arctic.

According to the Article 83 of the LOS Convention 'the delimitation of the continental shelf between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law as referred to in the Article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution.' As it was stated in one of the cases, concerning the delimitation within 200 NM, finding of an equitable solution is a 'fundamental norm'<sup>35</sup> to each delimitation. From the above-mentioned cases it can be concluded that 'the equitable solution will be determined autonomously on the basis of other criteria than the edified case law in respect to delimitations within 200 NM.<sup>36</sup> Geology, geophysics, hydrography and geomorphology will define the methods and criteria on which the equitable solution is based but not the coastal geography.<sup>37</sup> However, there is no provision in the LOS Convention nor in Technical Guidelines of the Commission establishing which criteria is primary and how this issue will be resolved. The same author considered that the title to the outer continental margin 'is based on something other than distance and geological and geomorphologic criteria are relevant for determining a title.'<sup>38</sup>

#### **3.2. The Determination of Title to the Arctic Continental Margin**

As it was reasonably stated by Weil, 'the delimitation cannot be understood without a title, which lies at its very heart.'<sup>39</sup> The establishment of an equitable solution

<sup>32</sup> *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal republic of Germany v. Netherlands)*, 3 ICJ Reports (1969).

<sup>33</sup> *Tunisia v. Libyan Arab Jamahiriya*, ICJ Reports (1982).

<sup>34</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984).

<sup>35</sup> *Id.*, Para 111.

<sup>36</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 475.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 471.

<sup>39</sup> P. Weil, *Dissenting Opinion Canada v. France arbitration*, 31(5) ILM (1992) 1198, paras 10–12.

in any delimitation must be carried out 'according to the legal basis of the title and must further comply with principles of equity in order to be found in law. It is therefore of quintessential importance to identify the basis of legal title as this is the sole factor that determines the applicable law and methods to find an equitable solution.<sup>140</sup>

Firstly, it should be borne in mind that the title to the Arctic outer continental margin is different to the title to the continental shelf within 200 NM. In case of delimitation of the continental shelf within 200 NM the preliminary equidistant line will be the basis for establishing of the methods and criteria to find an equitable solution.<sup>41</sup> Each coastal State has an inherent title to the 200 NM but not to the continental shelf beyond 200 NM.

In *Tunisia v. Libya* ICJ held that 'it is only the legal basis of the title to the continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties.'<sup>42</sup> Further the ICJ held in *Libya v. Malta* that 'the choice of criterion and method which is to employ should be made in a manner consistent with the concepts underlying the attribution of the legal title.'<sup>43</sup> It can be seen that the coastal geography is considered as a relevant criterion for the delimitation within 200 NM. The coast forms the title to the continental shelf within 200 NM; therefore the distance criterion is determinative. However, Kunoy postulated that by the way of analogy the coastal geography cannot be used as a criterion of five Arctic coastal States with respect to the applicable methods and criteria for finding an equitable solution because 'geography is alien with respect to the title of the outer continental margin.'<sup>44</sup> As it was stated in the *North Sea Continental Shelf Cases* by the ICJ 'the land is the legal source of power which a State may exercise over territorial extensions to seaward.'<sup>45</sup> Thus, it can be concluded that the delimitation beyond 200 NM in the Arctic will be based on the other principles than delimitation within 200 NM. As D.A. Colson assumed 'whereas the *North Sea* cases were decided prior to the emergence of the Convention the natural prolongation with respect to the Arctic delimitation will be relevant for the delimitation of the outer continental margin.'<sup>46</sup> Therefore, the primary of the Arctic coastal States will be to prove that 'the outer continental margin is a natural prolongation of the continental shelf.'<sup>47</sup> Concerning the potential case law, it also

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<sup>40</sup> *Id.* at p. 202.

<sup>41</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 472.

<sup>42</sup> *Tunisia v. Libyan Arab Jamahiriya*, ICJ Reports 48 (1982), para 47.

<sup>43</sup> *Libya v. Malta*, p. 46–47, para 61.

<sup>44</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 468.

<sup>45</sup> *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal republic of Germany v. Netherlands)*, 3 ICJ Reports 51 (1969), para 96.

<sup>46</sup> D.A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 AJIL 107 (2003).

<sup>47</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 471.

can be suggested that it will be based on a legal approach taken by ICJ in *North Sea Continental Shelf* cases 'that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion.'<sup>48</sup> Further, based on the above Kunoy suggested that the outer continental margin delimitation will be similar to land delimitation.<sup>49</sup> Thus, the question of a concurrency of title is rising in case of dispute. Each claimant has to prove that its title to the outer continental margin is concurrent and the primary principle is the determination of 'which of the parties has produced the more convincing proof of title to the disputed area.'<sup>50</sup> This was also stated in arbitral decision the *Island of Palmas* 'if a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title [...] superior to that which the other State might possibly bring forward against it.'<sup>51</sup> Finally, it can be concluded that 'the adjudicative body, prior determining the methods and criteria to establish an equitable solution will study an issue and in affirmative positive meaning to what extent the title of one coastal State could partially triumph the title of the other.'<sup>52</sup> In the case of the Arctic; Canada, Denmark and the Russian Federation will prove that the Lomonosov ridge is the natural prolongation of its territory, and the adjudicative body will scrutinize the title of each claimant. It should be mentioned in this regard that to date only Russia submitted data to the Commission, therefore the process is far from the end.

#### **4. The Role of the Commission on the Limits of the Continental Shelf**

##### **4.1. Functions and Constitutive Structure of the Commission**

The Commission is one out of three international bodies established under the LOS Convention (The International Seabed Authority, The International Tribunal of the Law of the Sea). The Commission is an independent institution which purpose is to 'facilitate the implementation of the United Nation Convention on the Law of the Sea in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'<sup>53</sup> In its work the Commission relied upon Rules of

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<sup>48</sup> *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark; Federal republic of Germany v. Netherlands*) 31, para 46.

<sup>49</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 472.

<sup>50</sup> *Minquiers adn Ecrehos case*, ICJ Reports 52 (1953).

<sup>51</sup> *Island of Palmas case*, 2 Reports of Int'l Arbitration Awards 838 (1928).

<sup>52</sup> B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 477.

<sup>53</sup> *United Nations, Commission on the Limits of the Continental Shelf, Purpose, Functions and Sessions* <[http://www.un.org/Depts/los/clcs\\_new/commission\\_purpose.htm#Purpose](http://www.un.org/Depts/los/clcs_new/commission_purpose.htm#Purpose)> (accessed July 8, 2015).

procedure and 'The Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (hereinafter CLCS Guidelines)<sup>54</sup> which are subordinate to the provisions of LOS Convention.

Functions of the Commission are set in Annex II of the LOS Convention:

'(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles and to make recommendations in accordance with the Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(b) to provide scientific and technical advice if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).<sup>55</sup>

The constitutive structure of the Commission consists of 21 members – 'individuals and not States or representatives of States'<sup>56</sup> who are experts in the field of geology, geophysics or hydrography but not lawyers. The deficiency of lawyers in the composition of the Commission has been attacked a lot. Thus Thomas Heidar called it an omission and stated that 'this omission has been criticized by many in light of the fact that even though it is not a court, one of the cardinal functions of the Commission must necessarily be to interpret or apply the relevant provisions of the Convention which is essentially a legal task.'<sup>57</sup> Another scholar and former Judge of International Tribunal for the Law of the Sea Gudmundur Eiriksson supported his point of view saying that: 'The relevant provisions of the United Nations Convention on the Law of the Sea are from the legal point of view, far from clear. In fact, when reading the recent literature one is struck by the lack of accord among commentators on the legal aspects. It is thus somewhat surprising that the law is not one of those fields of expertise qualifying candidates for election to the Commission considering the Commission's central role in the application of these provisions.'<sup>58</sup> This omission is mostly considered to be an intentional or deliberate by different scholars.<sup>59</sup> Another opinion was that the omission is 'rather unfortunate'<sup>60</sup>. Taking into account the role

<sup>54</sup> *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* adopted on 13 May 1999, CLCS/11 (United Nations, New York 1999).

<sup>55</sup> LOS Convention, Annex II, Art. 3(1).

<sup>56</sup> N.N. St. Claver Francis, *The Continental Shelf Commission* in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* 142 (The Hague, Martinus Nijhoff, 1999).

<sup>57</sup> Heidar, *Legal Aspects of Continental Shelf Limits* 30.

<sup>58</sup> Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf* 251.

<sup>59</sup> L.D.M. Nelson, *The Continental Shelf: Interplay of Law and Science*, in Ando N. et al., *Liber Amirocum Judge Shigeru Oda* 1238 (Kluwer Law International, 2002).

<sup>60</sup> E.D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime*, 1 *The Continental Shelf* 31 (Martinus Nijhoff, 2001).

of the Commission and a large political component of the delimitation process it can be assumed that the lack of lawyers is the deliberate omission. On the other hand, the main appropriation of the Commission is to consider scientific and technical data, therefore a legal component is not the primary.

Besides the lack of lawyers in the Commission, another two puzzling aspects in the Commission practice have been recipients of criticisms. Firstly, the commitment of the State which appoints a member of Commission 'to defray the expenses' places in question the truly independence and impartiality of the Commission members. Even the members of the Commission are concerned about it, as one of them explained:

'The concept of the independence of each Commission member is a most desirable one. However, one has to ask the question as to the extent to which this Commission can be truly independent when all expenses of the Commission member are borne by the State party which proposed the member. It is my opinion that the expenses of each Commission member should be borne by the United Nations to make it a real independent Commission.'<sup>61</sup> Such a comment is also logical, because financial aspects always attract undesirable apprehension. This aspect considered to be easily avoidable in case of transferring the financial burden from the State party to the United Nations.

The other provision which attracts criticism is the possibility of Commission members being an advisor and consultant to states in preparing the submissions 'to a particular delineation and that they are able to participate in final decisions with respect to the delineation.'<sup>62</sup> This provision again puts in question the neutrality of the Commission because while advising a member become biased to the result and cannot impartially make recommendations. On the other hand, 'to provide scientific and technical advice' is one of the main functions of the Commission. Nevertheless, this provision should also be reconsidered in order to avoid criticisms, since the impartiality of the Commission should not be doubted. However, to date there is no precedent of suspecting any of the Commission members.

#### **4.2. The Process of Submission**

As it was said each coastal State claiming to the extension of the outer continental margin must collect and submit data to the Commission to prove that the outer continental margin is a natural prolongation of the continental shelf. According to Annex II, Article 4 submission to the Commission has to be made within 10 years of entry into force of the LOS Convention. However, there is no legal consequence envisaged in the LOS Convention if a State does not make a submission within a 10 year period. Furthermore, this time limitation does not correspond to the rule,

<sup>61</sup> N.N. St. Claver Francis, *The Continental Shelf Commission* in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* 142 (the Hague, Martinus Nijhoff, 1999).

<sup>62</sup> Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf* 254.

established in the *North Sea Continental Shelf Cases* in 1969, which was codified later in paragraph 3 of the Article 77 of the LOS Convention that 'the rights of the coastal State over the continental shelf do not depend on effective or notional occupation, or on any express proclamation. The rights of the coastal State over the shelf exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land territory. In short, there is an inherent right.'<sup>63</sup>

The legal process between the submitting coastal State and the Commission has been criticized by some scholars and was called 'a narrowing down ping-pong procedure' (coastal State submission, Commission recommendations, coastal State disagreement with recommendations and re-submission) with no legislated endpoint.<sup>64</sup> The member of the Commission Alexei Zinchenko<sup>65</sup> considered that:

'The Article 76 does not clearly indicate what a submitting State's responsibilities are after receiving the recommendations of the Commission. If, however, the coastal State disagrees with those recommendations, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission. The purpose is to eventually achieve accord. But how long can this process of 'submission-resubmission' continue? James Gardiner, the Irish inventor of the sediment thickness formula applied in the Article 76, referred to it as a 'ping-pong' process that would become progressively tighter with time. But is it possible for the coastal State to just stop the process when it wishes? Well of course it can, but unless the Commission has 'vetted' the outer limits, the establishment of those limits by the State is not final and binding.'<sup>66</sup> This critics can be considered as reasonable bearing in mind that to date, nine submissions have been made but only one recommendation concerning the delimitation of the outer continental margin has been adopted by the Commission.<sup>67</sup> On the other hand, time pressure will be inadmissible in such a complex and a highly scientific sphere of application. Furthermore, the advancement of the consideration process may lead to the irreversible consequences, inasmuch as the establishment of limits will be final and binding.

<sup>63</sup> 3 Int'l Court of Justice Reports, 23(1969).

<sup>64</sup> P.R.R. Gardiner, *The Limits of the Sea Beyond National Jurisdiction—Some Problems with Particular Reference to the Role of the Commission on the Limits of the Continental Shelf*, in G. Blake (ed.), *Maritime Boundaries and Ocean Resources* 69 (London & Sydney: Croom Helm, 1987). R.W. Smith and G. Taft, *Legal Aspects of the Continental Shelf* in P.J. Cook and C.M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface* (New York, Oxford University Press 2000).

<sup>65</sup> Secretary of the Commission on the Limits of the Continental Shelf, Principal Officer, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations.

<sup>66</sup> Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 225 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>67</sup> On 9 April 2008, the Commission adopted the 'Recommendations of the Commission on the Limits of the Continental Shelf' in regard to the submission made by Australia on 15 November 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles.

### **4.3. Submission of Coastal States to the Commission in Cases of Unresolved or Maritime Disputes**

The LOS Convention established the general rule to settle any disputes in Article 279: 'State Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1 of the Charter.'<sup>68</sup> Concerning the maritime disputes the primary rule for the Commission is: 'the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'<sup>69</sup>, more importantly the Commission 'shall not consider and qualify a submission made by any of the States concerned in the Dispute.'<sup>70</sup> For the purpose of this paper it is necessary to emphasize on the provisions of Annex I to the Rules of procedure which are relating the disputes, 'which may arise in connection with the establishment of the outer limits of the continental shelf.'<sup>71</sup> In case of the Arctic it is more essential because three of the coastal States (Canada, Denmark and the Russian Federation) claim to the same part of the Arctic, proving that the Lomonosov ridge is the natural prolongation of their territory.

The definition of 'a dispute' can be found in the *East Timor* case, when ICJ explained that 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other.'<sup>72</sup>

There are several types of disputes specified in Annex I:

- 'disputes concerning what qualifies as a baseline under the LOS Convention;
- sovereignty disputes over the territory from which continental shelf extends;
- disputes over the interpretation or application of article 76.'<sup>73</sup>

Annex I of the Rules of Procedure contains several provisions to avoid conflicts in case of disputes. The primary rule is that the submitting coastal State has to inform the Commission of any disputes related to the submission.<sup>74</sup> A possibility of a submission for a portion of the continental shelf is envisaged in order not to prejudice questions

<sup>68</sup> Los Convention. Article 279.

<sup>69</sup> Los Convention. Annex II, article 9.

<sup>70</sup> Rules of procedure, Annex I, Rule 5(1).

<sup>71</sup> Rules of procedure, Annex 1 (1).

<sup>72</sup> *Case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Reports 99–100 (1995), para 22.

<sup>73</sup> Alex G. Oude Elferink, *Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes*, in M.H. Nordquist, et al., *Legal and Scientific Aspects of Continental Shelf Limits* 263 (Leiden, Martinus Nijhoff Publishers 2004).

<sup>74</sup> Rules of Procedure (para 2(a)).

relating to the delimitation of boundaries between States.<sup>75</sup> The coastal State itself will choose which parts of the continental shelf to include in the submission. In this case additional submission for the areas which are not included in the original submission may be made after 10-year constraint. Another option is joint or separate submissions may be made by two or more coastal States by agreement.<sup>76</sup> This provision can be considered as the ideal approach for settlement of a dispute. However, coastal States reluctantly use the above mentioned opportunity, because it is very difficult to reach the agreement when there are significant discrepancies between the involved parties. Taking into account that stakes in delimitation of the continental shelf are high, the compromise is not always attainable, especially in the case of the Arctic. To date there is only one example of joint submissions out of twelve submissions in Commission practice (joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the Celtic Sea and the Bay of Biscay – 2006). For the considering of the submission, a prior consent of all engaged States that are a party to the dispute is required before the examination of a submission.<sup>77</sup>

Thus, analyzing the relevant provisions of the LOS Convention, it can be concluded that the procedure for settlement of a dispute exist and the requirements of the law are: 'First, the coastal States in question must reach an agreement on how to divide the disputed areas between them, or, alternatively, agree on a joint exploitation area. Second, the coastal States concerned must establish the outer limits of the continental shelf *vis-a-vis* the international seabed area, after having made joint or separate submissions to the Commission and having received recommendations from the Commission.'<sup>78</sup>

It is of interest to understand the role of the Commission in the process of the delimitation of the outer continental margin. As it was reasonably suggested by McDorman 'the only concrete role of the Commission in the delineation of the outer limits is procedural.'<sup>79</sup> This postulate can be supported by the relevant provisions of the LOS Convention. The primary rule is that the Commission 'shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.'<sup>80</sup> Even the Commission itself defined its role as to facilitate, which shows the procedural basis in its practice.<sup>81</sup> Subsequently, McDorman emphasized

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<sup>75</sup> *Id.* Annex I (3).

<sup>76</sup> *Id.* Annex I (4).

<sup>77</sup> *Id.* Annex I (5).

<sup>78</sup> Thomas H. Heidar, *Legal Aspects of Continental Shelf Limits* 33.

<sup>79</sup> T.L. McDorman, *The Role of the Commission on the Limits of Continental Shelf: A Technical Body in a Political World*, 17(3) *Int'l J. of Marine and Coastal L.*319 (2002). DOI: 10.1163/157180802X00099.

<sup>80</sup> *Id.*

<sup>81</sup> See the Commission document 'Purpose, Functions and Sessions.' The Oxford English Dictionary provides the following definition for facilitate – 'make easy or less difficult or more easily achieved.'



informational role of the Commission, as the main task of it is to 'consider data' and 'make recommendations'.<sup>82</sup> Relied on the above he identified the potential risk for the Commission: 'it will be ignored, except as a procedural hurdle, and the positive involvement of the Commission in providing information for determinations of legitimating will be squandered.'<sup>83</sup> There are some pronouncements which support this point of view. It is of particular interest the definition of the role of the Commission made by its member Alexei Zinchenko: 'The CLCS is not a court of law, nor it was expected to become one. The role of this highly scientific organ which is called upon to provide assistance in the much politicized realm of setting legal boundaries is to help to establish the true limit of the outer boundary of the continental shelf according to the terms of the United Nations Convention on the Law of the Sea.'<sup>84</sup>

Finally, it can be concluded that it is a coastal State, 'which has the legal capacity to set the state's outer limit of the continental margin.'<sup>85</sup> The Commission makes only recommendations on scientific issues and its role should not be overestimated. While considering the role of the Commission, it should be borne in mind that 'the Commission was an integral part of the compromise reached regarding the Article 76 and its provisions on the determination of the outer limits of the continental shelf.'<sup>86</sup> Thus, the role and the status of the Commission cannot be reviewed individually, without reconsidering the legal approach in general.

## **5. State Practice Concerning the Establishment of the Outer Continental Margin in the Arctic**

### **5.1. The Submission of the Russian Federation**

In this section, consideration will be given to the submissions to the Commission made by Arctic coastal States, the reactions of neighboring States and the Commission recommendations.

The Russian Federation was the first coastal State that made a submission to the Commission with respect to the outer limits of the continental shelf beyond 200 NM, which provoked severe critics and indignation among other coastal States. It is explained by the fact that Russia claims to the part of the Arctic comparable to the size of Western Europe. To date eleven more submissions to the Commission have been made (Australia, Barbados, Brazil, Indonesia, Ireland, Mexico, New Zealand, Norway, France, United Kingdom of Great Britain and Northern Ireland, and joint by France,

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<sup>82</sup> McDormanp, *The Role of the Commission on the Limits of Continental Shelf: A Technical Body in a Political World* 320.

<sup>83</sup> *Id.*

<sup>84</sup> Zinchenko, *Emerging Issues in the Work of the Commission* 225.

<sup>85</sup> *Id.*

<sup>86</sup> Heidar, *Legal Aspects of Continental Shelf Limits* 29.

Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland). The number of states which may claim is considerably greater: Angola, Argentina, Denmark, Ecuador, Fiji, Guinea, Guyana, India, Japan, Madagascar, Mauritius, Micronesia, Myanmar, Namibia, Portugal, Seychelles, South Africa, Surinam, United States and Uruguay.<sup>87</sup>

On 20 December 2001, the Russian Federation was the first state which made a submission through the Secretary-General to the Commission on the limits of the Continental Shelf pursuant to the Article 76, paragraph 8 of the LOS Convention. The submission contains the information on the proposed outer limits of the continental shelf of the Russian Federation beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured.<sup>88</sup> The Arctic Ocean, the Sea of Okhotsk, the Barents Sea and the Bering Sea were the subject of the submission. In its submission the Russian Federation did not inform the Commission of any disputes in the delimitation of the continental shelf between opposite or adjacent states, or any other unresolved land or maritime disputes.<sup>89</sup>

Canada, Denmark, Japan, Norway and the United States reacted to the submission of the Russian Federation. The *Notes Verbales* of Canada and Denmark both refer to the 'lack of specific data that would allow a qualified assessment of the Russian Federation's submission and indicate that the absence of comments does not imply an agreement to or acquiescence in the submission.'<sup>90</sup>

The United States indicated that it believed the submission 'had major flaws as it related to the Continental Shelf in the Arctic Ocean.'<sup>91</sup> In its comments the United States argue 'the characteristics of two ridges (Lomonosov and Mendeleev) included in the outer limit lines as defined in the Russian submission suggesting that this do not form a natural prolongation in the sense of the Article 76 (1) of the LOS Convention.'<sup>92</sup> The United States concluded that the recommendations of the Commission had to be based on a high degree of confidence: 'If the Commission is

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<sup>87</sup> *The Law of the Sea: Definition of the continental shelf*, United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs 6 (New York, 1993).

<sup>88</sup> United Nations, Commission on the Limits of the Continental Shelf, Submission of the Russian Federation, <[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)> (accessed July 5, 2015).

<sup>89</sup> Para 1.2 of the executive summary of the Russian submission (reproduced in the document CLCS.01.2001.LOS, n.31).

<sup>90</sup> *Note Verbale* No.119. No. 8 of the Permanent Mission of Denmark to the United Nations to the Secretary-General of the United Nations of Feb. 4, 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/DNK of 26 February 2002); *Note Verbale* No. 0145 of the Permanent Mission of Canada to the United Nations to the Secretary-General of the United Nations of Jan. 18, 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/CAN of Feb. 26, 2002).

<sup>91</sup> Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, Feb. 28, 2002 (reproduced in CLCS.01.2001.LOS/USA of Mar. 18, 2002).

<sup>92</sup> Attachment to the Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, Feb. 28, 2002 (reproduced in *Id.*).

unsure, it should not make a recommendation but should announce that it needs further data, analyses and debate.<sup>93</sup>

The limit of the continental shelf in the Barents Sea and the Arctic Ocean was the main concern in Norway's reaction whereas both countries have a long history of negotiations since 1969.<sup>94</sup> The core controversy between Russia and Norway was about the methods of establishing the boundary. The Russian Federation has indicated that the boundary has to be a sector line, while Norway insisted on a median line. Norway consented to the Commission examining of the Russian submission with regard to the area under dispute.<sup>95</sup>

The position of the Russian Federation concerning these reactions was announced during the presentation of the Russian submission to the Commission by Ivan Gloumov, the Deputy Minister of Natural Resources of the Russian Federation. From the position of the Russian Government, there was no impediment to the consideration of the submission by the Commission.<sup>96</sup>

After considering the data and other submitted materials the Commission made recommendations in accordance with the Article 76. The recommendations contain the results of the examination of the data and information submitted by the Russian Federation with particular reference to the question of the entitlement of the Russian Federation to the continental shelf beyond 200 nautical miles, as well as whether the formulas and the constraints had been applied as required by the Article 76 of the Convention.<sup>97</sup> The Commission presented its recommendations to the Russian Federation regarding the four areas relating to the continental shelf extending beyond 200 nautical miles contained in the submission: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the Central Arctic Ocean.<sup>98</sup> As regards the Central Arctic Ocean, the Commission recommended that 'the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.'<sup>99</sup> It is of interest to note that there was no reference to other States in the summary of this part of the recommendation and as it was suggested by Elferink and Johnson: 'the recommendation to make a revised submission was not directly linked to the existence of a territorial or maritime dispute under Annex I to the Rules of Procedure.'<sup>100</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Note Verbale* of Mar. 20, 2002 of the Permanent Mission of Norway to the United Nations to the Secretary-General of the United Nations (reproduced in CLCS.01.2001.LOS/NOR of April 2, 2002).

<sup>95</sup> *Id.*

<sup>96</sup> Oceans and Law of the Sea; Reports of the Secretary-General; Addendum, n.36, para 29.

<sup>97</sup> *Id.* para 41

<sup>98</sup> *Id.*

<sup>99</sup> A.G.U. Elferink, C. Johnson, *Outer Limits of the Continental Shelf and 'Disputed Areas': State Practice concerning Article 76(10) of the LOS Convention*, 21(4) *The Int'l J. of Marine and Coastal L.* 473 (2006). DOI: 10.1163/157180806779441138.

<sup>100</sup> *Id.*

### **5.2. The Submission of Norway**

On 27 November 2006 Norway submitted data to the Commission on the limits of the continental shelf beyond 200 NM from the baselines from which the breadth of the territorial sea is measured. Norway consented, without prejudice to the bilateral delimitation of the continental shelf between Norway and the Russian Federation, to the Commission considering and making recommendations on the basis of the Russian submission with regard to the so-called 'Loop Hole' in the central Barents Sea beyond 200 NM from the baselines of Norway and the Russian Federation and for two separate areas in the North East Atlantic and the Arctic: the Western Nansen Basin in the Arctic Ocean and the Banana hole in the Norwegian Sea.<sup>101</sup> The submission was considered during the 19th session of the Commission (5 March – 13 April 2007). It was established that there were some unresolved questions remained related to the disputes with neighboring States: Denmark, Iceland and Russian Federation. Thus, those questions ought to be considered by reference to rule 46 and annex 1 of the Rules of Procedure of the Commission.<sup>102</sup> Denmark, Iceland and the Russian Federation reacted to the submission of Norway. The Government of the Russian Federation in a *Note Verbale* of 21 February 2007 made it clear that it had no objection to the Commission considering and making recommendations with regard to the area under dispute without prejudice to any future delimitation.<sup>103</sup> Denmark in its *Note Verbale* of 24 January 2007 and Iceland in its *Note Verbale* of 29 January 2007 notified that they did not object to the Commission considering the documentation submitted by Norway concerning the Banana Hole.<sup>104</sup> Then the Commission established a sub commission to examine the submission of Norway.

### **5.3. Other Arctic States Position: Canada, Denmark, the United States**

**Canada.** Canada has always been taking active position in claiming to the Arctic. It must be stressed that Canada has not submitted data to the Commission pursuant to the Article 76 of the LOS Convention. The deadline for Canada is 2013. Canada became more active after the planting of the titanium flag on the seabed of the Arctic Ocean by Russian Arctic-2007 expedition on 2 August 2007. Subsequently, the intention to build two military facilities in the Arctic was announced by Canadian minister Steven Harper.<sup>105</sup> Canada also claims to the Lomonosov ridge.

**Denmark.** Denmark has not yet submitted information to the Commission on the proposed outer limits of the continental shelf beyond 200 NM. The deadline

<sup>101</sup> See notification CLCS.01.2001.LOS/NOR.

<sup>102</sup> *Id.*

<sup>103</sup> *Supra.*

<sup>104</sup> *Id.*

<sup>105</sup> *Canada to strengthen Arctic claim* (2008), <<http://news.bbc.co.uk/1/hi/world/americas/6941426.stm>> (accessed Aug. 11, 2015).

for Denmark is 2014. However, Denmark announced its position concerning the Lomonosov ridge. It is considered by Danish government that the Lomonosov ridge is an extension of Greenland the Danish autonomous province.

**The United States.** The United States is the only Arctic coastal state which has not ratified the LOS Convention, thus as a non-party cannot claim to the outer continental margin and submit data to Commission. However, the United States admitted to be bound by provisions of the LOS Convention as rules of the customary international law. It is of interest to note that 'the United States is in a curious position of wanting to restrict coastal state claims while at the same time being in a position to be a major beneficiary of expansive offshore claims.'<sup>106</sup> The United States can be involved in a land or maritime dispute as a non-party to the LOS Convention. The Rules of Procedure provide such possibility in paragraph 5 of Annex 1.

Thus, to date only two submissions to the Commission concerning the Arctic have been made by Norway and the Russian Federation. The deadlines for Canada and Denmark are approaching. It is expected that the United States will ratify the LOS Convention in the nearest time. It is predictable that the main struggle for the part of the Arctic will be between Canada, Denmark and the Russian Federation.

## 6. Conclusion

New claims to the Arctic put a great pressure on a modern international law relating to the delimitation of the outer continental margin. Despite the fact that many provisions of the Article 76 of the LOS Convention has been criticized for the difficulties in its implementation, the current legal approach allows the demarcation of the continental margins in the world and avoid potential conflicts. A special attention in the current legal approach has been paid to the delimitation of the outer continental margin in cases of unresolved land and maritime disputes. Coastal States may choose a number of different approaches from the procedures developed by the Commission. The envisaged options allow coastal States to cooperate in order to make joint or separate submissions by agreement. Taking into account relevant provisions, it can be concluded that 'the LOS Convention and the procedural rules devised by the Commission may thus assist in creating a certainty about the location of the boundaries of the continental shelf to the largest extent possible, making a significant contribution to the stability and finality of ocean boundaries.'<sup>107</sup>

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<sup>106</sup> Commentary *The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI*, attached to the Letter of Submittal from the US Secretary of State to the US President, part of the Message of Transmittal of the LOS Convention from the US President to the US Congress, US Senate Treaty Doc. 103-39, 102d Congress, 2d Session 50-58 (1994).

<sup>107</sup> A.G.U. Elferink, C. Johnson, *Outer Limits of the Continental Shelf and Disputed Areas: State Practice concerning Article 76(10) of the LOS Convention* 487.

The Article 76 of the LOS Convention in general is considered to be a great political achievement, especially taking into account that the 1958 Geneva Convention did not envisage the possibility of delimitation of the outer continental margin at all. However, the difficulties of implementing remain. It can be explained by the fact that the LOS Convention is still young and a practice of implementing is not fully formed. As it was acknowledged by the Chairman of the Commission Peter Croker: 'Two decades had passed since the time of the Third Conference and during those two decades our knowledge about the nature of continental margin had increased enormously. As an example of this, not a million miles away from where we are at this moment, in the northeast Atlantic, we have discovered that in some areas sediment thickness actually increases away from the continent, something perhaps not previously envisaged and which in a way turns the Gardiner formula on its head.'<sup>108</sup> The complexity of the rules and area of application is another reason for difficulties in implementing. The experts emphasized that 'two of the principal sets of difficulties in implementing the Article 76 are locating the foot of the slope and dealing with ridge issues.'<sup>109</sup> Nevertheless, the practice has been developing during the last years. The first significant phenomenon occurred on 9 April 2008 when the Commission adopted the 'Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Australia on 15 November 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles.'<sup>110</sup> This will have a direct impact on the delimitation of the outer continental margin in the Arctic.

The Commission as a special institutional body and as a permanent directness participant of the process of the delimitation should be mentioned separately. The Commission has been criticized a lot for several aspects in its practice. Firstly, the lack of lawyers in membership considered to be a significant omission. Secondly, the financial relationship with the State party and a possibility to advise potential claimants are also disputed and put objectionable questions about independence and impartiality. Thirdly, the legal process between the coastal State and the Commission which is called 'ping-pong' process by some scholars can be endless and there is no legislated endpoint. However, these omissions are not crucial and may be disposed practically as it was proposed by some Commission members. Another point is that the role of the Commission is considered to be procedural. At the same time, this is very important as it is clear that 'the outer limits of the continental shelf will not be finally established without recommendations by the Commission.'<sup>111</sup>

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<sup>108</sup> Croker, *The Commission on the Limits of the Continental Shelf: Progress to Date and Future Challenges* 216.

<sup>109</sup> J.N. Moore, *Concluding Remarks* 457.

<sup>110</sup> Official Documents System of the United Nations.

<sup>111</sup> Heidar, *Legal Aspects of Continental Shelf Limits* 33.

The Arctic by virtue of its natural and geographical features is a potential conflict region. The huge reserves of hydrocarbon resources provoked an inappropriate aggression and militarization among the Arctic coastal States. As it was assumed by Ron Macnab 'probably the best way to avoid this sort of contention is for neighbor States to agree to work together by combining and rationalizing all available data sets for their region of interest and by harmonizing their analytical procedures.'<sup>112</sup> The last events indicate that the Arctic States are trying to find new ways of resolving the disputes and stop the militarization of the Arctic. On a two-day summit in Greenland in May 2008 five Arctic coastal States consented to let the U.N. rule on conflicting territorial claims on the region's seabed, moreover "the five nations agreed that no special Arctic treaty was necessary, saying in the declaration there was no need to develop a new international legal regime."<sup>113</sup> However, it is hard to believe in a peaceful settlement of the Arctic disputes because the stakes in the delimitation of the Arctic outer continental margin are very high.

Analyzing educed difficulties in implementing and some discrepancies in the provisions of the Article 76, it can be concluded that they do not constitute grounds for a consideration of a new legal approach. As it was found there are some solutions and proposals to avoid the complexities. Concerning the discrepancies, they are mainly contained in the Rules of Procedure and in the Scientific and Technical Guidelines of the Commission. They can be disposed practically without reviewing of the legal concept.

Finally, in the nearest future the struggle for the Arctic are likely to intensify, although it should be born in mind that any 'delimitation is a legal operation [...] which must [...] be based on consideration of law.' It can be expected that the Arctic coastal States will follow the requirements of the LOS Convention and 'shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in the Convention in a manner which would not constitute an abuse of right.'

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<sup>112</sup> Macnab, *The Outer Limit of the Continental Shelf in the Arctic Ocean* 307.

<sup>113</sup> Kym McLaughlin, *Arctic Claimants Say They Will Obey U.N. Rules*, May 29 (2008), available at <[http://www.enr.com/top\\_stories/article/36647](http://www.enr.com/top_stories/article/36647)> (accessed Sep. 30, 2015).

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