



PUBLICATIONS ON OCEAN DEVELOPMENT

THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

Delineation, Delimitation
and Dispute Settlement

Bjarni Már Magnússon

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The Continental Shelf Beyond 200 Nautical Miles

Delineation, Delimitation and Dispute Settlement

By

Bjarni Már Magnússon



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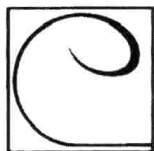
Reykjavik, 30. August 2014.

Abbreviations

ABLOS	Advisory Board on the Law of the Sea
AJIL	American Journal of International Law
ARIEL	Austrian Review of International and European Law
BYBIL	British Yearbook of International Law
CJICL	Cambridge Journal of International and Comparative Law
Chinese JIL	Chinese Journal of International Law
CLCS	Commission on the Limits of the Continental Shelf
Denv. J. Int'l & Pol'y	Denver Journal of International Law and Policy
EC	European Communities
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
FAO	Food and Agricultural Organization
GYBIL	German Yearbook of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
IHO	International Hydrographic Organization
IMO	International Maritime Organization
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMB	International Maritime Boundaries
IOC	Intergovernmental Oceanographic Commission
ITLOS	International Tribunal for the Law of the Sea
JIDS	Journal of International Dispute Settlement
Law & Contemp. Probs.	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LLGDS	Land-Locked and Geographically Disadvantaged States
LOSB	Law of the Sea Bulletin
LOSC	United Nations Convention on the Law of the Sea
LOS Convention	United Nations Convention on the Law of the Sea
LNTS	League of Nations Treaty Series

MLR	Modern Law Review
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NM	Nautical Mile(s)
ODIL	Ocean Development and International Law
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SPLOS	State Parties to the United Nations Convention on the Law of the Sea
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
Vand. J. Transnat'l Law	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

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Introduction

1.1 The Topic

This book addresses various aspects of the establishment of the outer limits of the continental shelf beyond 200 nautical miles.¹ The reason why there is global interest in this issue lies in the fact that it is possible to explore and exploit important natural resources from the seabed beyond 200 nm. In some areas of the world it is necessary for neighbouring coastal States to settle disputes concerning these limits. The economic, financial and political incentives to solve such disputes are often high. It is, for instance, unlikely that oil and gas companies are willing to make an investment in disputed areas. Another factor is that territorial rights and natural resources have throughout history been a flammable combination which has negatively impacted peace and stability in the international society.

One of the central purposes of the international law of the sea is to define various maritime zones, their extent and limits. According to the United Nations Convention on the Law of the Sea² the continental shelf extends at least to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured.³ If a coastal State fulfils complex geoscientific criteria laid out in the Convention it is entitled to the continental shelf beyond the 200 nm limit.⁴

1 1 nautical mile (nm) equals 1,852 metres.

2 Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 396 (UNCLOS or the Convention). Some authors use the abbreviation LOSC or LOS Convention.

3 Article 76(1) of UNCLOS. The provisions on baselines are found in articles 5–14 of UNCLOS.

4 For the reason of simplification, the continental shelf beyond 200 nm is often referred to as the outer or extended continental shelf in this book while the continental shelf within 200 nm is sometimes referred to as the inner continental shelf. These terms are nowhere to be found in UNCLOS and are not theoretically correct since ‘there is in law only a single “continental shelf” rather than an inner continental shelf and a separate extended or outer continental shelf’. *In the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago* (Barbados v. Republic of Trinidad & Tobago) (Arbitration Tribunal) (2006) 45 ILM 800, 835, para. 213; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (No 16) (Bangladesh v. Myanmar) (Judgement) (2012) ITLOS Reports 2012, 4, 96–7, para. 362 (Bangladesh/Myanmar Case); *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (Bangladesh V. India) (2014)

UNCLOS provides that information on the limits of the continental shelf beyond 200 nm from the baselines shall be submitted by the coastal State to a scientific and technical commission, named the Commission on the Limits of the Continental Shelf.⁵ The Commission is responsible for making recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelves beyond 200 nm. If the limits of the shelf established by a coastal State are on the basis of the recommendations, they are final and binding.⁶ This process is quite different from the one provided for in the 1958 Geneva Convention on the Continental Shelf⁷ and from the establishment of other maritime zones under international law which can be established without the involvement of an international entity.

The establishment of the outer limits of the continental shelf beyond 200 nm has two main features: The establishment of the boundary line between the continental shelf and the international sea bed area⁸ (the delineation of the continental shelf) and the establishment of the boundary between the continental shelf of adjacent or opposite coastal States (the delimitation of the continental shelf).⁹ These features overlap profoundly and cannot be

<http://www.pca-cpa.org/showfile.asp?fil_id=2705> accessed 30 August 2014 [21, para. 77] (*Bangladesh/India Case*).

5 Hereinafter the Commission or CLCS.

6 Article 76(8) of UNCLOS.

7 Adopted on 29 April 1958; entered into force 10 June 1964; 499 UNTS 311 (1958 Continental Shelf Convention). The 1958 Continental Shelf Convention is one of four conventions adopted in Geneva in 1958 which are the predecessors to UNCLOS.

8 The international seabed area is usually referred to as the Area. Article 1(1) of UNCLOS defines the Area as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. The definition is a negative one 'for in order to know the exact extent of the Area, one needs to know up to where exactly coastal states have extended their national jurisdiction at sea'. Erik Franckx, 'The International Seabed Authority and the Common Heritage of Mankind: The need for States to Establish the Outer Limits of their Continental Shelf' (2010) 25 IJMC 543, 552. Article 140 of UNCLOS provides that '[a]ctivities in the Area shall . . . be carried out for the benefit of mankind as a whole'.

9 These two terms should not be confused with the term demarcation which is important in land boundary delimitations. The demarcation of a land boundary 'amounts to laying it down, as mutually defined, by means of boundary pillars, monuments and buoys, and permanent erections of other kinds, along the topographical conformations of the territories to be separated by it'. A. Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester University Press 1967) 28. Demarcation is obviously of limited practical value in outer continental shelf delimitations since the importance of visually showing the boundary line on the seabed itself is very limited. Modern technology is of more practical help. Modern satellite navigation systems locate geodetic points without resorting to the actual physical features.

viewed in complete isolation from each other.¹⁰ The delineation process is a complex legal-scientific/technical procedure where the CLCS plays a pivotal role in curtailing the territorial temptations of broad margin States. Its task is to protect the Area beyond the limits of national jurisdiction that has been designated as the common heritage of mankind.

The delimitation process is different from the CLCS procedure. The actions of the CLCS are without prejudice to matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.¹¹ According to UNCLOS it is for neighbouring States to delimit the maritime boundaries of their continental shelves.¹² The delimitation is supposed to be effected by agreement and, if not possible, within a reasonable time resort shall be made to procedures provided for in the dispute settlement part of UNCLOS.¹³ The Convention provides that this process shall be guided by international law as defined in article 38 of the Statute of the International Court of Justice (ICJ Statute). The most important outcome of this guidance is that it designates a law-making role for international courts and tribunals. The purpose of the delimitation is to achieve an equitable solution,¹⁴ not to fulfil specific scientific and technical criteria as in the CLCS procedure. From the work of Aristotle to modern times equity has been associated with procedure. Equity viewed in these terms aims 'to devise remedies giving fuller effect to the norms of positive law'.¹⁵

The relationship between the delineation process of the outer continental shelf and the dispute settlement procedures under UNCLOS has been controversial because States failed to address the issue when negotiating the Convention. The outcome of the same negotiations was that international courts and tribunals were mandated to decide what is the law in maritime boundary delimitations. Consequently, international courts and tribunals have been given a central role in deciding what is the procedural and substantive law in this field. Thus far, four delimitation cases that address the outer

10 See e.g. Coalter Lathrop, 'Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf' in David Colson & Robert Smith (eds.) *International Maritime Boundaries* vol. VI (Martinus Nijhoff 2011) 4139, 4140.

11 Article 9 of Annex II to UNCLOS.

12 Article 83 of UNCLOS.

13 Part XV of the Convention contains the provisions on dispute settlement.

14 Ibid., This is also the purpose of delimitations involving the Exclusive Economic Zone (EEZ). See article 74(1) of UNCLOS.

15 Phaeton Kozyris, 'Lifting the Veils of Equity in Maritime Entitlements: Equidistance with proportionality around the islands' (1997–8) 26 *Denv. J. Int'l & Pol'y* 319, 326.

continental shelf have been decided by international courts and tribunals: (1) *Barbados/Trinidad & Tobago Case* decided by an arbitral tribunal in 2006; (2) the *Bangladesh/Myanmar Case* decided by the International Tribunal for the Law of the Sea in 2012;¹⁶ (3) the *Territorial and Maritime Dispute between Nicaragua and Colombia*¹⁷ decided by the International Court of Justice¹⁸ in 2012; (4) the *Bangladesh/India Case* decided by an arbitral tribunal in 2014. More such cases are forthcoming. In 2013 Nicaragua instituted proceedings against Colombia before the ICJ in a dispute that has been named the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.¹⁹ The case is directly related to the outcome of the judgement between the two states in 2012. In the end of August 2014 Somalia instituted proceedings against Kenya with regard to a maritime boundary delimitation dispute in the Indian Ocean which has an outer continental shelf aspect.²⁰ Clearly, this area of international law is and will be dynamic for a number of decades to come. It is hoped that this book will be of some help to future litigation, negotiations and academic discussions.

1.2 The Approach

This book is about the relationship between the delineation and delimitation of the outer continental shelf, the relationship between the inner and outer continental shelf and the relationship between the CLCS and international courts and tribunals. The book is also about the role of science and scientific experts in international law and who is responsible for applying and interpreting the law in an area which involves complicated scientific and technical considerations. An attempt is made to answer the five following questions:

- What is the role of the Commission on the Limits of the Continental Shelf in delineation and delimitation disputes?

¹⁶ Hereinafter ITLOS or the Tribunal.

¹⁷ (*Nicaragua v. Colombia*) (Judgement) [2012] ICJ Rep. 624 (*Nicaragua/Colombia Case*).

¹⁸ Hereinafter ICJ or the Court.

¹⁹ (*Nicaragua v. Colombia*) (Application Instituting Proceedings) <<http://www.icj-cij.org/docket/files/154/17532.pdf>> accessed 30 August 2014.

²⁰ *Proceedings instituted by the Federal Republic of Somalia against the Republic of Kenya on 28 August 2014 (Somalia v. Kenya)* (Application Instituting Proceedings) <<http://www.icj-cij.org/docket/files/161/18360.pdf>> accessed 30 August 2014.

- Are the principles of the delimitation of the continental shelf beyond 200 nm the same as those for within 200 nm?
- Has a rule of customary international law emerged that is especially applicable in outer continental shelf delimitations?
- What is the role of international courts and tribunals in disputes regarding the establishment of the outer limits of the extended continental shelf?
- Are there any special factors concerning the outer continental shelf that limit the jurisdiction of international courts and tribunals?

1.3 Outline of the Study

This book will address some of the larger questions concerning the establishment of the outer limits of the extended continental shelf. Chapter two explains various important concepts for the subject of the book and discusses the main aspects of the delineation of the outer continental shelf. It focuses to a large extent on the historical development that led to the current legal framework concerning the continental shelf, who are entitled to it and how the outer limits are established.

Chapter three focuses on the legal nature of the CLCS, its recommendations and how the Commission differs from international dispute settlement bodies. It asks the question of what the CLCS really is. It deals also with questions regarding the interpretation of article 76(8) of UNCLOS. In addition, an attempt is made to explain how the Commission deals with submissions in the event of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.

Chapter four aims to shed light on the methods that have been used and could be used in boundary delimitations involving the outer continental shelf. An attempt is made to answer the question of whether the principles of maritime delimitation of the outer continental shelf are the same as those for the delimitation of the inner continental shelf. It asks whether the equidistance/relevant circumstances method is applicable in delimitation cases before international courts and tribunals concerning the outer continental shelf and analyses boundary agreements involving the outer continental shelf with the aim of identifying trends and differences in the State practice.

Chapter five focuses on the settlement of disputes by international courts and tribunals in the context of the outer continental shelf. Jurisdictional and procedural matters are the focal point. It examines the dispute settlement mechanism of UNCLOS, the law-making role of international courts and

tribunals and questions concerning the optional exception clause, standing, entitlement disputes prior CLCS recommendations and whether States are obliged to await recommendations from the CLCS before they seek to delimit their outer continental shelf. The chapter also addresses the evaluation of scientific and technical evidence in cases concerning the outer continental shelf and the consequences of a judgement for the CLCS. Finally, the conclusions of the book are found in chapter six.

Overall, this book analyses the role of coastal States, the CLCS and international courts and tribunals in the establishment of the outer limits of the extended continental shelf and how the legal framework can be further coherently developed in accordance with international law. The main contribution of the book to the existing literature, which is rather extensive, concerns the interplay between the delineation and delimitation processes as well as various aspects of maritime boundary delimitations beyond 200 nm.