

THE LEGAL ARCTIC GOLD RUSH

- THE PROCEDURE OF THE EXTENSION OF THE RUSSIAN FEDERATION'S CONTINENTAL SHELF ANALISED THROUGH GLOBAL ADMINISTRATIVE LAW -

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I. GENERAL CONSIDERATIONS

1. On 2 August 2007, a small submersible vessel deposited a Russian flag on the seabed two miles under the polar ice cap. This was, supposedly, a way to back up Russia's claim to a substantial part of the floor of the Arctic Ocean, more specifically, the Lomonosov Ridge. ¹ Denmark and Canada have also expressed claims in the region. ²

At stake is the control of the Arctic waters and, with it, what could be huge deposits of oil and natural gas in the seabed below. Global warming – driven, in part, by humanity's profligate use of those fossil fuels – has led to a slowly but steady process of the melting of the polar ice cap, exposing potentially huge deposits of hitherto unreachable natural resources.

But Russia, Denmark and Canada are not alone in the great race for Arctic oil and deep-sea mining resources. Finland, Norway, Iceland and the United States take also an interest in this matter.

As several claims over a delimited but potentially hugely profitable territory line up, an analogy with the 19th century California gold rush can be drawn. ³

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¹ See BBC, *Russia plants flag under N Pole*, 2 August 2007, at <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

² See CBC, *Russia plants flag staking claim to Arctic region*, 2 August 2007, at <http://www.cbc.ca/world/story/2007/08/02/russia-arctic.html>.

³ See Clifford Krauss, Steven Lee Myers, Andrew C. Revkin and Simon Romero, the New York Times, *As Polar Ice Turns to Water, Dreams of Treasure Abound*, 10 October 2005, <http://www.nytimes.com/2005/10/10/science/10arctic.html>; BBC, *The Arctic's new gold*

2. However, there is a “21st century twist” in the race for the Arctic today.

That twist is the existence of international law regulating the several claims to the Arctic Ocean’s seabed that is enforced by an international body. This means that the Arctic race – and the control of the North Pole – was transformed into a scientific and mostly legal discussion.

II. THE “RACE TO THE ARCTIC” AND THE UNITED NATIONS’ CONVENTION ON THE LAW OF THE SEA

3. The United Nations’ Convention on the Law of the Sea of 10 December 1982 (UNCLOS), which entered into force on 16 November 1994, is one of the most important international legally binding documents in the world today. It has been considered a “constitution” of the seas.⁴

The UNCLOS founds a regime for the governance of the oceans of the world, codifying and developing customary international law as well as creating new rules and institutions. As a “constitution”, the UNCLOS was intended to create the essential framework for future solutions in addition to dealing with a myriad of legal issues, providing the basis for the exercise by States of their rights and duties in the use of the ocean and in the exploitation of its resources.

The UNCLOS provides for, amongst other things, the regime of the maritime spaces – the internal waters⁵, the territorial sea⁶, the contiguous zone⁷, the exclusive economic zone⁸ and also the continental shelf⁹.

rush, 25 November 2005, at <http://news.bbc.co.uk/2/hi/business/4354036.stm>; The Economist, *Gold rush under the ice*, 3 August 2007, http://www.economist.com/world/europe/displaystory.cfm?story_id=9607005; The Guardian Weekly, 31 August 2007, <http://www.guardianweekly.co.uk/?page=editorial&id=123&catID=1>.

⁴ The President of the Third UN Conference on the Law of the Sea, Tommy Koh, called the UNCLOS a “Constitution” in 1982 at the time of its signing. *Vide* T.B. Koh, “A Constitution for the Oceans”, in UN, *The Law of the Sea – Official Text of the United Nations Convention on the Law of the Sea*, New York, 1983.

⁵ The internal waters are generally formed by the waters on the landward side of the baseline of the territorial sea (article 8, (1), of UNCLOS).

⁶ Territorial waters, or a territorial sea is a belt of coastal waters extending at most 12 nautical miles, measured from baselines determined in accordance with UNCLOS (article 3 of UNCLOS).

4. The legal regime applicable to the continental shelf is provided for in Part VI of UNCLOS, articles 76 through 85.

According to the UNCLOS regime, the continental shelf of a State is comprised of the seabed and the subsoil of the submarine areas contiguous to its coast. The coastal State may exercise sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources¹⁰. Such rights are exclusive in that no one may undertake these activities without the express consent of the coastal State.¹¹ These sovereign rights do not depend on occupation, effective or notional, or on any express proclamation and do not affect the legal status of the superjacent waters or of the air space above those waters.¹²

5. The definition of the continental shelf and the criteria by which a coastal State may establish the outer limits of its continental shelf are set out in article 76 of UNCLOS. In addition, the Third United Nations Conference on the Law of the Sea adopted on 29 August 1980 the *Statement of Understanding* concerning a specific method applicable to such special features as those in the southern part of the Bay of Bengal.¹³

6. According to article 76, (1), of UNCLOS, 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*

⁷ The contiguous zone is a belt of water extending from the outer edge of the territorial sea to up to 24 nautical miles from the baseline, within which a state can exert limited control for the purpose of preventing or punishing “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea” (article 33, (1) and (2), of UNCLOS).

⁸ The exclusive economic zone is an area beyond and adjacent to the territorial sea, that cannot extend beyond 200 nautical miles from the baselines, which is subject to a specific legal regime, under which the coastal State was special rights and jurisdiction over the exploration and use of marine resources (articles 55 *et seqq.* of UNCLOS).

⁹ See *infra*.

¹⁰ See article 77, (1), of UNCLOS.

¹¹ See article 77, (2), of UNCLOS.

¹² See article 78, (1), of UNCLOS.

¹³ This Statement is contained in Annex II to the Final Act of the Conference.

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». In this sense, UNCLOS recognises the term continental shelf as a legal concept and the term continental margin as a geomorphological concept.¹⁴

7. The article 76, (1), of UNCLOS defines the continental shelf by reference to two alternative basis for entitlement: *a) 200 nautical miles distance from the baselines – independently of any proof that there is such a continental shelf in a geological sense, or even any occupation, effective or notional, or on any express proclamation – or b) the “natural prolongation of its land territory” criterion.*¹⁵ The latter basis of entitlement can be used by a coastal State to claim a continental shelf which extends itself beyond 200 nautical miles. As we are going to see, the “*natural prolongation of its land territory*” criterion is the basis for the Russian claim to the Arctic.

But let’s begin to examine the “*natural prolongation of land territory*” criterion. According to the definition provided by article 76, (1), of UNCLOS, as long as this criterion is satisfied, the continental margin, defined as «*seabed and subsoil of the shelf, the slope, and the rise*»,¹⁶ can become in fact the continental shelf. However, the “*natural prolongation*” nature of an area is a necessary but not sufficient condition for its legal inclusion in the continental shelf. In fact, «*the continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6*» of article 76.¹⁷ These limits constitute the way to determine the outer edge of the continental margin referred to in article 76, (1).¹⁸ As a consequence, through the application of the

¹⁴ See, e.g., M. M. SHAW, *International law*, 4th edition, Cambridge, 1997, pp. 432 et seqq. and D. M. ONG, “A Legal Regime for the Outer Continental Shelf? An Inquiry as to the Rights and Duties of Coastal States within the Outer Continental Shelf”, available at: <http://www.gmat.unsw.edu.au/ablos/ABLOSo3Folder/PAPER7-4.PDF>.

¹⁵ This criterion has been used traditionally to delineate the breath of the continental shelf, for instance by the International Court of Justice in the Libya/Malta Continental Shelf case. See Continental shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982 ([1982] ICJ Reports 18 at 47-58, paras 45-68; Continental shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985; [1985] ICJ Reports 13 at 31-37 paras 29-41).

¹⁶ See article 76, (3), of UNCLOS.

¹⁷ See article 76, (2), of UNCLOS.

¹⁸ See article 76, (4) a), of UNCLOS.

limits, parts of the natural prolongation of the land territory may be considered to be beyond the outer limits of the continental shelf.

The article 76, (4), provides for the first limit to the continental shelf breadth: the outer edge of the legal continental shelf. This can be established through one of two formulas, whichever is the greater: *i)* a measurement of 60 nautical miles seawards from the foot of the slope¹⁹, or *ii)* the «*sediment thickness line*», consisting of points where the underlying sediment thickness is one per cent of the distance to the foot of the slope.

The second limit to the breadth of the continental shelf is established in article 76, (5). It relates to the maximum distance seaward that the outer limit line can lie and is determined through two possible rules used alone or in combination, whichever is the greater. They consist in drawing a line *i)* 100 nautical miles seaward of the 2500 meters isobath which connects the depth of 2,500 meters, or *ii)* 350 nautical miles seaward from the coast baselines.

The outer limit of the continental shelf can not exceed 350 nautical miles from the baselines. This limit does not apply to submarine ridges or to submarine elevations (these are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs submarine elevation).²⁰

The delineation of the outer limits of a continental shelf extending beyond the 200 nautical miles limit should be made «*by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude*». ²¹

8. The basic understanding of this regime is essential to grasp how to delineate the outer limit of a State's continental shelf.

For instance, one of the most disputed points of the Russian submission is the qualification of the Lomonosov Ridge (an underwater ridge that crosses the Arctic Ocean between the New Siberian Islands and Ellesmere Island) as a submarine elevation that is a natural prolongation from its Asian continental shelf. If Russia manages to prove so, a vast area of seafloor in the central portion

¹⁹ The foot of the slope is a physiographic feature on the surface of the sea floor separating the continental slope from the continental rise.

²⁰ See article 76, (6) UNCLOS.

²¹ See article 76, (7) UNCLOS.

of the Arctic Ocean can become part of its continental shelf, in spite of being located beyond the 350 miles limit.²² However, effort is also being done by Canada and Denmark (in regards to Greenland) to try to document that the Lomonosov Ridge is, in fact, an extension of the North American continental shelf.

9. As it can be seen in our brief explanation, the rules regarding the expansion of the continental shelf are very complex.

The delimitation of the coastal States' continental shelves is important in several levels and even beyond the coastal States national interests. In fact, it is essential to mankind because those outer limits establish the actual extension of the Area, which is, together with its recourses, common heritage of mankind²³. In fact, the ocean floor and subsoil thereof beyond the limits of national jurisdiction – beyond the outer limits of the continental shelves – are considered as the Area.²⁴ The actual extend of the Area will depend on the breath of the continental shelf of the costal States. Hence, the importance of the publicity that should be given to the charts or lists of geographical coordinates showing the limits of the continental shelves.²⁵

It is because of its complexity and importance that, in order to make sure that the rules regarding the expansion of the continental shelf are correctly interpreted by the coastal States, UNCLOS provides for an international body whose mission is to make recommendations on the delimitation of continental shelves beyond the 200 mile limit: the Commission on the Limits of the Continental Shelf (CLCS).

10. This was a brief presentation of the material requirements for a coastal State to establish the limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. But there are also formal requirements. In order to make such a

²² See article 76, (6) UNCLOS.

²³ See article 136 of UNCLOS.

²⁴ See article 1, (1), 1), of UNCLOS.

²⁵ Article 134, paragraph 3

claim a country must submit particulars of such limits along with supporting scientific and technical data to the CLCS.²⁶

The submission of the particulars should occur as soon as possible, but in any case within ten years of the entry into force of the UNCLOS for that State²⁷. In the case of a State Party for which the Convention entered into force before 13 May 1999, it is understood, that the ten-year time period is considered to have commenced on 13 May 1999.²⁸ This date was chosen because it was when the Scientific and Technical Guidelines (STG) were adopted by the CLCS and the States Parties considered that only after the adoption of the STG had the States the basic documents concerning submissions in accordance with article 76, (8), of the UNCLOS.

11. On the basis of the submission, the CLCS will make recommendations to the coastal State on matters related to the establishment of the outer limits of its continental shelf. According to article 76, (8), only the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

The first submission ever to be presented to the CLCS was the Russian Federation's one.

II. THE SUBMISSION BY THE RUSSIAN FEDERATION

12. On 20 December 2001, the Russian Federation made a submission through the Secretary-General of the United Nations (UN) to the CLCS, pursuant to article 76, (8), of the UNCLOS.

The said submission contained 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 the territorial sea is

²⁶ See article 76, (8) of UNCLOS and article 4 of UNCLOS annex II.

²⁷ See Article 4 of Annex II of UNCLOS.

²⁸ In accordance with the «*Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*», document SPLOS/72 of 29 May 2001.

measured in four areas: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the central Arctic Ocean.

It must also be noted that the Convention entered into force for the Russian Federation on 11 April 1997. Hence, the submission was made within the 10 year time limit.

13. In accordance with rule 49 of the Rules of Procedure of the CLCS (RP),²⁹ a communication has been circulated to all States Members of the UN – which include all members of UNCLOS –, in order to make public the proposed outer limits of the continental shelf pursuant to the submission and to allow the possibility for them to make communications in respect of the submission. Canada, Denmark, Japan, Norway and the United States of America all presented communications on the proposed outer limits.

14. The submission made by the Russian Federation was reviewed during the 10th session of the CLCS.³⁰

In the beginning of the session, opportunity was given to the Russian Federation representatives to make a presentation of the submission, followed by a question-and-answer period. The Russian representatives were also requested to present the position of their government regarding the communications made by other States in relation to the Russian submission. Their position was that the communications did not constitute obstacles to the consideration of the submission by the CLCS.

15. After that and following informal consultations, a sub-commission was elected to examine the Russian submission and formulate recommendations, in accordance with article 5 of annex II to the UNCLOS. The sub-commission was composed of seven members, appointed in a balanced manner and taking into account specific scientific elements of the Russian Federation's submission.³¹

²⁹ See document CLCS/40/Rev.1, of 17 April 2008.

³⁰ The 10th session of the CLCS was held in New York from 25 March to 12 April 2002.

³¹ The composition of the Subcommission was as follows: Alexandre Tagore Medeiros de Albuquerque (Brazil), Lawrence Folajimi Awosika (Nigeria), Galo Carrera Hurtado (Mexico),

The sub-commission's work – which included the detailed examination of the submission –, included 6 meetings devoted to consultations in the form of questions and answers between its members and the experts of the delegation of the Russian Federation. Additional information on certain elements of the submission was also requested to the Russian Federation. On 14 June, the sub-commission completed the recommendations and forwarded them to the 11th session of the CLCS,³² which continued the consideration of the Russian submission.

16. The CLCS debated the issue of whether the representatives of the Russian Federation had a right to be present during the deliberations on the proposed recommendations. This matter will be studied in further detail *infra*.

17. The CLCS continued its deliberations on the recommendations in closed meetings, making several amendments on the draft proposed by the sub-commission, and adopted the recommendations by consensus. The recommendations of the CLCS were submitted in writing to the Russian Federation and to the Secretary-General of the UN.

Regarding the four areas relating to the continental shelf extending beyond 200 nautical miles contained in the Russian submission (the Barents Sea, the Bering Sea, the Sea of Okhotsk and the central Arctic Ocean), the CLCS recommended that:³³

- a) *«In the case of the Barents and Bering seas (...) upon entry into force of the maritime boundary delimitation agreements with Norway in the Barents Sea, and with the United States of America in the Bering Sea, to transmit to the Commission the charts and coordinates of the delimitation lines as they would represent the outer limits of the continental shelf of the Russian Federation extending beyond 200 nautical miles in the Barents Sea and the Bering Sea respectively»;*

Peter F. Croker (Ireland), Karl H. F. Hinz (Germany), Iain C. Lamont (New Zealand) and Yong-Ahn Park (Republic of Korea). The Subcommission elected Mr. Carrera as its Chairman, Mr. Hinz Vice-Chairman and Mr. Croker as Rapporteur.

³² The 11th session of the CLCS, following the election of its new membership by the Meeting of States Parties.

³³ See the Report of the Secretary-General to the Fifty-seventh session of the General Assembly under the agenda item Oceans and the Law of the Sea (A/57/57/add.1, paras. 38-41).

- b) *«Regarding the Sea of Okhotsk, the Commission recommended to the Russian Federation to make a well-documented partial submission for its extended continental shelf in the northern part of that sea. The Commission stated that this partial submission shall not prejudice questions relating to the delimitation of boundaries between States in the south for which a submission might subsequently be made, notwithstanding the provisions regarding the 10-year time limit established by article 4 of annex II to the Convention. In order to make this partial submission, the Commission also recommended to the Russian Federation to make its best efforts to effect an agreement with Japan in accordance with paragraph 4 of annex I to the Rules of Procedure of the Commission»;*
- c) *«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».*

III. THE CLCS AS A GLOBAL REGULATORY BODY

A) GENERAL CONSIDERATIONS

18. The analysis of the procedure for the extension of the Russian Federation's continental shelf reveals the uttermost importance of one body created by the UNCLOS: the CLCS.

The CLCS is a body created by an international treaty, the UNCLOS. It is in that treaty (on article 76 and especially on annex II) that one can find the general legal regime applicable to CLCS.

B) COMPOSITION

19. The CLCS consists of 21 members who must be experts in the field of geology, geophysics or hydrography, elected by States Parties to UNCLOS

from among their nationals and that are elected for a five year period, after which they are eligible for re-election.³⁴

The CLCS' composition must ensure «*equitable geographical representation*». That is why not less than three members shall be elected from each geographical region.³⁵

They are nominated by the State Parties after appropriate regional consultations and each member is elected by a two-thirds majority of the votes of the representatives of States Parties present and voting.³⁶

C) FUNCTIONS AND POWERS

20. As we have seen, the UNCLOS establishes that every coastal State should be entitled to at least 200 miles of continental shelf independently of the geomorphic characteristics of the seabed near its coast, unless there are competing claims over the same territory. The UNCLOS also provides that the continental shelf could extend beyond the 200 miles limit, as long as some requirements were fulfilled. Having established that, it became necessary to assure the compliance with such requirements. The CLCS is a treaty body which was created as an answer to that problem, ensuring an *a priori* control over compliance with the UNCLOS.

21. In order to understand the true importance of the CLCS, one must know its functions. These, according to article 3, (1), UNCLOS annex II, are:³⁷

a) On the one hand, the CLCS is the entity responsible for considering the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits allegedly extend beyond 200 nautical miles. After due consideration, CLCS makes recommendations on said outer limits in accordance with article 76 UNCLOS.

b) On the other hand, given the complexity of the regime for establishing an extended continental shelf provided for in UNCLOS, CLCS has also the duty

³⁴ See article 2, (1) and (4), of UNCLOS annex II and rule 7 (1) of RP.

³⁵ See article 2, (3), of UNCLOS annex II.

³⁶ See article 2, (2) and (3), of UNCLOS annex II.

³⁷ See document CLCS/46, p. 7.

to provide scientific and technical advice, if requested by the coastal State concerned, during the preparation of the data to be submitted.

22. The functions of the CLCS are related with the implementation of article 76 UNCLOS. Although the duty to give advice to submitting coastal States is important, the bulk of its powers is related with the consideration of scientific and technical data and other material submitted by coastal States concerning the outer limits of the continental shelf beyond the 200 miles limit and to make recommendations to coastal States on matters related to those outer limits. This means that, given a certain submission, the CLCS has the power to decide if that submission is in conformity with the legal regime. Only if it concludes that it is, does the submission become final and binding delineation of continental shelf limits.

In this sense, the CLCS is enforcing the UNCLOS legal regime by deciding on the compliance of the submitting coastal States with the article 76. This means that the CLCS was adjudicating powers in the context of a global regulatory regime.

23. In addition to the explicit authority conferred upon it by the UNCLOS, it is recognized that, as a treaty body, the CLCS has certain implied powers that are essential for the fulfilment of its responsibilities under the UNCLOS. Those implied powers are, namely, rule making powers³⁸.

Firstly, the CLCS, as any other body, is competent to establish its own procedural rules and other relevant documents on its general internal organization. Such rules have to be complied with by States in their dealings with the CLCS.

Secondly, insofar as the CLCS has the function to make an independent assessment of the scientific and technical data provided by the submitting States, it must have the power to set out the procedures it will adopt in making such an assessment. This implies a power to establish how the CLCS is going to assess whether the scientific and technical data submitted by a coastal State

³⁸ See, e.g., the Second Report of the Committee for Legal Issues of the Outer Continental Shelf of the International Law Association, Toronto Conference 2006, p. 11-14, available at <http://www.ila-hq.org/pdf/Outer%20Con%20Shelf/Report%202006.pdf>.

prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met. These are still regulations of internal procedures but with important implications for the submitting coastal State.

Finally, the CLCS has also a power to regulate substantive aspects of the regime. In fact, the CLCS' power to make recommendations to coastal States involves the assessment of scientific and technical data by the CLCS which has to be carried out «in accordance with article 76 of the Convention».³⁹ This wording indicates that the CLCS is bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State – which is a limit on the CLCS' independent or discretionary action. This means that there is an implicit competence of CLCS to regulate issues concerning the interpretation or application of article 76 or other relevant articles of the UNCLOS to the extent this is required to carry out the functions which are explicitly assigned to it.⁴⁰ However, these regulations must not curtail the competence of the States Parties to interpret the UNCLOS.

24. As we have seen, the CLCS' rule making powers are related with the need to facilitate the discharge of its functions in an orderly and effective manner. Hence, the rules of procedure and other relevant documents adopted by the CLCS, due to the nature of its functions, are not merely organizational, or internal, in nature. The rule making powers include the interpretation of the UNCLOS rules and the regulation of the ways through which a given State can prove its stance, namely the determination of which is the adequate scientific proof needed. In doing so, the CLCS' rules offer guidance to States which make a submission to the CLCS.⁴¹

However, unlike the case of the International Seabed Authority,⁴² the UNCLOS does not contain any article providing the CLCS with the power to

³⁹ See article 3, (1) a) of UNCLOS annex II.

⁴⁰ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949; [1949] ICJ Reports 174 at 180 and 182).

⁴¹ See, on the legal status of the rules, e.g., S. CASSESE, "Global Standards For National Administrative Procedure", pp. 121 et seqq.. Available at: http://www.iilj.org/GAL/documents/10120504_Cassese.pdf.

⁴² See article 149, (4), of UNCLOS.

adopt its own rules or procedure. Therefore, the CLCS can exert such power insofar as it is essential to the performance of its duties.

This is consistent with the 1949 advisory opinion of the International Court of Justice on *Reparations for injuries suffered in the service of the United Nations*. The Court found in that opinion, *inter alia*, that «under international law, the Organization must be deemed to have those powers, which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties».⁴³ Equivalent considerations can be applied to the CLCS with regard to powers which are essential to the performance of its duties, even though not expressly provided in the UNCLOS.

Such rules can only be objected to on the ground that the CLCS has overstepped the limits of its competence – acting *ultra vires* – or that these rules are invalid for other reasons.⁴⁴

25. We have concluded that the CLCS has not only administrative adjudicating powers but also regulatory powers. These regulatory powers have a binding effect because they regulate the way in which the consideration of the submission is going to be made. If a State does not comply, then its submission will not be considered and recommendations will not be made.

In fact, the CLCS regulates the implementation of the international regime. In doing so, the addressees of the CLCS' regulations are the States and the national authorities that are bound to those regulations in the relations between themselves and with the CLCS. These regulations affect the way in which the national administrations organize the submission for an extended continental shelf, thus conditioning internal national procedures. The procedure through which the coastal State conducts the technical and scientific investigations that allows it, later on, to delineate the outer limits of the

⁴³ I.C.J. Reports, 1949, p. 182.

⁴⁴ See *e.g.* R. Bernhardt “*Ultra Vires Activities of International Organizations*” in J. Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague, 1996, p. 602; and K.H. Kaikobad *The International Court of Justice and Judicial Review*, The Hague, 2000, p. 36.

continental shelf and to provide evidence of the legality of such limits is provided by the CLCS' regulations.

It is an upper-down approach: the global regulatory body determines the administrative procedures in the national level.

26. Having discussed the binding nature of the CLCS' regulations and documents, one should also address the question of the nature of the CLCS' recommendation on the outer limits submitted by the coastal State, as provided by article 76, (8), of UNCLOS.

Prima facie, the recommendation is apparently non-binding. The expression recommendation is usually used to describe non-binding documents. Moreover, the UNCLOS does not expressly establish a consequence or a sanction for non-compliance with the recommendation. In that sense, it is true that a State could adopt the outer limits of its continental shelf regardless of the CLCS' recommendation.

However, according to article 76, (8), UNCLOS, only the limits of the continental shelf established by a State on the basis of CLCS' recommendations shall be final and binding. Moreover, only limits thus established are given due publicity by the Secretary-General. In that sense, even if formally the CLCS' decision is not binding, in fact, as all the claims to extended continental shelves that do not follow the CLCS' recommendations are not "final and binding", there is a strong incentive to respect such recommendations. Actually, article 7 of Annex II of UNCLOS expressly provides that «*Coastal States shall establish the outer limits of the continental shelf in conformity with the provisions of article 76, paragraph 8, and in accordance with the appropriate national procedures*».

Hence we can conclude that the recommendation of the CLCS is not a recommendation on the exact sense of the word, but actually a true decision on the compliance of the coastal State claims with the criteria of article 76 UNCLOS. That decision can express the compliance, the partial compliance or non-compliance (*rectius* rejection) of the coastal State claims.

It is worth noting that neither the CLCS has implementing power regarding its recommendations nor the UNCLOS regime provides for direct mechanisms that would force a State to comply with them. There is also no

higher authority – superior in relation to the States – with power to enforce those recommendations.

But, if there is no means of direct implementation of the CLCS' recommendation, how can we say that those recommendations are, in fact, binding? The answer is: in this case, as in many others in international law today, the lack of enforceability is replaced by other means to induce compliance, indirect ones.

And which are these other means to induce compliance? As we said earlier, article 76, (8), of UNCLOS, implicitly states that the limits delineated otherwise are only provisional – in the sense that they are not final – and non-binding. In this sense, nothing guarantees the respect for those limits by the other States and by the other international actors, like the UN or the Authority of the Area.⁴⁵ It is in the State's self-interest to comply with the recommendation in order to have international recognition of the outer limits of its continental shelf. The binding effect results from the negative incentive to comply and the pressure provided by those incentives.

27. Actually, as the compliance with the recommendations is a condition of the final and binding nature of the delineation of the outer limit of the continental shelf, one must assume that the juridical force of the recommendation goes beyond the relation between the CLCS and the submitting State or even the field of International Public Law.

In fact, only a delineation which is final and binding can be enforced by the coastal State in both International and Internal Law. Only such delineation is binding to both public and private parties alike.

For instance, a private contractor that wishes to drill 250 miles on the coast of a given State must know if that area is part of that State's continental shelf. Depending on the CLCS' recommendation on the coastal State's submission its delineation of the outer limits can be binding or not. If it is binding and includes that area, it is part of that State's continental shelf. If it is not, it is part of the Area. The legal regimes applicable in both cases are completely different – the national one, in the first case, the international one (UNCLOS), in the second case – and different are also the competent

⁴⁵ See article 156 *et seqq.* of UNCLOS.

authorities to regulate and licence the drilling (in this case) – the national authorities, in the first case, the Authority, in the second. This means that a private entity cannot ignore the CLCS’ recommendation, if he wants to safely drill offshore (in this example). If he does not, he effectively is operating outside international law.

One can conclude that the recommendation made by an international body (the CLCS) has a binding effect also over the private parties. The private parties are induced to abide by the CLCS’ recommendation in order to achieve legal certainty of their position. The “enforcement through incentives” approach once more.

28. It is also interesting to establish the relation between the regime provided by article 76 and the question of the delimitation of continental shelves between States with opposite or adjacent coasts that can be seen in the recommendations made to the Russian Federation’s submission.

The UNCLOS, as well as several rules and regulations of the CLCS, stress that the procedure established in article 76 is without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts⁴⁶. In consequence, the actions of the CLCS are limited in the sense that it cannot interfere in matters relating to delimitation of boundaries between States in that situation.⁴⁷

The regime of delimitation of the continental shelf between States with opposite or adjacent coasts is provided by article 83 of UNCLOS. According with this regime, where there is no agreement in force between the States concerned, questions relating to the delimitation of the continental shelf «*shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution*»⁴⁸. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

⁴⁶ See article 76, (10), of UNCLOS.

⁴⁷ See article 9 of Annex II of UNCLOS.

⁴⁸ See article 83, (1) and (4), of UNCLOS.

Bearing this in mind, let's analyse the recommendations delivered after the consideration of the Russian Federation's submission. The CLCS recommended that the partial submission over the continental shelf of the Sea of Okhotsk «*shall not prejudice questions relating to the delimitation of boundaries between States in the south for which a submission might subsequently be made, notwithstanding the provisions regarding the 10-year time limit established by article 4 of annex II to the Convention*». The CLCS also recommended to the Russian Federation «*to make its best efforts to effect an agreement with Japan in accordance with paragraph 4 of annex I to the Rules of Procedure*».⁴⁹

As we can see, the CLCS, while stressing that its recommendation is without prejudice to the delimitation of borders, also mentions the 10 year time limit. In a way, by doing so, the CLCS pressures Russia to either reach an agreement with Japan on their borders or, at least, on a joint or separate submission to the CLCS paragraph 4 of annex I to the RP. The CLCS' recommendation and the time limit established in Annex II of UNCLOS are, in fact, conditioning the freedom of the States to delineate its borders. The conditioning is made, basically through a pressure mechanism: if the States do not agree, the CLCS cannot make a recommendation, which means that it is not possible to delineate final and binding outer limits of the continental shelf beyond the 200 miles limit.

Once again, there is indirect means to induce State action in conformity to international law – through positive and negative incentives (in this case, the ability to effectively present a submission to the CLCS).

29. In conclusion, the CLCS is a global administrative body, with both adjudicating and regulatory powers in relation to a global legal regime (the Law of the Sea, as provided by the UNCLOS). The CLCS' powers are binding not only to the coastal States but to all public and private parties alike. There is no direct mechanism to enforce CLCS' decisions or regulations – their implementation is accomplished by indirect means to induce compliance.

⁴⁹ See the Report of the Secretary-General to the Fifty-seventh session of the General Assembly under the agenda item Oceans and the Law of the Sea (A/57/57/add.1, paras. 38-41).

D) THE ROLE OF SCIENTIFIC CRITERIA

30. In article 76, especially in (3), (4) and (6), we can see the importance of the resource to purely scientific terms in legal regulation as criteria for decision by international bodies. The discretionary powers of the deciding body are (at least in theory) limited because it has scientific criteria. In consequence, the power of the coastal State to delineate the outer limits of its continental shelf is also limited.

By this technique the scientific terms are allocated legal effect and bind the deciding body and the coastal States. The main effect is that interpretation and application of a legal rule will depend on non-legal scientific criteria.

31. The purpose of this technique is presumably to introduce objective criteria into a process, which could otherwise be highly subjective and controversial. By making the extension of the continental shelf dependent on both substantive scientific norms and a procedure of ascertaining the fulfilment of such criteria by an international scientific expert commission the discretionary powers of States are somewhat restricted. Instead of subjective policy based claims, the extension of the continental shelf is made objective scientific operational claims. The presumed objective scientific criteria are supposed to lead to an open and rationalised process of extension in contrast to perhaps more subjective policy driven claims.⁵⁰ The objective and rational criteria is also supposed to be a less contentious mean to delineate the outer limits of the continental shelf.

32. But this is only one of the roles that can be fulfilled by science in the global arena. There is also the matter of legitimacy of the body in charge of the decision. As the CLCS has no democratic legitimacy, the recourse to scientists as members of the international body and to scientific supposedly objective criteria of decision is a strong source of alternative legitimacy. This is seen as a way to counter the claims of democratic deficit in the global arena.

⁵⁰ See also T.L. MCDORMAN "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17 *International Journal of Marine and Coastal Law* 301-324 at 315.

Besides, the scientific criteria allow a common universal approach to the process and the possibility of peer review. These criteria also allow a higher degree of transparency of decision-making processes.

However, as the recourse to scientific terms in legal regulation rises, the risk of politicization of science also rises. In addition, one must never forget that any epistemological and scientific truths are only temporary: they can be refuted by opposite proofs. In that sense, scientific criteria can be also contentious – there are no absolute truths in science.

33. Actually, as the legal regime uses scientific criteria, it transforms them into legal concepts. By doing so, the scientific free judgment is also transformed in administrative discretion. This happens both in adjudicating the legal regimes and in regulating those regimes. Scientific criteria included in a legal regime become legal criteria and is subjected to interpretation in the same degree as legal criteria.

IV. THE PRESENCE OF GLOBAL ADMINISTRATIVE LAW PRINCIPLES IN THE PROCEDURE BEFORE THE CLCS

A) GENERAL CONSIDERATIONS

34. By studying the procedure of consideration of the Russian Federation's submission for an extended continental shelf, one can notice the emergence of manifestations of what can be classified as principles of global administrative law.

The discovery of the existence of a global administrative law area is relatively new.⁵¹ It is defined as the principles, procedures, and review mechanisms that are emerging to govern decision-making and regulatory

⁵¹ See, e.g., B. KINGSBURY, N. KRISCH, and R. B. STEWART, "The Emergence of Global Administrative Law", pp. 5 and 25 et seqq. Available at: <http://www.iilj.org/GAL/documents/TheEmergenceofGlobalAdministrativeLaw.pdf>. See also B. KINGSBURY, N. KRISCH, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", pp. 2 et seqq. (available at: <http://www.iilj.org/GAL/documents/Introduction.pdf>) and S. CASSESE, "Global Administrative Law: an introduction" (available at: http://www.e-italici.org/it_data/file/s_cassese_global_administrative_law.pdf).

rulemaking by a variety of global regulatory structures.⁵² The major focus of global administrative law is to find ways to regulate the activities of global regulatory bodies, in order that the exercise of public power beyond the nation-state respects the rule of law and remains responsive – and accountable – to the interests upon which it impacts.

35. The power to set the borders of a State is traditionally understood as an absolute and sovereign power of each State. However, article 76, (8), and annex II of UNCLOS establish a procedure for the delimitation of the borders between a State's continental shelf and the Area in which the coastal States asks for recommendations to an international body on how to establish the outer limit of the area over which it has sovereign rights. More important than that: only if the State abides by the recommendations are those outer limits final and binding.

The UNCLOS regime provides for a legal framework that allows for the proceduralization and judicialization of the exercise of a sovereign power which is mandatory to all State parties. This proceduralization together with the creation of a permanent administrative body to adjudicate it is fundamentally different and foreign when compared with International Law's solutions to border conflicts and border delineation until now.

The sovereign right to establish the State's borders is, in this case, limited by the legal criteria provided for by article 76. This limitation transforms the sovereign and absolute State's power into something more close to administrative discretion. In this sense, legality of the exercise of the sovereign power to establish the outer edge of the continental shelf can be controlled by an independent body, even *a priori*, as it is in this case, most like the exercise of administrative discretionary powers.

36. In fact, by establishing the highly complex and formalized procedure that allows coastal States to establish the outer limits of its continental shelf beyond the 200 miles limit, the UNCLOS was creating a

⁵² See, e.g., S. CASSESE, "Administrative Law Without The State? The Challenge Of Global Regulation", pp. 670 et seqq. Available at: <http://www.iilj.org/GAL/documents/ADMINISTRATIVELAWWITHOUTTHESTATE.pdf>.

compulsory procedure which avoids the unilateral action of States or the use of force. Up until UNCLOS, there was no system that would allow an *a priori* control of the establishment of such limits, resolving some of the most important disputes – namely, the ones related with the establishment of the limits of the continental shelf – through procedure and not through conflict.

37. A specific trace of this procedure is the fact that it has various stages which are the responsibility of both national and global administrative bodies. A brief description of the whole procedure can be made.

The procedure begins on the national level, with the scientific data being collected and analysed and the national submission being made. In this stage, international bodies – as the CLCS – can contribute and help the national administration with its task.

When the national submission is completed, the coastal State seeks a favourable CLCS' recommendation: it is the global level. In the end of this stage, if the recommendation is, in fact, favourable to the coastal State's submission, it is up to its national administration to collect charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf thus delineated. At last, the final stage is the deposit with the Secretary-General of the UN of such data, in order for him to give it due publicity.

38. It is in this procedure that we are going to find the manifestations of global administrative law's principles.

B) THE GLOBAL ADMINISTRATIVE LAW PRINCIPLES IN THE PROCEDURE BEFORE THE CLCS: THE RIGHT TO A FAIR HEARING

39. The right to a fair hearing before a decision is taken on a matter that directly affects you is one of the basic due process principles in administrative law. But does this principle also apply to the procedure of appreciation of the submission for an extended continental shelf before the CLCS? If the answer is

affirmative, that would be a lead to the general nature of the right to a fair hearing in global administrative law.

40. As we pointed out while describing the procedure of appreciation of the Russian Federation's submission, the CLCS debated the issue of whether the representatives of the Russian Federation had a right to be present during the deliberations on the proposed recommendations.

The main point of debate was how article 5, *in fine*, of UNCLOS annex II – which provides that «*the coastal State which has made a submission to the Commission may send its representatives to participate in the relevant proceedings without the right to vote*» – should be interpreted. More precisely, the question was: should the deliberation of the CLCS on the submission of a coastal State be considered as a relevant proceeding referred in article 5?

Two opposite views were expressed.

Some of the CLCS' members were of the opinion that the deliberation would have to be considered a relevant procedure, pursuant to, at the time, rule 51 of the RP,⁵³ and paragraph 16 of section VII of the Modus Operandi of the CLCS⁵⁴ (both rules are no longer in force). As a consequence, the coastal State was entitled to participate in the proceedings, without the right to vote. They also expressed the view that, should the RP be interpreted as preventing the participation of that State's representatives during the CLCS' discussion of the recommendations proposed by the sub-commission, the provisions of UNCLOS should prevail over the RP.

However, according to an opposing view, the RP constituted a further development of the provision of article 5 of UNCLOS annex II and had been widely distributed, made available to all States and had been met with no objections. It was emphasized that rule 51 of the RP provided for the participation of the coastal State in the proceedings deemed relevant by the CLCS – so there was no contradiction with which article 5, *in fine*, of UNCLOS annex II. In addition, the representatives of the coastal State had already been invited by the CLCS on two separate occasions during the 10th session to make a presentation on the submission, and furthermore, the sub-commission had held

⁵³ CLCS/3/Rev.3 (6 February 2001).

⁵⁴ CLCS/L.3 (12 December 1997).

six meetings of consultations in the form of questions and answers between the members of the sub-commission and the representatives of the coastal State.

An additional opposing argument was made, stating that in accordance with paragraph 4 of RP annex II, the deliberations of the CLCS and sub-commission on all submissions made in accordance with article 76, (8), of the UNCLOS have to take place in private and remain confidential. Therefore, it was stated, at the current, final stage, the CLCS should consider and adopt the recommendations at a private meeting.

In view of the clear impossibility of achieving a consensus on the issue, the Chairman put to the vote the question of considering the discussion of the recommendations of the sub-commission in a closed meeting, and, accordingly, considering those proceedings as “*not relevant*” for the purposes of inviting the coastal State pursuant to article 5 of UNCLOS annex II and rule 51 of the RP. The vote was conducted by secret ballot and, out of 18 members present and voting, the question was answered positively by 15 votes against 3 negative responses.

41. At a first glance one could be inclined to conclude that the right to a fair hearing prior to the final decision was not recognized by the CLCS regime.

However, the matter continued under deliberation and discussion by the CLCS. Two opposing views continued to be expressed over the matter. On the one side, the opinion according to which the recognition of the right to a fair hearing prior to the final decision was necessary in the light of the concerns of States parties. On the other side, the fear that further interaction with the submitting States would disrupt the impartiality of the process and the privacy of the discussions within the CLCS during the consideration of the recommendations prepared by the sub-commissions. Related with this subject it was also discussed the possibility of providing for a mechanism by which the coastal State would be appraised of the content of the recommendations proposed by a sub-commission to the CLCS. The implementation of such a mechanism would be vital for the effectiveness of the opportunity given to the

submitting State to express its position at the final stages of the consideration of the submission and draft recommendations.⁵⁵

Eventually, on 7 October 2005, the RP were amended in order to guarantee to the submitting State extensive rights to provide additional clarification to the sub-commission on any matters relating to the submission⁵⁶. Furthermore, the number of relevant proceedings in which the coastal State may intervene was amended to three (prior to the amendment, it was two).

42. On 10 May 2006, the RP was once again amended. This time the amendment was considerably more comprehensive, consisting in the insertion of three new paragraphs in to section IV (10) of RP annex III⁵⁷.

The amendment establishes that a delegation of the coastal State should be invited to one or several meetings with the sub-commission in an advanced stage during the examination of the submission. In those meetings, the sub-commission must provide a comprehensive presentation of its views and general conclusions arising from the examination of part or all of the submission.

After the presentation, it is provided that the coastal State has the opportunity to provide a response to it during the same session, and/or at a later stage, in a format and schedule determined by agreement between the delegation and the sub-commission.

Only after the meetings with the submitting State can the sub-commission proceed to prepare its recommendations to be submitted to the CLCS for its consideration.

43. On 6 October 2006, following continued discussion, section VI of RP annex III was amended.⁵⁸ A number 1 bis was added stating that «*after the subcommission presents its recommendations to the Commission, and before*

⁵⁵ See document CLCS/48, paragraphs 41 and 42.

⁵⁶ Two additional paragraphs were inserted in section III (6) and a subparagraph c) was inserted in section VI (15) of RP annex III. See document CLCS/48, paragraphs 44 and 45.

⁵⁷ Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 10 May 2006, document CLCS/50, n° 36.

⁵⁸ Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 6 October 2006, document CLCS/52, n° 41.

the Commission considers and adopts the recommendations, the coastal State may make a presentation on any matter related to its submission to the plenary of the Commission, if it so chooses. For that presentation, the coastal State may be allowed up to half a day. The coastal State and the Commission shall not engage in discussion on the submission or its recommendations at that meeting. After the presentation made by the coastal State, the Commission shall consider the recommendations in private, without the participation of the representatives of the coastal State».

44. As we can see, there was a continuous effort of recognition and densification of the right to a fair hearing to the submitting State – although it is never called like that. The recognition of this right was a demand of the submitting States before the CLCS.

One can also realise that the right to a fair hearing implies the right to know the appreciation of its submission by the sub-commission up until that point or, in this case, the right to know the draft recommendations. Only then is the hearing fair and can be effective. In fact, only if the submitting State knows the position of the administrative body can it respond accordingly. This was also provided for in the new regime.

C) THE PRINCIPLES OF PUBLICITY AND OF PARTICIPATION

45. The procedure for submitting an extended continental shelf also reflects the principles of due publicity and transparency, as well as the right of participation of other parties with legitimate interest in the proceedings. Once again we are before classic administrative law principles that also can be found in the global legal regimes.

46. After recording a submission (rule 48 of RP), acknowledging its receipt to the submitting coastal State (rule 49 of RP) and notifying the CLCS and all States Members of the UN, including States parties to the UNCLOS, of the receipt of the submission (rule 50 of RP), the Secretary-General of the UN is required to make public the executive summary of the submission, including all charts and coordinates indicating the outer limits of the continental shelf (rule

50 of RP and paragraph 9.1.4 of the STG). In the case of the Russian Federation's submission, the publicity of the executive summary was made through a communication circulated by all members of the UN.

As we can see, the rules on publicity are not provided for in the UNCLOS, but they were established by the CLCS itself, recognizing that the delineation of the outer limits of a State's continental shelf can be of importance by neighbouring States and to all of mankind, because – as we have already seen – the dimension of the Area, which is part of the common heritage of mankind.

47. The importance of giving due publicity to a submission was recognized by the Legal Counsel of the UN, dating of 25 August 2005⁵⁹. In this legal opinion, it was stated that⁶⁰:

«In the event that a coastal State submits new particulars related to the proposed outer limits of its continental shelf, either in response to requests by the Commission for additional data and information or clarifications or on its own, an issue may arise with regard to the due publicity given to the original submission. If the new particulars lead to a significant departure from the original limits contained in the executive summary that was given due publicity by the Secretary-General of the United Nations, it appears that the newly proposed particulars of the outer limits of the continental shelf should be given similar publicity. All States have an interest in being notified about the limits proposed in a submission. The outer limits of the continental shelf of a State also define the Area (the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction), which is, together with its resources, the common heritage of mankind (article 136 of the Convention).

⁵⁹ See document CLCS/46, «Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf: Legal opinion on whether it is permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission».

⁶⁰ *Id.* p. 11 and 12.

According to the preamble of the Convention, the exploration and exploitation of the Area and its resources “shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States”.»

In view of this legal opinion, the CLCS invited Brazil – the State that wanted to provide additional data and information – to prepare an addendum or corrigendum to the executive summary to be transmitted to the CLCS through the Secretary-General. The Secretary-General then gave due publicity to the addendum made by Brazil to the executive summary of the submission through the circulation of a communication to all Member States of the UN and parties to the UNCLOS, including all charts and coordinates contained therein.

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48. As for the participation of other parties with legitimate interest in the proceedings, it should be noted that the analysis of State practice which has developed shows that, following the circulation of the executive summary of a submission, there are States which find it necessary to provide comments on particular aspects of the executive summary by sending notes verbales to the Secretary-General with a request that those comments should be brought to the attention of the CLCS and be circulated to all States Members of the UN.

This practice was also recognized by the opinion of the Legal Counsel of the UN, dating of 25 August 2005,⁶² which was adopted by the CLCS⁶³.

The reasons for the participation are the same as those given to the obligation of publicity: *i)* the importance for neighbouring States to comment on the outer limits of the continental shelf of the submitting State as it can have influence in the limits of their continental shelf; and *ii)* the importance to all of mankind, because of the relation between the extended continental shelf and the dimension of the Area, which is part of the common heritage of mankind.

⁶¹ See Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 7 October 2005, document CLCS/48, n° 18-19.

⁶² See document CLCS/46, p. 12.

⁶³ See document CLCS/48, n° 18-19.

There is no specific time-frame provided for the participation, but rule 51, (1), of the RP, establish a time span of three months between the publication by the Secretary-General of the executive summary and the beginning of the appreciation of the submission by the CLCS, which can be used as a reference to the period during which other States can send notes verbales. In order to assure that the interest parties can provide comments, complete information must be provided. This is regulated by paragraph 9.1.4 of the STG that provides for the content of the executive summary that is made public.

49. One must note that the publicity of the executive summary of the submission and the corresponding charts is also made through the *Internet*, in order to be accessible to the general public. However, the practice developed only recognizes standing to States in producing comments on the proposed outer limits.

50. The recommendations of the CLCS on matters related to the establishment of the outer limits of the continental shelf are not made public, but are submitted in writing to the submitting coastal State and to the Secretary-General of the UN⁶⁴. It is the coastal State that must deposit charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf, to which the Secretary-General gives due publicity.⁶⁵

D) THE PRINCIPLE OF CONFIDENTIALITY

51. In the legal regime for the consideration of the extension of the continental shelf the confidentiality of certain aspects of the submission is protected. This is an exception to the general rule of transparency in administrative law and global administrative law.

The principle of the confidentiality of the procedure – or, at least, of certain aspects of the procedure – is justified by the fact that the submission

⁶⁴ See article 6, (3), of UNCLOS annex II and rule 53, (3), of RP.

⁶⁵ See article 76, (9) of UNCLOS.

contains information and data generally considered to be sensible or classified by the States: the profile of the State's continental shelf.

The necessity to protect data and facts related to the State's submission leads to the confidentiality of the procedure of consideration of the submission.

⁶⁶ Besides that, while making a submission, the coastal State may classify as confidential any data and other material, not otherwise publicly available, that it submits. In that case, the confidential material remains confidential after the consideration of the submission is concluded unless decided otherwise by the CLCS with the written consent of the coastal State. ⁶⁷

The confidentiality of the procedure also implies that the CLCS' and the sub-commissions meetings must be held in private, unless the CLCS decides otherwise. ⁶⁸ More specifically, all the deliberations of the CLCS and of the sub-commission on submissions made in accordance with article 76, (8), UNCLOS must take place in private and remain confidential. ⁶⁹

All the CLCS' members are under the duty to maintain the confidentiality of the deliberations and proceedings of the Commission together with any information identified as confidential, as provided for in paragraph 3 of the Internal Code of Conduct for members of the CLCS. ⁷⁰

The RP annex II is exclusively dedicated to matters of confidentiality, namely the classification of material, the access to confidential data and information and the duty to preserve confidentiality of the CLCS' members. Also the enforcement of confidentiality duties is provided for in paragraph 5 of RP annex II, including the creation of a Committee on Confidentiality and the procedure to be taken if an alleged breach of confidentiality is reported.

E) THE PRINCIPLE OF IMPARTIALITY

52. When studying the article 76 regime, one comes across with another of the global administrative law's principles: the principle of impartiality. The

⁶⁶ See rule 51, (3), of RP.

⁶⁷ See paragraph 2 (1) and (3) of RP annex II.

⁶⁸ See rule 23 of RP.

⁶⁹ See paragraph 4 of RP annex II.

⁷⁰ See document CLCS/47, of 8 September 2005.

legal regime for the consideration of the extension of the continental shelf is actually based on the existence of an impartial administrative body with adjudicating powers. In order to assure administrative impartiality of the members of the CLCS' and of the CLCS itself, the legal regime provides for several rules against bias.

These rules on administrative impartiality have the objective not only to avoid biased decisions but also to assure that the administrative body is perceived as impartial and neutral. This is important also in regard of its legitimacy. In this case, as in many others, appearances do matter.

53. There are several rules that provide for the independence and neutrality of the CLCS' members.

The CLCS' members serve in their personal capacities and not as representatives of any State.⁷¹ In order to assure that, members of the Commission who are nationals of the coastal State making the submission as well as any Commission member who has assisted the coastal State by providing scientific and technical advice with respect to the delineation shall not be a member of the sub-commission dealing with that submission.^{72/73}

Besides, the CLCS' members' duty to act independently includes the prohibition to seek or receive instructions from any Government or from any other authority external to the CLCS.⁷⁴ The duty to preserve integrity, independence and impartiality the duty to avoid conflict of interest and the duty to act independently are all provided for in the Internal Code of Conduct for members of the CLCS.⁷⁵

F) THE EXISTENCE OF A REVIEW MECHANISM

54. Another typical trace of global administrative law is the existence of a review mechanism by an independent body. The legal regime for the

⁷¹ See article 2, (1), of UNCLOS annex II.

⁷² See article 5 of UNCLOS annex II.

⁷³ The submitting State must refer the names of any CLCS' members who have provided it with scientific and technical advice (article 4 of UNCLOS annex II).

⁷⁴ See rule 11 of RP.

⁷⁵ See document CLCS/47, of 8 September 2005, paragraphs 2, 4 and 5.

consideration of the extension of the continental shelf also establishes the right of the State to ask for the CLCS' decision to be reconsidered and reviewed by means of making a revised or new submission, «within reasonable time».⁷⁶

However, the legal regime only provides for a review procedure by the same body: the CLCS, without establishing guarantees of appeal to an impartial third body.

If there is a dispute concerning the interpretation or application of UNCLOS, the court or tribunal chosen by the State when signing, ratifying or acceding it, according to article 287, (1), UNCLOS, has jurisdiction over such dispute.⁷⁷ One can speculate if this jurisdiction may include the judicial review of a CLCS' recommendation, if the dispute concerns only its interpretation of UNCLOS and not technical or scientific aspects of its adjudication. Even if it is so, article 296, (2), UNCLOS⁷⁸ provides that the judicial decisions so rendered only have binding force between the parties and in respect of that particular dispute. This is obviously a problem when the dispute is over border delimitation

G) THE GLOBAL ADMINISTRATIVE LAW PRINCIPLES IN THE PROCEDURE BEFORE
THE CLCS: GENERAL CONCLUSIONS

55. As we have seen, the regime established for the consideration of submissions for an extended continental shelf contains several examples of recognition of global administrative law principles.

56. Some of the principles are provided for in the regime established by the UNCLOS and its annexes, as the existence of a review mechanism. There are cases where these principles, despite being recognized by the UNCLOS, are thoroughly regulated by the CLCS, as the principle of impartiality. In other cases – the majority – these principles were recognized by the administrative body (by itself or through pressure of the submitting States), as it is the case of the publicity of the submission and the confidentiality. Finally, there are also cases,

⁷⁶ See article 8 of UNCLOS annex II and rule 53, (4) of RP.

⁷⁷ See also articles 286 and 288, (1), UNCLOS.

⁷⁸ See also article 33, (2), UNCLOS annex VI.

as with the principle of participation of the interest parties, the recognition of the principle was made in face of the international bodies' or States' practice.

57. All this demonstrates that the recognition of global administrative law's principles is a process that is still under way. However, the progressive deepening of these principles and the emergence of new ones proves that we have already come a long way in the road to an effective rule of law in international law.

As we can see, the principles are progressively being recognized through the implementation of the legal regimes. The due process principles, like the principle of publicity and of participation of interested parties or, more importantly, the right to a fair hearing, are the result of the pressure being made by the States themselves. They are the response to a need effectively felt by the international actors. In fact, as the process of proceduralization of the powers of States in international law deepens, also the need for procedural fairness is felt more strongly. Because the States accept limitations on the exercise of their sovereign rights – in this case, the right to establish the breadth of the continental shelf –, through the submission to a mandatory procedure, for instance, they demand something in return: procedural rights.

The administrative principles here acknowledged are in favour of States before an international body – not in favour of citizens before the Administration. In this sense, despite the similarities, the global administrative law's principles are different of the national administrative law principles.

58. Global administrative law is fragmented into several self-contained regulatory systems. However, several principles and practices are beyond that fragmentation and apply, within some degree of fluctuation, throughout the several regimes.

In the regime that we have analysed we could see as these principles were recognized through regulation passed by the global body itself or even as they result from the practice of the international actors. These are the same

principles that have been acknowledged in other global administrative law procedures. A common set of global administrative law principles is emerging.⁷⁹

59. Also important to achieve a higher degree of integration is the cooperation between international bodies. The CLCS' regime is a good example of this integration.

The CLCS is part of the UN "universe" as a treaty body of the Organization. This status was recognized by the «Legal opinion on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission»,⁸⁰ in which the Legal Counsel, Under-Secretary-General of the UN for Legal Affairs expressed the view that the CLCS' members could be considered to be experts on mission covered by article VI of the Convention on the Privileges and Immunities of the UN.⁸¹ According to the Legal Opinion, the CLCS is in an analogous position to the Committee on the Elimination of Racial Discrimination which was also considered a treaty body of the UN in a legal opinion of 15 September 1969 on the privileges and immunities of its members.⁸²

In fact, sessions of the CLCS and its sub-commissions are normally held at the UN Headquarters in New York⁸³ and its secretariat is provided by the Secretary-General of the UN,⁸⁴ through the Division for Ocean Affairs and the Law of the Sea of the UN Office of Legal Affairs. Actually, the RP of the CLCS establish duties that the Secretary-General of the UN must perform.⁸⁵

Besides being integrated in the UN "universe", the article 3, (2), of UNCLOS annex II, expressly provide for the possibility of cooperation, «*to the extent considered necessary and useful*», between the CLCS and the

⁷⁹ See, in disagreement, C. HARLOW, "Global Administrative Law: The Quest for Principles and Values", pp. 207 et seqq.. Available at: <http://www.iilj.org/GAL/documents/GlobalAdministrativeLawHarlow.pdf>.

⁸⁰ Letter dated 11 March 1998 from the Legal Counsel, Under-Secretary-General of the UN for legal affairs, addressed to the CLCS, "Legal opinion on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission".

⁸¹ Adopted by the General Assembly of the United Nations on 13 February 1946.

⁸² United Nations Juridical Yearbook, 1969, pp. 207-210.

⁸³ See rule 4, (1) of RP.

⁸⁴ See article 2, (5) of UNCLOS annex II.

⁸⁵ See rule 16 of RP.

Intergovernmental Oceanographic Commission⁸⁶ (IOC) of UNESCO, the International Hydrographic Organization⁸⁷ (IHO) «*and other competent international organizations with a view to exchanging scientific and technical information which might be of assistance*» in discharging the CLCS' responsibilities. In fact, there are several formal or informal groups cooperating with the CLCS like the Advisory Board on the Law of the Sea (a joint body composed of participants from the International Association of Geodesy [IAG],⁸⁸ the IHO, as well as the Division for Ocean Affairs and the Law)⁸⁹, the International Cartographic Association,⁹⁰ the International Organization for Standardization,⁹¹ and, of course, the International Maritime Organization.⁹²

⁸⁶ The IOC is an autonomous intergovernmental body, located within UNESCO created in 1960 by resolution 2.31 of the General Conference of UNESCO to promote international cooperation and coordinate programmes in scientific investigation, sustainable development, protection of the marine environment, capacity-building for improved management, and decision-making related with the nature and resources of the oceans. For further detail, please visit <http://ioc-unesco.org/>.

⁸⁷ The IHO is an intergovernmental consultative and technical organization that was established in 1921 to support the safety in navigation and the protection of the marine environment by bringing about the greatest possible uniformity and accuracy in nautical charts and documents. For further detail, please visit <http://www.iho.shom.fr/>.

⁸⁸ The International Association of Geodesy is a constituent member of the International Union of Geodesy and Geophysics (which, in turn, is one of the 25 unions that compose the International Council for Science) whose mission is the advancement of geodesy, an earth science that includes the study of the planets and their satellites. Its membership comprises countries and individuals. For further detail, please visit <http://www.iag-aig.org/index.php>. The International Council for Science (ICSU) was founded in 1931 to promote international scientific activity in the different branches of science and its application for the benefit of humanity, and is one of the oldest non-governmental organizations in the world. For further detail, please visit <http://www.icsu.org/index.php>.

⁸⁹ In September 1994 the IAG and the IHO agreed to form a joint Advisory Board to provide advice and guidance and, where applicable, offer expert interpretation of the hydrographic, geodetic and other technical aspects of the Law of the Sea, specially in the zone of overlap between the technical and regulatory aspects of UNCLOS, to the parent organisations, their member states or to other organisations on request. The Board is comprised of three representatives from each organisation and two additional members, one representing the UN Division of Ocean Affairs and the Law of the Sea Office of Legal Affairs (DOALOS) in an ex-officio capacity, and the other representing the International Hydrographic Bureau. For further detail, please visit <http://www.gmat.unsw.edu.au/ablos/>.

⁹⁰ The mission of the International Cartographic Association is to promote the discipline and profession of cartography in an international context. Each member nation is represented by a *national member organisation*, which is supposed to be the national society or committee for cartography or geographical science. The Association can also accept requests for affiliated membership from international or national scientific, technical or other organisations. For further detail, please visit <http://cartography.tuwien.ac.at/ica/>.

⁹¹ The International Organization for Standardization (ISO) is the world's largest developer and publisher of international standards. ISO is a non-governmental organization that forms a network covering 157 countries, one member per country. There are public and private members, including national standards institutes that are part of the governmental structure of their countries, and private sector members, set up by national partnerships of industry

It is through the cooperation between the several international bodies that a greater unity – or, at least, a greater degree of coherence – is achieved between the several regimes applied by the global administrative bodies in presence.

60. In the regime for the consideration of submissions for an extended continental shelf there is also a great degree of cooperation between the international bodies and the national administrations of the several States. Actually, as we have seen, one of the functions of the CLCS is to help the several States in preparing their submissions. This cooperation is also a way to promote cross-fertilization between international and national administrative regimes.

There is also a promotion of cooperation between neighbouring States, with regards to joint submissions or the delimitation of borders by peaceful means.

61. In conclusion, the way to greater unity of international law regimes is through the practice of global bodies and of States in the global arena and it is enhanced by the cooperation both in international and in national levels. This unity is progressively emerging from the action of the several international actors.

The unity – or some degree of it – can be seen as the pattern of development of international law evolves. We could see that global administrative law principles emerge through the work of global bodies – its regulations or its practices – independently of a master plan. In this sense, the evolution of global administrative law can be perceived as chaotic or leading to contradictory results. We believe that such perception is not real and that within due time a pattern of procedural fairness and rule of law will prevail.

associations. It is the Central Secretariat in Geneva, Switzerland, that coordinates the system. For further detail, please visit <http://www.iso.org/iso/home.htm>.

⁹² The Convention establishing the International Maritime Organization (IMO) was adopted in Geneva in 1948 and IMO first met in 1959 (it was formerly known as the Inter-Governmental Maritime Consultative Organization or IMCO). IMO is affiliated with the UN and its' main task has been to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping. IMO is composed of member States and associate members. Non-governmental organizations can be given consultative status and inter-governmental organizations can conclude Agreements of Co-operation with IMO. For further detail, please visit <http://www.imo.org/>.