
More Disputes Ahead for the CLCS?
CLCS Practice on Rule 46 of its Rules of Procedure

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Abstract

When the provisions on the Commission on the Limits of the Continental Shelf (CLCS) were negotiated during the Third UN Conference on the Law of the Sea (UNCLOS III), its role in relation to disputes was only vaguely described in the Convention text.² To implement and operationalize its obligations and mandate provided in article 76(8) of and Annex II to the United Nations Convention on the Law of the Sea (LOSC), the Commission created rule 46 of and Annex I to its Rules of Procedure (RoP), seeking to establish a uniform procedure for how to respond to continental shelf submissions subject to disputes. This operationalization of the provisions of the LOSC has caused controversy, and the CLCS has been criticized for lessening its Convention obligations; moving from *non-prejudice* to *non-consideration* of outer continental shelf (OCS) submissions. This Chapter argues that the non-consideration clause is not the only problem in relation to the CLCS' handling of OCS disputes. Equally problematic is the CLCS' interpretation and application of rule 46 of the RoP. The Chapter concludes that the CLCS' current practice on the interpretation and application of rule 46 may cause great challenges in the future, as it increases the number and variety of disputes where States are allowed to block the CLCS' consideration of OCS submissions by other States, with the ultimate effect of preventing coastal States from establishing final and binding limits towards the Area.

Keywords: CLCS, outer continental shelf, delineation, operationalization, rule 46, land or maritime dispute, Oki-no-Tori Shima.

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² The Commission on the Limits of the Continental Shelf is referred to as the CLCS or the Commission in the following.

1 Introduction

When a coastal State makes a continental shelf submission to the CLCS in accordance with article 76(8) of the LOSC, this triggers a duty for the CLCS to make recommendations to the coastal State on matters related to the establishment of the outer limits of its continental shelf. However, the existence of a dispute in relation to the submission directly affects the Commission's consideration of the continental shelf submission. Article 76(10) provides that the provisions of article 76 are “*without prejudice* to question of delimitation of the continental shelf between States with opposite or adjacent coasts”,³ and article 9 of Annex II to the LOSC continues that “[t]he actions of the Commission shall *not prejudice* matters relating to delimitation of boundaries between States with opposite or adjacent coasts”.⁴ These provisions are the so-called *saving clauses* that were agreed upon during UNCLOS III for the purpose of safeguarding the interests of States other than the coastal State when coastal States establish their OCS limits.⁵

The CLCS has been criticized for its attempt to further develop and operationalize these saving clauses in its Rules of Procedure (RoP). This Chapter discusses the legal basis for and practical implications of the CLCS' operationalization of the saving clauses. Is the critique against the CLCS justified? In particular, the Chapter discusses the CLCS' application of rule 46 of the RoP and raises the question if the current CLCS' practice may result in an unfortunate increase in the number of disputes in relation to OCS submissions.

2 (Re)defining the scope of disputes relevant for delineating the continental shelf

2.1 The CLCS and its Rules of Procedure

During the UNCLOS III negotiations concerning the areas subject to national jurisdiction, the negotiating States soon realized that there would be a need for an international organ to organize or manage the process for establishing the outer limits of the continental shelf. The first initiative of a boundary commission came up during the third session of UNCLOS III, in a United States proposal, suggesting that “every delineation pursuant to this Article shall be submitted to the *Continental Shelf Boundary Commission* for

³ Emphasis added.

⁴ Emphasis added.

⁵ *ILA Berlin Conference on the Legal Issues of the Outer Continental Shelf*, Berlin Conference Report 2004, p. 26.

review".⁶ The reference to the "Continental Shelf Boundary Commission" was pioneering the existing regime of the continental shelf, and was the initiative that led to the present CLCS, described in article 76(8) of the LOSC. However, the LOSC does not elaborate on the course of the submission procedure or the functions of the CLCS. Therefore, the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) prepared provisional Draft Rules of Procedure, which were applicable until the CLCS considered and adopted its own Rules of Procedure (RoP).⁷ The CLCS considered the Draft RoP for several sessions and adopted the majority of its provisions.

In addition to the detailed RoP, the members of the CLCS prepared three annexes to the RoP, addressing certain critical issues, namely confidentiality, disputes and a *modus operandi* for the Commission. Although not being obligated to either consult with the Meeting of States Parties (SPLOS) or comply its reactions, the CLCS presented its revised RoP to the SPLOS for consideration and comments before adoption.⁸ CLCS' development and operationalization of the saving clauses was accordingly approved by the SPLOS, at least indirectly.

In a Legal Opinion, the UN Legal Counsel observed that, although the Convention does not contain articles providing the CLCS with the power to adopt its own rules of procedure, "the States Parties to the Convention acknowledged (...) the right of the Commission to adopt documents necessary for the proper discharge of its responsibilities

⁶ The United States (1975 mimeo), Reproduced in Platzöder, R.: *Third United Nations Conference on the Law of the Sea: Documents Vol. XI 1987*, p. 500 (emphasis added).

⁷ *Report of the Fifth Meeting of States Parties* (20 September 1996) Doc. SPLOS/14, para. 44, and *Draft Rules of Procedure of the Commission on the Limits of the Continental Shelf* (26 July 1996) Doc. SPLOS/CLCS/WP.1. The Division for Ocean Affairs and the Law of the Sea (DOALOS), Office of Legal Affairs, provides secretariat services for SPLOS.

⁸ For an insight in the dialogue between the CLCS and SPLOS on rule 46 and Annex I to the RoP, see *Draft Rules of Procedure of the Commission on the Limits of the Continental Shelf* (26 July 1996) Doc. SPLOS/CLCS/WP.1, and *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission – First session* (30 June 1997) Doc. CLCS/1, para.11; *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission – Second session* (17 September 1997) Doc. CLCS/4, paras 6 and 8; *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission – Third session* (15 May 1998) Doc. CLCS/7, paras 5 and 14; and *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission – Fourth session* (11 September 1998) Doc. CLCS/9, paras 17-18.

under the Convention”.⁹ It is generally accepted that the Commission was and is competent to establish the rules applicable to its internal procedures.¹⁰

2.2 Operationalizing the saving clauses of the LOSC

When the CLCS adopted the RoP with annexes, it made two considerable adjustments as compared with the DOALOS Draft RoP, both of which have proven to impact the CLCS’ obligations as prescribed in LOSC article 76(8), especially in light of the wording of the saving clauses it initially set out to operationalize.

The first considerable amendment was the adoption of rule 46 of the RoP. In the DOALOS Draft RoP, the issue of disputes in relation to a submission was addressed in draft rule 44, providing that:

in a case in which there is a dispute in the delimitation of the continental shelf, the coastal State must inform the CLCS of such a dispute, and the actions of the Commission should not prejudice matters relating to the delimitation between the States.¹¹

Draft rule 44 was more or less a summary combination of the saving clauses included in article 76(10) and article 9 of Annex II to the LOSC. When the CLCS developed the final version of the RoP, it developed draft rule 44 into the current rule 46, and broadened the scope of disputes it considered relevant for the process of delineating the continental shelf. Whereas the saving clauses of the LOSC and draft rule 44 spoke of not prejudicing the outcome of *delimitation disputes*, the new rule 46 also included “or other cases of unresolved land or maritime disputes”. Rule 46 provides that “in case there is a dispute in the delimitation of the continental shelf or in other cases of unresolved land or maritime disputes”, submissions may be made and shall be considered in accordance with Annex I to the RoP.¹²

In addition to broadening the scope of disputes relevant for OCS submissions, Annex I was created to establish a procedure for how the coastal State, other States and the Commission should act in case there was a dispute in relation to the submission. Paragraph 1

⁹ 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 (7 September 2005) Doc. CLCS/46, p. 8.

¹⁰ ILA Berlin Conference on the Legal Issues of the Outer Continental Shelf, Berlin Conference Report 2004, p. 7. See also Oude Elferink, A.G.: “Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution”, in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World’s Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325, at p. 317.

¹¹ *Draft Rules of Procedure of the Commission on the Limits of the Continental Shelf* (26 July 1996), SPLOS/CLCS/WP1.

¹² CLCS Rules of Procedure, rule 46.

of Annex 1 maintains that the competence with respect to disputes rests with States, and accordingly, the CLCS is not awarded any competence in relation to disputes. In order to make sure to avoid any prejudicial effects from the CLCS' procedure on the outcome of related disputes, paragraph 5(a) of Annex I prescribes that if a dispute as described in rule 46 exists in relation to a submission, the CLCS must not consider or qualify a submission made by any of the States concerned in the dispute, unless all States parties to the dispute give prior consent. In spite of the mandatory language of article 76(8) of the LOSC, and in contrast with the saving clauses and rule 46, paragraph 5(a) of Annex I accordingly creates an exception to the CLCS' duty to issue recommendations.¹³ Whereas the saving clauses require non-prejudice, the CLCS decided that the way to operationalize these rules was by means of non-consideration.

In practice, paragraph 5(a) of Annex I provides States, other than the relevant coastal State, with an opportunity to block the CLCS' consideration of the coastal State's submission, if the submission is subject to dispute. If its submission is blocked, the coastal State cannot establish final and binding limits in accordance with article 76(8) of the LOSC. Without final and binding limits, the coastal State is prevented from fully benefiting from its rights over the continental shelf¹⁴ and the extent of the Area, which is the common heritage of mankind, remains uncertain.¹⁵

2.3 Is there a need to change the RoP?

Several authors have expressed their concern with the way the saving clauses are implemented and operationalized in the RoP, and it is necessary to distinguish properly between the two relatively large changes resulting from the CLCS-adopted RoP with annexes.¹⁶ Whereas rule 46 takes it upon itself to define the *scope of disputes* that are

¹³ Serdy, A.: "The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate", *International Journal of Marine and Coastal Law*, 2011 (26) pp. 355-383, at p. 366.

¹⁴ Oude Elferink, A.G.: "Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325, at p. 318.

¹⁵ LOSC, articles 1(1) and 136.

¹⁶ See, amongst others, Oude Elferink, A.G.: "Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325; Serdy, A.: "The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate", *International Journal of Marine and Coastal Law*, Vol. 26 (2001) pp. 355-382; Cavnar, A.: "Accountability and the Commission on the Limits of the Continental Shelf: Deciding who owns the ocean floor", *IILJ Emerging Scholars Paper 15* (2009), pp. 1-45.

considered relevant for OCS delineation, paragraph 5(a) of Annex I defines the *consequence* if such a defined dispute exists.

The primary concern amongst legal scholars has been that paragraph 5(a), which in practice allows other States to block the Commission's consideration of a submission, is potentially undermining the role of the Commission.¹⁷ It has been argued that Annex I has resulted in a "counterproductive oversensitivity to disputes", and that it is the result of a serious misunderstanding of the saving clauses in LOSC.¹⁸ Nothing in the wording of the saving clauses indicates that the CLCS should not consider disputed submissions.¹⁹ They only provide that the provisions of article 76 and the actions of the CLCS are without prejudice to the question of delimitation of the continental shelf.

Oude Elferink observes that the application of paragraph 5(a) may in certain instances lead to a deadlock, where the CLCS will not be able to consider a submission and issue recommendations and a court or tribunal will not be able to address the delimitation of the continental shelf until the time the States have received recommendations by the CLCS on their outer limits.²⁰ He argues that the saving clauses in the LOSC do "not envisage the Commission not making recommendations due to undelimited boundaries, but rather provides that the article is without prejudice to the question of the delimitation of the continental shelf".²¹ Consequently, deadlocked disputes may be the result of the CLCS *not* acting in accordance with the saving clauses, and paragraph 5(a) arguably fails to ensure that the actions of the Commission do not prejudice matters relation to the delimitation of boundaries.²² As a solution, Oude Elferink suggests that the CLCS, on the basis of its competence to adopt and amend its own rules of procedure, could delete paragraph 5(a) of

¹⁷ Jensen, Ø.: *The Commission on the Limits of the Continental Shelf*, Brill Nijhoff 2014, p. 68; Oude Elferink, A.G.: "Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325.

¹⁸ Serdy, A.: "The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate", in *International Journal of Marine and Coastal Law*, Vol. 26 (2001) pp. 355-382, at p. 362, 364.

¹⁹ Jensen, Ø.: *The Commission on the Limits of the Continental Shelf*, Brill Nijhoff 2014, p. 66; Oude Elferink, A.G.: "Causes, Consequences, and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf", (ed. Symmons, C.R.) *Selected Contemporary Issues in the Law of the Sea*, Martinus Nijhoff Publishers, 2011, p. 270.

²⁰ Oude Elferink, A.G.: "Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325 p. 317.

²¹ *Ibid.*, p. 312.

²² *Ibid.*

Annex I altogether, allowing the CLCS to consider all pending submissions, and removing the possibility for other States to block OCS submissions.²³

In theory, a deletion of paragraph 5(a) would remove the third State veto over CLCS' consideration of OCS submissions, and allow coastal States to benefit fully from their rights over their OCS,²⁴ but it comes across as highly unlikely that the CLCS would initiate such amendment in the first place. The delineation of the OCS has become an increasingly politicized process, and former Member of the Commission, Harald Brekke, maintains that it is important that the Commission shows consistency through time based on precedence, and that it is "crucial for the global acceptance of the outer limits of the continental shelf that states feel they are treated equally".²⁵ Oude Elferink admits that States already having objected to the CLCS' consideration of submissions in disputed areas would probably object to any alterations of the RoP unblocking the CLCS consideration of such submissions.²⁶ If the CLCS were to initiate a deletion of paragraph 5(a), it would most likely consult the SPLOS before changing Annex I. In light of the important economic, strategic and political interests concerned, it is not likely that the States Parties would support such amendment. Based on CLCS' history of SPLOS consultations, it is expected that the CLCS would strive to comply with the opinion of the SPLOS.

Instead of risking the good working relationship between the SPLOS, the CLCS and individual States Parties, it might be less controversial if the CLCS takes a step back and takes a closer look at the *scope of disputes* as it is formulated in rule 46, which was the other considerable amendment made by the CLCS when it adopted the RoP. Rather than asserting that the blocking of submissions is too grave a consequence, we should consider if the access for initiating such consequence is too wide. Rule 46 provides the overall condition for the application of Annex I and its paragraph 5(a) in the first place. In order to limit the potential use or misuse of paragraph 5(a) in the future, there is arguably a need for identifying or establishing a uniform interpretation of rule 46, as this is the provision that actually *broadens* the scope of the saving clauses.

²³ *Ibid.*, p. 317.

²⁴ *Ibid.*, p. 312.

²⁵ Brekke, H: "Towards Establishing a Stable Regime for Seabed Jurisdiction: The Role of the Commission", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 269-288, p. 286.

²⁶ Oude Elferink, A.G.: "Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a Problem or Problem without a Solution", in (eds.) Nordquist, M.H.; Moore, J.N., Long, R.: *Legal Order in the World's Oceans, UN Convention on the Law of the Sea*, Brill Nijhoff 2018, pp. 302-325, p. 318.

Although the reference to “other cases of unresolved land or maritime disputes” was invented by the CLCS itself, it never provided the public with any explanation as to which kinds of disputes the phrase “land or maritime disputes” was intended to encompass. It is accordingly interesting to review the coastal States submissions and reactions that other States have submitted to the CLCS, to determine how the phrase “land or maritime disputes” is employed by the CLCS in practice.

2.4 The interpretation and application of Rule 46 in practice

The CLCS has received a total of 80 submissions thus far, and 60 of these have been subject to reactions from other States.²⁷ A majority of the reactions have been submitted to inform the CLCS of relevant disputes and provide consent to the CLCS’ consideration of the submission, so-called *notes verbales* of “non-objection”. In relation to 24 submissions, one or more States have invoked paragraph 5(a) of Annex I to the RoP and blocked the CLCS’ consideration of the submission. 19 submissions are currently blocked due to ongoing disputes, nine of which have been next in line for consideration by the Commission, but have been passed over due to the presence of disputes.²⁸ It is important to have in mind that on many occasions, the submissions may be blocked due to more than one type of dispute, as presented in the following, and they may be blocked by more than one State.

A closer look at the submissions that are currently blocked reveals that in the majority of instances where paragraph 5(a) is invoked, the submission is subject to a delimitation dispute. 54 submissions have received reactions due to unresolved delimitation, and in 17 of these instances, one or more States parties to the delimitation dispute have refused to consent to the CLCS’ consideration of the submission, thereby invoking the consequences in paragraph 5(a). For disputes that do not concern unresolved delimitation, the dispute definition in the saving clauses has to be expanded, as provided by rule 46.

The second largest category of disputes where the consideration of submissions has been blocked, are disputes concerning title to land territory, or so-called sovereignty disputes. If the disputed territory generates maritime zones, including a continental shelf, such disputes

²⁷ These numbers are based on the information publicly available at the CLCS website, available at http://www.un.org/Depts/los/clcs_new/clcs_home.htm, and are up to date as of 1 November 2018.

²⁸ These are the submissions by Myanmar (subm. no. 16); Yemen (subm. no. 18); United Kingdom in respect of the Hatton Rockall area (subm. no. 19); Ireland in respect of the Hatton Rockall area (subm. no. 20); Fiji (subm. no. 24); Malaysia and Vietnam (subm. no. 33); Vietnam (subm. no. 37); Palua (subm. no. 41); and United Kingdom in respect of the Falkland Islands, South Georgia, South Sandwich Islands (subm. no. 45). All submissions are available at the CLCS website, http://www.un.org/depts/los/clcs_new/commission_submissions.htm (date of visit 19.11.2018).

may concern the establishment of OCS limits in accordance with rule 46. Five submissions are currently blocked due to disputed territory. The ongoing territorial disputes relate to the claims of UK and Argentina to the Falkland Islands/Malvinas Islands, South Georgia and the South Sandwich Islands, and a number of disputed islands in the South and East China Sea. In addition, they include a dispute concerning the delimitation of mainland territory between Guyana and Venezuela. Whereas these territorial disputes are clearly land disputes, it can be argued that they may at the same time be within the scope of what was originally intended to be included in the saving clauses. The Virginia Commentary describes article 76(10) as

a saving provision for all questions regarding the delimitation of overlapping claims between States to continental shelf. (...) This provisions emphasizes that article 76 prescribes the method of determining the outer limits of the continental shelf; it does not address in any way the question of delimitation of the continental shelf between opposite of adjacent States (...).²⁹

When a land border dispute is settled, this will directly impact the delimitation of the water column belonging to the disputed territory, and the potential prejudicial effect of any CLCS consideration is the same as in the other cases of unresolved or disputed delimitation.

However, if the sovereignty dispute concerns title to one or more islands, as is the case for the Falklands Islands/Malvinas Islands, South Georgia and the Sandwich Islands, and several disputed islands in the China Sea, a settlement of the dispute will not necessarily result in a delimitation dispute. In such instances, the CLCS could have decided on the extent of the continental shelf generated by the islands, without prejudicing the outcome of the sovereignty dispute, with immediate spin-off effects on maritime delimitation.

A third category of objections has occurred where the coastal State is subject to treaty obligations that are allegedly incompatible with its obligations under the LOSC. The Antarctic Treaty can be used as an example of such treaty obligations. The Antarctic Treaty prohibits the assertion of claims to Antarctica, whilst the LOSC on the other hand obligates its States Parties to submit continental shelf submissions within 10 years. This incompatibility may cause disputes, and has resulted in several objections being submitted to the Commission and some cases of invocation of paragraph 5(a) of Annex I. Four submissions are currently blocked due to incompatible treaty obligations.

Finally, States have blocked the CLCS' consideration of OCS submissions due to disputes concerning the coastal States' interpretation or application of provisions of the

²⁹ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Center for Oceans Law and Policy, University of Virginia, Martinus Nijhoff Publishers, p. 883.

LOSC. Such disputes can occur in relation to a broad spectre of provisions, for example concerning the natural prolongation criteria in article 76, or the geographical area of application of the Statement of Understanding. Three submissions are currently blocked due to the coastal State's interpretation or application of the LOSC.

The final two categories of disputes are not easily defined as “unresolved land or maritime disputes”, as they primarily concern treaty interpretation and the weighing of treaty obligations. Although the outcome of these disputes may have consequences for the entitlement to the continental shelf, and accordingly may ultimately affect the location of the delineation line, these disputes seems to be quite far from the negotiating parties' intent with the saving clauses, as disputes concerning delimitation are clearly not the same as disputes concerning treaty interpretation and application. Likewise, it is difficult to define such disputes as “other cases of unresolved land or maritime disputes”. Conflicting views on how a treaty provision should be interpreted, or the priority between different international treaties, are certainly not “land or maritime disputes” in their ordinary meaning.

When considering OCS submissions, the CLCS never seems to categorize the disputes presented to it as either “land or maritime disputes”.³⁰ In the publicly available *Statements by the Chair*, no statements are provided concerning the classification of disputes as either “land or maritime dispute”. Instead, it seems satisfied with simply observing the existence of an alleged dispute in relation to the submission.³¹ The CLCS does not seem to have a clearly defined definition of a dispute, and a review of CLCS practice demonstrates that the threshold for something to be considered a dispute in the relation to the submission procedure is low.³² In fact, the Chairman of the CLCS has observed that “Annex I (...) dealt with the complex issues of how the Commission should treat possible submissions containing areas under actual or *potential* dispute” (emphasis added).³³ It seems sufficient that either the coastal State itself or another State submits a *note verbale* to the CLCS informing it about the presence of a

³⁰ This conclusion is drawn on the basis of a review of the Statements by the Chair and all recommendations issued by the CLCS, both of which are publicly available at the CLCS website, http://www.un.org/Depts/los/clcs_new/clcs_home.htm (date of visit 19.11.2018). Due to the strict confidentiality clauses included in rule 44, rule 51(3) and Annex II to the RoP, this is the only information made public from the CLCS deliberations. Paragraph 4 of Annex II provides that “[t]he deliberations of the Commission and subcommittees on all submissions made in accordance with article 76, paragraph 8, of the Convention shall take place in private and remain confidential”.

³¹ Busch, S.: *Establishing Continental Shelf Limits Beyond 200 Nautical Miles by the Coastal State: A Right of Involvement for Other States?*, Brill Nijhoff 2016, p. 120.

³² *Ibid*, p. 380.

³³ *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission – Third session*, (15 May 1998) Doc. CLCS/7, para. 5.

dispute, and asks the Commission not to take any action on the submission.³⁴ To date, the Commission has complied with *all* requests to discontinue its work on allegedly disputed submissions.³⁵

It is accordingly unclear how the phrase “land or maritime dispute” is understood. As compared to the saving clauses’ reference to “delimitation disputes” and “unresolved delimitation”, the phrase clearly broadens the number of situations where States may invoke paragraph 5(a) of Annex I to the RoP, blocking the CLCS’ consideration of a submission. On the basis of CLCS practice to date, any dispute which can ultimately have any effect on the maritime areas when it is settled, seems to be considered a dispute within the scope of rule 46 by the CLCS – allowing the blocking of submissions with reference to paragraph 5(a) of Annex I to the RoP.

2.5 Case study: The Oki-no-Tori Shima

The Japanese submission to the Commission is a useful example for illustrating the consequences of the lack of a clear definition of the scope of rule 46, and to demonstrate the potential for new dispute categories being asserted to the CLCS.

Several States submitted their reactions to the Japanese OCS submission to the CLCS, including China that objected to the CLCS’ consideration of the submission. China argued that Oki-no-Tori Shima is a rock “which cannot sustain human habitation or economic life of [its] own” and therefore can not generate a continental shelf.³⁶ It further asserted that, as Oki-no-Tori Shima had no ground to generate a continental shelf, it was not within the mandate of the CLCS to make any recommendations on the portions of the continental shelf in that area. China argued that establishing continental shelf limits based on Oki-no-Tori Shima would seriously encroach upon the Area as the common heritage of mankind.³⁷ On this basis, China requested the CLCS not to take any action on the part of the submission concerning the Oki-no-Tori Shima, thus without providing any reference to paragraph 5(a) of Annex I.

Japan asserted that, since the interpretation of article 121 was outside the mandate of the CLCS and was not referred to in the RoP, the Commission should not take into account

³⁴ Busch, S.: *Establishing Continental Shelf Limits Beyond 200 Nautical Miles by the Coastal State: A Right of Involvement for Other States?*, Brill Nijhoff 2016, p. 71.

³⁵ This conclusion is based on a review of all submissions and thereto attached reactions submitted to the CLCS, available at the CLCS website, http://www.un.org/Depts/los/clcs_new/clcs_home.htm (date of visit 19.11.2018). See also Busch, S.: *Establishing Continental Shelf Limits Beyond 200 Nautical Miles by the Coastal State: A Right of Involvement for Other States?*, Brill Nijhoff 2016.

³⁶ *Note verbale* by China, submitted to the CLCS, dated 6 February 2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf (date of visit 19.11.2018).

³⁷ *Ibid.*

the position expressed in the *note verbale* by China.³⁸ The Commission agreed that it had no role in matters related to the legal interpretation of article 121, and decided that the submission should be considered by a subcommission.³⁹ Accordingly, the CLCS did seemingly *not* consider a dispute concerning article 121 to constitute a dispute within the scope of rule 46, and instructed the subcommission to proceed with the consideration of Japan's full submission. Interestingly, the Commission also decided that it "shall take no action on the part of the recommendations prepared by the Subcommission in relation to the area referred to in the notes verbales (...) until the Commission decides to do so".⁴⁰ The CLCS did not make any reference to the RoP in support of its decision not to take action on the disputed parts of the submission.

The CLCS' consideration of the Japanese submission raises two important questions. First, what was the CLCS' basis for deciding that a dispute concerning the interpretation of article 121 was not at the same time a "land or maritime dispute" within the scope of rule 46? Second, when the CLCS had decided that this was not a dispute within the scope of rule 46, and the exception to its duty to issue recommendations included in Annex I was accordingly not applicable, how could the CLCS at the same time decide not to take any action on the part of the submission that was subject to dispute? Having decided that rule 46 and Annex I are inapplicable, there exists no legal basis for the CLCS to retain its recommendations on the full Japanese submission.⁴¹

The CLCS handling of the Japanese submission demonstrates several weaknesses in the current CLCS practice. First and foremost, the fact that the CLCS never publicly provides the reasoning behind its decisions is jeopardizing their legitimacy, and reduces predictability for both coastal States and other States. Macnab observes that it is the role of the CLCS to

legitimize continental shelf submissions from individual coastal states while ensuring that the proposed outer limits do not encroach unduly upon the international seabed that comprises the "common heritage of mankind". It must strive for consistency and predictability in its decisions (...).⁴²

Cavnar observes that

³⁸ Rebuttal by Japan, submitted to the CLCS, dated 25 March 2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_25mar09.pdf (date of visit 19.11.2018).

³⁹ *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission – Twenty-third session*, doc. CLCS/62, paras 23-26. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/307/58/PDF/N0930758.pdf?OpenElement>, date of visit 19.11.2018).

⁴⁰ *Ibid.*, para. 26.

⁴¹ LOSC art. 76(8).

⁴² Macnab, R.: "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76" in *Ocean Development & International Law*, 35:1, 2004, p. 1-17, at pp. 11.

[i]f the Commission does not have to explain or justify its actions to states (...) there is no way to make sure that it is adhering to its mandate (...). (...) [A]n unaccountable CLCS could undermine the entire article 76 process.⁴³

Without access to the reasoning forming basis for a decision such as the CLCS decision in relation to the Japanese submission, one may question if the CLCS' interpretation and application of rule 46 is correct.

Secondly, the CLCS' decision not to take action on parts of the submission, in spite of the subcommission having prepared full recommendations, and regardless of its own decision that the alleged dispute was not a rule 46-dispute, is highly questionable. Due to the mandatory language of article 76(8) of the LOSC, the CLCS has an obligation to issue recommendations when it has decided that rule 46 is not applicable.⁴⁴ If the CLCS starts to allow disputes other than those defined in rule 46 as a basis for invoking paragraph 5(a) of Annex I, this may result in severe consequences for coastal States, far beyond those intended by the saving clauses of the LOSC. It is submitted that the CLCS either should have issued full recommendations in accordance with article 76, or it should have defined the dispute as a rule 46 dispute. There is no in-between, and irrespective of any reasoning it may or may not provide, it is hard to find a valid legal basis for the CLCS' decision. Brekke acknowledges that the approach in relation to the Japanese submission undermines the validity of the saving clauses and rule 46.⁴⁵ He underlines that it is "crucial that the Commission sets a precedence through its recommendations that is generally accepted, and that the practice of the Commission is seen as consistent with that precedence (both scientific and procedural)".⁴⁶ The practice of the CLCS in relation to Japan's submission is certainly not a practice that the CLCS can and should maintain.

The Chinese objection to the CLCS' consideration of the Japanese submission is also interesting from another perspective, as it demonstrates that the State objecting to an OCS submission does not necessarily have to be party to a dispute with the submitting coastal State. As basis for its objection, China takes it upon itself to defend the interests of the international community, arguing that the Japanese submission would seriously encroach

⁴³ Cavnar, A.: "Accountability and the Commission on the Limits of the Continental Shelf: Deciding who owns the ocean floor", *ILJ Emerging Scholars Paper* 15 (2009), pp.1-44, at p. 25.

⁴⁴ Serdy, A.: "The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate", *International Journal of Marine and Coastal Law*, 2011 (26), pp. 355-383, at p. 366.

⁴⁵ Brekke, H.: "Towards Establishing a Stable Regime for Seabed Jurisdiction: The Role of the Commission", in (eds.) Nordquist, M.H., Moore, J.N., Long, R.: *Legal order in the World's Oceans: UN Convention on the Law of the Sea*, Brill Nijhoff, 2018, p. 285.

⁴⁶ *Ibid.*, p. 287.

upon the Area as the common heritage of mankind. The CLCS does not respond to this argument, but it is clear that a similar argument may be employed in relation to almost every OCS submission. If a State is allowed to block another State's submission on the sole basis that the OCS may potentially encroach upon the Area, this would certainly undermine the core function of the CLCS. The Area is negatively defined by the delineation line and it is necessary to identify the location of such line in order to decide where the Area starts. If a portion of the seabed is defined as part of the continental shelf subject to national jurisdiction, it is not part of the Area.

The diversity of the third States' reactions received by the CLCS so far, combined with the vague wording of rule 46, indicates that there is a large potential for new types of disputes being submitted under rule 46. In an era of unavoidable sea level rise, and changing maritime limits, the disputes will not necessarily concern delimitation, disputed territory or the interpretation of the natural prolongation requirement, but may involve other areas of the law of the sea, such as the law on baselines or the legal regime for islands. With increased attention on areas beyond national jurisdiction, we can potentially also experience an increased interest in OCS submissions by States that are not necessarily parties to a dispute with the coastal State, but fear that the submissions represent a potential encroachment of its interests in the Area, similar to what was argued by China in relation to the Japanese submission.

3 Conclusive remarks

Although the Commission has no function in settling disputes, it certainly has an important role in relation to disputes. When States make a continental shelf submission to the Commission, it has to decide whether a dispute exists in relation to the submission, before it can continue its consideration of the submission. But to what extent does the CLCS look into the dispute in order to decide the nature of the dispute? According to current CLCS practice, it seems sufficient that a State asserts that there is a dispute which it considers relevant for the location of the OCS limit of the submitting coastal State. The CLCS will not consider the submission, seemingly regardless of whether or not the dispute can be defined as within the scope of rule 46 or not. Recent CLCS practice contributes to blur the scope of rule 46, and the procedure for establishing permanent continental shelf limits contributing to stabilizing the world's oceans has arguably moved in the opposite direction of what is desired. Instead of

pursuing a coherent and predictable practice, the CLCS may unintentionally have expanded third States' access to interfere in the coastal States' process of establishing OCS limits.

Brekke observes that “the number of cases where submissions become blocked by other states becomes less”, and describes this as a sign of the CLCS' success.⁴⁷ However, if States start to operate more freely within the broad definition of dispute in rule 46, the current CLCS practice may contribute to undermine the legitimacy of CLCS' considerations and decisions, and may affect how coastal States cooperate and interact with the CLCS. The CLCS risks an increase in the number of disputes being argued with reference to rule 46, allowing States to block the CLCS' consideration of OCS submissions by other States.

For the future, there is an urgent need to clarify what competence the Commission has to decide *if* a situation in fact constitutes a dispute, and define *which* disputes are within the scope of rule 46, and which are not. In addition, the Commission must ensure a uniform procedure and practice for how it deals with disputes if they are considered to be *outside* the scope of rule 46.

⁴⁷ Brekke, H.: “Towards Establishing a Stable Regime for Seabed Jurisdiction: The Role of the Commission”, in (eds.) Nordquist, M.H., Moore, J.N., Long, R.: *Legal order in the World's Oceans: UN Convention on the Law of the Sea*, Brill Nijhoff, 2018, p. 287.