

IS THERE A 400-MILE RULE IN UNCLOS ARTICLE 76(8)?

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Abstract: The omission from Australia's 2004 submission to the Commission on the Limits of the Continental Shelf of two areas of prolongation of the Australian landmass beyond 200 nautical miles from the territorial sea baseline appears to rest on a view that it is unnecessary to include in a submission any area within 200 miles of another State's territory. Examination of the text of the UN Convention on the Law of the Sea suggests that this is probably erroneous. Although the practical consequences for Australia of having acted on this view are unlikely to be significantly detrimental, this is not necessarily true of the parallel situation between China and Japan in the Okinawa Trough.

1. Introduction

One of the less predictable consequences of the series of difficult negotiations between Australia and the United Nations Transitional Administration in East Timor and the new State known as the Democratic Republic of Timor-Leste (hereinafter Timor-Leste) in relation to the ocean areas between them¹ has been to highlight an ambiguity in Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS).² This concerns the rare but significant situation when two States are separated by less than 400 miles of water and the configuration of the seabed is such that one of those States does, but the other does not, have an entitlement under the rules of paragraphs 4 to 7 of Article 76 to a continental shelf extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. There seem to be only two known such instances anywhere in the world. One is in the East China Sea, where the natural prolongation of the Asian mainland (Chinese territory) extends well beyond 200 miles to the Okinawa Trough, but a distance of less than 400 miles separates China from Japan's Ryukyu Islands.³ The other, considered in this contribution, is the Timor Trough, a substantial seabed feature over 3000 metres deep in places running roughly parallel to the coast of the island of Timor shared by Indonesia and Timor-Leste, and much closer to

¹ The negotiations referred to are those culminating in the conclusion of the Timor Sea Treaty (done at Dili, 20 May 2002; [2003] Australian Treaty Series (hereinafter ATS) 13) together with the Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for the Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor (Dili, 20 May 2002; [2002] ATS 11), the Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (done at Dili, 6 March 2003; [2007] ATS 11) and most recently the Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (done at Sydney, 12 January 2006; [2007] ATS 12).

² United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, *United Nations Treaty Series* (hereinafter UNTS) vol 1833, p.3.

³ V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World*, 2nd edn (Leiden and Boston: Martinus Nijhoff, 2005), at 185 and 211.

that island than to the Australian continent – see Map 1.⁴ In 1972 Australia and Indonesia concluded a seabed boundary⁵ that runs roughly along the 200-metre isobath on the southern lip of the Timor Trough.⁶ This reflected the basis of entitlement to a continental shelf at the time: out to the 200-metre isobath and beyond to where the depth of the superjacent waters admits of the exploitation of the natural resources – a formula taken from Article 1 of the 1958 Convention on the Continental Shelf⁷ but accepted in 1969 by the International Court of Justice⁸ as reflecting or crystallising the position at customary international law. Since then, the customary basis of entitlement has changed to that in UNCLOS Article 76, paragraph 1, and all coastal States now have, subject to delimitation with opposite and adjacent States, a minimum entitlement of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Thus, in the Timor Trough, Timor-Leste’s entitlement is the standard 200 nautical miles, while Australia’s extends beyond 200 miles to the *thalweg* of the Timor Trough.⁹

2. Australia’s Article 76(8) Submission and Timor-Leste’s Reaction

Paragraph 8 of Article 76 of UNCLOS provides that:

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf...

On 15 November 2004 Australia made its submission to the Commission on the Limits of the Continental Shelf (CLCS) created by Annex II to UNCLOS, covering ten regions in which Australia submitted an outer limit for its continental shelf beyond 200 miles from the baseline.¹⁰ Shortly thereafter Timor-Leste, taking advantage of the opportunity afforded to

⁴ *Ibid.*, at 185 and 210-211.

⁵ Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, done at Jakarta, 9 October 1972; 974 UNTS 319, [1973] ATS 32.

⁶ S. Kaye, *Australia’s Maritime Boundaries*, 2nd edn (Wollongong: Centre for Maritime Policy, University of Wollongong, 2001), at 48-49.

⁷ Convention on the Continental Shelf, done at Geneva, 29 April 1958, 499 UNTS 311.

⁸ In the *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p.3 at 39.

⁹ Strict application of paragraph 4 of Article 76 would suggest that Australia’s entitlement, subject to delimitation with Timor-Leste, runs all the way to the outer limit of the latter’s territorial sea (taking the *thalweg* as the foot of slope, beyond which the Australian continental shelf could extend up to a further 60 miles). As far as the author is aware, however, Australia has never pressed this point, content to rely on its historical exercise of jurisdiction as far as the *thalweg*, the seaward limit of the oil exploration licences it granted: Kaye, *supra* n 6, at 48. The northern boundary of the Zone of Cooperation established by the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (done over the Zone of Cooperation, 11 December 1989; [1991] ATS 9) was chosen as an approximation of the bathymetric axis of the Timor Trough: *ibid.*, at 71.

¹⁰ The 10 regions are listed in the Executive Summary of the Australian submission (hereinafter Australian submission), which may be viewed at

<http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_web_delivery.pdf>

(last accessed, along with all other websites cited herein, on 1 June 2008) and is described in A. Serdy, “Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline – Australia’s Submission to the Commission on the Limits of the Continental Shelf”, (2005) 36 *Ocean Development and International Law* 201. The CLCS adopted its recommendations in response on 9 April 2008: UN doc CLCS/58

other States to raise points for the CLCS to consider in its deliberations on a submission,¹¹ lodged a diplomatic Note covering a three-page “position paper” making certain observations on the Australian submission. One of these noted that both the Australian submission “and any recommendations issued by the CLCS in response to the said submission, are... without prejudice to the question of delimitation of any maritime boundaries between Timor-Leste and Australia.”¹² At the time, Australia and Timor-Leste were in negotiations that had begun earlier in 2004 on a permanent delimitation of their respective maritime zones in the Timor Sea. For reasons falling outside the scope of the present contribution, the result of those negotiations was not a treaty of the kind originally envisaged, but instead the third in a series of interim instruments pending a final delimitation between the two States, whose effect is to postpone, probably for 50 years, the negotiation of a permanent boundary.¹³ Although much of the position paper appears to rest on a fundamental misunderstanding as to the very ability of the Australian submission to prejudice Timor-Leste’s position,¹⁴ the last point it makes does warrant closer scrutiny and indeed quotation in full:

(25 April 2008), *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, at 3-4 (paragraph 11). These are not described in the document, but the reaction of the Australian Minister for Resources and Energy in his subsequent press release of 21 April 2008 suggests that the outer limits submitted by Australia were approved without significant or any alteration: The Hon Martin Ferguson AM MP, “UN confirms Australia’s rights over extra 2.5 million square kilometres of seabed”,

<<http://minister.ret.gov.au/TheHonMartinFergusonMP/Pages/UNCONFIRMSAUSTRALIA%E2%80%99SRIGHTSOVEREXTRA.aspx>>. For an overview of the functioning of the CLCS see T.L. McDorman, “The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World” (2003) 17 *International Journal of Marine and Coastal Law* 301.

¹¹ UN doc CLCS/40 (2 July 2004), Rules of Procedure of the Commission on the Limits of the Continental Shelf, Annex III (Modus operandi for the consideration of a submission to the Commission on the Limits of the Continental Shelf), section II, subparagraph 2(a)(v) invites the submitting State to include in its initial presentation to the CLCS “[c]omments on any note verbale from other States regarding the data reflected in the executive summary including all charts and coordinates as made public by the Secretary-General in accordance with rule 50.” A number of amendments to the Rules have since been consolidated and the whole republished as UN doc CLCS/40/Rev.1 (17 April 2008), but this does not affect any of the provisions cited herein. In all eight States lodged Notes with the Secretary-General on Australia’s submission: see

<www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm>.

¹² Note NV/UN/71/2005 (11 February 2005) from the Permanent Mission of the Democratic Republic of Timor-Leste to the United Nations to the Secretary-General of the United Nations, available on the CLCS website at <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_tls.pdf>.

¹³ See Article 4(7) read with Article 12 of the Treaty on Certain Maritime Arrangements in the Timor Sea, *supra* n 1. It was preceded by the next two treaties cited in the same footnote. Article 83(3) of UNCLOS specifically provides for such interim arrangements.

¹⁴ Timor-Leste’s main concern – see paragraphs 3 to 10 of the position paper attached to Note NV/UN/71/2005, *supra* n 12 – is the way the Timor Sea is depicted on the Executive Summary’s overall map of Australian maritime boundaries. Yet, since the Timor Sea is not among the ten regions within the Australian submission, no recommendation from the CLCS will have been made in relation to this area – see also *infra*, text at nn 21 and 22. Although it is true that neither Australia’s 1972 maritime boundary treaty with Indonesia nor the subsequent one in 1997 (Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, done at Perth, 14 March 1997 ([1997] Australian Treaties Not In Force 4)) can avoid affecting the shelved Australia/Timor-Leste maritime boundary negotiations, Australia’s description of them to which Timor-Leste objects in paragraph 6 of its position paper applies only to the Argo region, well to the west of the Timor Sea (see Map 2). Hence even if, contrary to Timor-Leste’s wish, the CLCS were to have placed “unqualified reliance” on those references, it is submitted that the prejudicial consequences Timor-Leste fears (paragraphs 9 and 10) could not possibly follow. That said, it will not have been difficult for the CLCS, now that it has come to frame its recommendations for the Argo region, to do so in language avoiding any implications for any area outside that region. This is in line with the Second Report of the International Law Association Committee on Legal Issues of the Outer Continental

11. A third point to be raised concerns Australia's continental shelf entitlement in the Timor Sea region. The seabed boundary claim advanced by Australia in this region is based on a natural prolongation argument, an argument underlying which is a claim to a continental shelf entitlement beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In other words, the boundary-line claimed by Australia vis-à-vis Timor-Leste lies to a large extent in an area that is beyond the 200-mile limit computed from the Australian baseline.

12. **In the Australian submission, it is not clear why Australian [sic] has chosen not to refer to its claimed entitlement beyond 200 nautical miles in the Timor Sea.** It is equally unclear why Australia has not referred to the dispute that involves delimitation of its maritime boundary with Timor-Leste, in relation to which the Australian claim relies on an argument of natural prolongation beyond 200 nautical miles. Irrespective of the explanation, it is Timor-Leste's view that the CLCS should make clear in its recommendations that there is no question of endorsement of the Australian continental shelf entitlement beyond 200 nautical miles in the Timor Sea region.¹⁵

Since paragraph 11 is factually correct, the bolded first sentence in paragraph 12 raises a genuine issue deserving to be explored, even if Timor-Leste itself may have no discernible motive for broaching it other than mischief-making.¹⁶ This affects an area in the Timor Sea encompassing a small part of the Joint Petroleum Development Area (JPDA) created by the

Shelf <www.ila-hq.org/pdf/Outer%20Con%20Shelf/Report%202006.pdf> (hereinafter ILA Second Report), at 19, where the Explanatory Note to Conclusion No 14 observes that the result of Article 76(10) is that

the provisions in articles 76(8) and 76(9) concerning the final and binding and permanent nature of the outer limits of the continental shelf cannot be invoked against another State where the delimitation of the continental shelf is concerned. In the light of this provision, other States should in principle accept the consideration of a submission by a coastal State that raises issues of delimitation of the continental shelf, as its consideration and subsequent recommendations will not prejudice their rights.

See also A.G. Oude Elferink and C. Johnson, "Outer Limits of the Continental Shelf and "Disputed Areas": State Practice concerning Article 76(10) of the LOS Convention" (2006) 21 *International Journal of Marine and Coastal Law* 461, which includes a useful survey of the first six submissions to the CLCS, and the reactions to them of other States.

¹⁵ Timor-Leste Position Paper attached to Note NV/UN/71/2005, *supra* n 12, paragraphs 11 and 12 (emphasis added).

¹⁶ It can hardly be supposed that Timor-Leste would have reacted with equanimity to an Australian submission that included the Timor Sea as an eleventh region, despite Australia's assurance in its Executive Summary that its "entire submission is made without prejudice to outstanding delimitations, consistent with article 76, paragraph 10 and Annex II, article 9 of UNCLOS", to the extent of not invoking the provision in paragraph 5 of Annex I to its Rules of Procedure, *supra* n 11. This states that the CLCS must refrain from examining submissions in such situations, or examine them only with the consent of the other State(s) concerned – a self-denying ordinance (in the apt words of C.R. Symmons, "The Irish Partial Submission to the Commission on the Limits of the Continental Shelf in 2005: A Precedent for Future Such Submissions in the Light of the "Disputed Areas" Procedures of the Commission?", (2006) 37 *Ocean Development and International Law* 299 at 308) that, as noted by Oude Elferink and Johnson, *supra* n 14 at 466, is not found in UNCLOS itself. Since establishing the extent of the entitlement of opposite States to a continental shelf, where the CLCS has a role, is anterior to its delimitation between them, where it has none, it does not necessarily follow that for the CLCS to allow outstanding delimitations to act as an automatic brake on its activity in such situations would be any less generative of discord among the States involved than pressing ahead regardless. Resolving this conundrum, however, is a matter for another occasion.

Timor Sea Treaty and a larger area to the north of it landward (from Australia's perspective) of the *thalweg* of the Timor Trough. Before doing so, however, it will be convenient to deal with the remaining points in paragraph 12.

The second sentence is no less disingenuous than the first. Even allowing for the distinct possibility that the existence of the dispute is the very reason for the non-inclusion of the Timor Sea region in Australia's submission, the requirement to indicate outstanding maritime delimitations, complied with by Australia in respect of all three of the regions affected,¹⁷ arises only to the extent that such areas are covered by a submission. It would be odd if Timor-Leste were suggesting that Article 76, paragraph 8 places coastal States under a positive duty to submit to the CLCS information on every possible area of continental margin beyond 200 nautical miles from their baselines, whether or not they wanted to exercise continental shelf sovereign rights there. True it is that the wording of paragraph 8 suggests that the making of a submission to the CLCS by a State whose continental margin as defined in Article 76 extends beyond 200 nautical miles from its baselines is mandatory. But the weight of States' opinion in recent years seems to have swung behind the conclusion that it is optional, the underlying assumption being that it is in the coastal State's interests to have a universally recognised boundary between its continental shelf and the area beyond national jurisdiction, hence no compulsion is necessary.¹⁸ On this analysis, while a coastal State that fails to make a submission to the CLCS cannot entirely avoid the legal consequences of its choice, its fundamental entitlement to a shelf granted by Article 77 of UNCLOS is not lost.¹⁹ Australia's sovereign rights over that part of the continental shelf beyond 200 nautical miles from its baselines which was not included in the submission would therefore still be opposable to other States – only the extent of the shelf, through its uncertain outer limit, would not be “final and binding” and thus still open to doubt and possible legal challenge. If so, then *a*

¹⁷ CLCS Rules of Procedure, *supra* n 11, Annex I (Submission in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes), paragraph 2 requires the CLCS to be “(a) Informed of such disputes by the coastal States making the submission; and (b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.” See also the Australian Executive Summary, *supra* n 10, at 6 (outstanding delimitations in general), 11 (boundaries with Norway, France and New Zealand in the Australian Antarctic Territory region), 17-18 (boundary with France in the Kerguelen Plateau region) and 35 (boundary with France in the Three Kings Ridge region).

¹⁸ See in this regard the uncontradicted assertion by “[s]ome delegations” at the 2001 meeting of States Parties to UNCLOS “that there was no legal consequence stipulated by the Convention if a State did not make a submission to the Commission.” (Except, surely, the consequence in Article 76(8) itself that the condition precedent to the outer limit of the continental shelf becoming “final and binding” cannot then be met.) Several other (or possibly the same) delegations “underscored the principle that the rights of the coastal State over its continental shelf were inherent...”: UN doc SPLOS/73 (14 June 2001), *Report of the eleventh Meeting of States Parties*, at 12 (paragraph 75), available at [http://daccessdds.un.org/doc/UNDOC/GEN/N01/411/52/PDF/N0141152.pdf](http://daccessdds.un.org/doc/UNDOC/GEN/N01/411/52/PDF/N0141152.pdf?OpenDocument).

¹⁹ See e.g. Conclusions Nos 1 and 15 in ILA Second Report, *supra* n 14, at 2 and 19-20 respectively; see also the identical references to Article 77 in the Notes accompanying the Australian and New Zealand submissions to the CLCS regarding the continental shelf off their respective sectoral claims in Antarctica www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf and www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_doc_es_attachment.pdf. In the Australian submission the reference supports the inclusion of this area with a request to the CLCS “not to take any action for the time being with regard to the information in this Submission that relates to continental shelf appurtenant to Antarctica”; in that of New Zealand it supports the exclusion of the equivalent area, the submission being described as “partial...in accordance with the Commission's rules, not including areas of continental shelf appurtenant to Antarctica, for which a submission may be made later...”.

fortiori it is equally open to a coastal State to make a submission covering only part of its continental shelf beyond 200 miles, and the Rules of Procedure of the CLCS specifically envisage this in some circumstances.²⁰ The better view is hence that Article 76 leaves it entirely within the submitting State's prerogative to determine which areas to include in its submission, and which to exclude from it. Exclusion of an area means that the submitting State will lose in respect of that area the benefit of paragraph 8 rendering the outer limit "final and binding" if it is made on the basis of the CLCS's recommendation, as well as other possible consequences considered below, but the choice is the submitting State's alone to make.

Similarly the third sentence is otiose, and there is no reason for the CLCS to have made a declaration in the terms asked of it by Timor-Leste, since under Annex II to UNCLOS that body's functions are circumscribed by the submissions actually made to it. As the CLCS cannot make any recommendation on an area enclosed by a notional outer limit that for any reason has not been submitted to it,²¹ it would have been equally inappropriate for it, in its recent recommendations to Australia,²² to make a specific point of withholding endorsement of a proposition relating to such an area that the submitting State did not ask it either expressly or by implication to endorse.

It should be noted at this juncture that the Timor Sea is not the only area to which Timor-Leste's comments are pertinent. On this view, the Argo region itself has been truncated, as immediately to the north of it (as depicted in the Australian Executive Summary) there is a second area beyond 200 nautical miles from Australia's territorial sea baseline on Scott Reef which by virtue of the 1997 treaty with Indonesia²³ forms part of Australia's continental shelf.²⁴ This is shown in Map 2.

The remainder of this article focuses on the possible reasons for the exclusion from Australia's submission of these two areas beyond 200 nautical miles from its baseline, and the consequences that flow from these. Since Australia omitted the Timor Sea region from its submission and included only the southern portion of the Argo region, it is evidently proceeding on the assumption that it can obtain the benefits of sovereign rights and jurisdiction over the continental shelf beyond 200 miles from its baselines without a recommendation to this effect from the CLCS, provided that the areas in question are within 200 miles of the baseline of some other State.

²⁰ Annex I, paragraph 3 states that "A submission may be made by a coastal State for a portion of its continental shelf in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention."

²¹ Except, presumably, if the view expressed in the previous paragraph is wrong, a recommendation for the coastal State to supplement its submission with information on the outer limit in the missing region(s).

²² *Supra* n 10.

²³ *Supra* n 14.

²⁴ Scott Reef's eligibility to generate an exclusive economic zone and continental shelf, notwithstanding the inability to do so under Article 121(3) of UNCLOS of "[r]ocks which cannot sustain human habitation or economic life of their own", is supported in V. Prescott, "The Problems of Completing Maritime Boundary Delimitation between Australia and Indonesia", (1995) 10 IJMCL 389 at 394. Indonesia's acceptance of this, at least in relation to Sandy Island, forming part of Scott Reef, is noted in the National Interest Analysis tabled in the Australian Federal Parliament along with the 1997 treaty: see <www.austlii.edu.au/au/other/dfat/nia/1997/18.html> under the subheading "Water Column Delimitation".

3. The meaning of “the baselines”

The central ambiguity here is: whose baselines are referred to by the words “the baselines” in paragraph 8 of Article 76? This gives rise to two questions: (i) has Australia complied with this provision by excluding from its submission areas within 200 miles of another State’s baseline? (ii) even if so, has Australia by that exclusion damaged its own interests in its outstanding maritime boundary delimitations with Indonesia and Timor-Leste?²⁵

The Australian assumption rests on the basis that the underlying intent of Article 76 is to ensure that the seabed beyond national jurisdiction, recognised as the “common heritage of mankind” by Article 136, with its mineral resources placed under the administration of the International Seabed Authority (ISA), is not unduly diminished by exorbitant unilateral delineations by coastal States of the outer limits of their continental shelves. Given that under paragraph 1 each coastal State is entitled to a continental shelf of a minimum of 200 miles’ breadth, it follows that no such diminution is possible in respect of areas where opposing coastal States’ baselines are less than 400 miles apart, since the entire seabed of such areas must fall within the continental shelf of one or other of the opposite States. Hence, it is reasoned, it is not necessary for a coastal State to include these areas in its submission to the CLCS. This would require reading “the baselines” in Article 76(8) as meaning the baselines of any State, not necessarily those of the submitting State. There is, however, an opposing view which posits that the term “the baselines” that occurs several times in Article 76 and elsewhere in UNCLOS must be consistently read as “its baselines”.

The difficulty with the Australian assumption is that, if the 400-mile rule was in fact the intent of the drafters of UNCLOS, they singularly failed to leave any trace of it either in the text of Article 76 or in its *travaux préparatoires* digested in Volume II of the well known Virginia Commentary.²⁶ Indeed the Virginia Commentary if anything supports the opposing view by omitting reference to baselines altogether in relation to paragraphs 4, 7 and 8:

[Paragraph 4] Wherever a coastal State intends to establish the outer limit of its continental margin beyond 200 nautical miles...²⁷

Paragraph 7 requires the coastal State to delineate the outer limit of its continental shelf wherever the shelf extends beyond 200 nautical miles...²⁸

²⁵ Question (ii) assumes that there is no obligation to exclude such areas; if this is incorrect, then Australia has obviously complied with it and the issue of damage to its interests does not arise.

²⁶ S.N. Nandan and S. Rosenne (Volume Editors), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol II (Dordrecht/Boston/London: Martinus Nijhoff, 1993) (hereinafter Virginia Commentary), 837-890. Specifically in relation to the 1997 treaty, according to V. Prescott, “Resources of the Continental Margin and International Law” in P.J. Cook and C.M. Carleton (eds), *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford: Oxford University Press, 2000) 64 at 73, “It is believed that both governments considered that this arrangement needed no approval by the Commission.” More boldly, but without any supporting argument, C.M. Carleton, “Delimitation Issues”, *ibid.*, 312 at 317-318 asserts that “there is no requirement for this boundary to be referred to the Commission...both States concerned correctly concluded they did not need the approval of the Commission.”

²⁷ Virginia Commentary, *supra* n 26, at 876.

²⁸ *Ibid.*, at 881.

Paragraph 8 requires the coastal State to submit to the Commission information on the limits of its continental shelf beyond 200 nautical miles...²⁹

Indeed Annex II, paragraph 4 takes the same approach:

Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission...

The foregoing all points to the ordinary meaning of the term “the baselines” in Article 76 being “its baselines”. Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties³⁰ requires the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose. The context of paragraph 7 must include the remainder of Article 76, as well as other UNCLOS provisions concerned with the outer limits of various maritime zones. The same phrase occurs in paragraph 1, where it can mean only “its baselines”:

The continental shelf of a coastal State [extends] throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

This is also true of Article 33, paragraph 2 on the contiguous zone:

The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

and of Article 57 on the exclusive economic zone (EEZ):

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

In addition, the usual - though not invariable³¹ - way in which UNCLOS refers to the various maritime zones of a coastal State is to preface them with the definite article, even where “its” would be more idiomatic, e.g. Article 77, paragraph 1:

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

²⁹ *Ibid.*, at 882.

³⁰ Done at Vienna, 23 May 1969, 1155 UNTS 331.

³¹ For example, Article 76(1) begins: “The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond *its* territorial sea...” (italics added).

The comparable provision in relation to the territorial sea is split over two articles which, read together, are consistent with the preceding analysis:

Article 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Thus the view preferred here has the advantage over the implicit Australian interpretation of giving a consistent meaning to the term, whereas the latter would require “the baselines” to mean one thing in one place and another thing elsewhere. Alternatively, if recourse to the *travaux* is had under Article 32 of the Vienna Convention because the Article 31 approach leaves the meaning ambiguous or obscure, it would have been no less reasonable an intent of the drafters - and no less consistent with the available evidence in this regard - to require a coastal State to justify on geomorphological or geological grounds any extension of its continental shelf beyond 200 miles from its own baselines, irrespective of whether any other nearby State could have exercised sovereign rights over the area on the distance criterion.

Other language versions of the text lead to the same conclusion. Both the French³² and Spanish³³ versions of Article 76, paragraph 8 exactly mirror the English in terms of the issue under discussion, while the only difference between the Russian and these three is a purely linguistic one, namely that there is no definite article in Russian, but the distinction is still present, since, where the other European languages have the possessive adjective in paragraph 1 of the same Article, so does the Russian.³⁴

4. Consequences of error

This is not to say that the consequences of Australia taking a wrong view of Article 76, paragraph 8, if that indeed is what it is, are particularly severe. Certainly Australia is not in breach of this provision if one accepts the view that no State is under an obligation to include any particular area in its submission. There is still, though, the question of the wisdom of the

³² *Viz.*, “L’Etat côtier communique des informations sur les limites de son plateau continental, lorsque celui-ci s’étend au-delà de 200 milles marins *des* lignes de base à partir desquelles est mesurée la largeur de la mer territoriale, à la Commission des limites du plateau continental...” (italics added).

³³ *Viz.*, “El Estado ribereño presentará información sobre los límites de la plataforma continental más allá de las 200 millas marinas contadas desde *las* líneas de base a partir de las cuales se mide la anchura del mar territorial a la Comisión de Límites de la Plataforma Continental...” (italics added; note that the first mention of the continental shelf is preceded by the definite article here too, unlike the French and English).

³⁴ That is, “*sa* mer territoriale” in the French, “*su* mer territorial” in the Spanish and “*его* территориального моря” in the Russian (italics added). With the single exception mentioned at the end of the previous footnote, there is complete concordance among the four languages in all the other provisions of the Convention quoted in the main text between nn 29 and 32. The author regrettably is not in a position to comment on the Arabic and Chinese authentic texts.

resulting omissions. A risk management analysis may be of assistance in this regard, focusing on the consequences of Australia acting on either view if it is subsequently shown to be wrong. In terms of legal risk, if Australia had taken the opposite view from the one it did, then by acting on it Australia would merely have submitted to the CLCS a little more data and argumentation than was needed, and no conceivable harm could come from this. But if there is no 400-mile rule, yet Australia acted (as it has) as though there were, there could be quite serious consequences for Australia's outstanding maritime delimitations.

a. Truncation of the Argo region

For the northern Argo region, the risk is that, although Australia and Indonesia have both been acting as though the 1997 treaty were in force, over a decade after its signature both States are still to ratify it. Should the bilateral relationship deteriorate, as it has on occasion in the past, Indonesia could yet reopen the seabed boundary in this region, on the basis that it conceded to Australia the area in question within 200 nautical miles of its archipelagic baselines on the assumption that Australia could and subsequently would demonstrate through the CLCS the technical soundness of its entitlement to it as the natural prolongation of the Australian continent. Australia having failed to do so, Indonesia could argue that any such entitlement is lost, and that it will not ratify the 1997 treaty without a change in the boundary to run south of that area of seabed. It may be conceded, however, that there is no evidence of Indonesia having raised this argument,³⁵ and if it ratifies the 1997 treaty, there will no longer be any such risk. It should also be noted that Australia's position is secure against any third State, which cannot argue that the part of Australia's continental shelf within 200 nautical miles of Indonesia's baselines falls, if Indonesia does not want it, within the international seabed area under ISA jurisdiction, on the basis that the boundary with Indonesia runs in the wrong place.³⁶

b. Omission of the Timor Sea region

The more interesting consequences are for Australia's negotiating position for a permanent seabed boundary with Timor-Leste when the 50-year period in the 2006 treaty recently brought into force³⁷ expires. Here the cogency of Australia's position hitherto could be severely undermined. This is because the implied 400-mile rule carries a further necessary implication: that a submission to the CLCS was not required in this region precisely because that part of the seabed could have been Timor-Leste's, in other words that Australia's entitlement is not original, flowing from its own natural prolongation, but derivative from Timor-Leste's entitlement on the 200-mile distance criterion, and is thus subordinate to the latter. This is tantamount to abandonment of Australia's longstanding claim to seabed rights over the full extent of the natural prolongation of the Australian continent ending at the

³⁵ Prescott does not indicate the reason for his belief, *supra* n 26, but if it is informal conversations he may have had with negotiators of the 1997 treaty on one or both sides, that would reinforce the conclusion that the risk Australia is running is fairly slight.

³⁶ This is only superficially an exception to the principle that treaties do not bind non-parties to them (Vienna Convention on the Law of Treaties, *supra* n 30, Article 34), since while overlapping continental shelf entitlements remain undelimited, the position is that the area must be the continental shelf of one or other of the coastal States, and the delimitation treaty does not alter this.

³⁷ *Supra*, text at n 13.

thalweg of the Timor Trough, and would mean that any Australian argument for a continental shelf boundary running more than 200 miles from the nearest point of the Australian baseline would cease to be credible. In effect, Australia would have made a major concession to Timor-Leste even before the bargaining had begun.

Seen in this light, what might Australia's motivation have been for omitting this area from the submission? Two possible reasons suggest themselves. The first and more likely is that a practical case may be made for it should there be a subconscious view in Australian Government circles that the chances of securing any significant part of the area by negotiation of a permanent seabed boundary are negligible. Depending on where the future permanent boundary runs, there might even be no loss at all. This would be so if, for example, one view of the precedent in the 1997 treaty with Indonesia is followed, where part of the seabed boundary is a simplified line of equidistance between the line 200 miles from Indonesia's archipelagic baselines and the full extent of Australia's continental shelf entitlement under the formulae of UNCLOS Article 76. In that case, all the area more than 200 miles from Australia's baselines would go to Timor-Leste (see the line on Map 2 labelled "Approximate median line between outer limits of overlapping continental shelf entitlements"). Under the alternative characterisation of the 1997 precedent,³⁸ the best it could reasonably hope for, only the very small thickly shaded part of the area south of the line on Map 2 labelled "Approximate median line between outer limit of Australia's continental shelf entitlement and PFSEL" is beyond 200 miles from Australia's baselines. In order to gain a more substantial area beyond 200 miles from those baselines, Australia would need to persuade Timor-Leste that the gap in the 1972 seabed boundary with Indonesia³⁹ should simply be closed by a straight line (see the accordingly described line on Map 2), which is probably unrealistic.

The second reason is that in any event Article 82 of UNCLOS would render that outcome economically irrational because it makes the area worth more to Timor-Leste than it would be to Australia.⁴⁰ Article 82 is often referred to as the *quid pro quo* by which the international community in recognising the coastal State's sovereign rights over the continental shelf beyond 200 miles is not completely deprived of any benefit derived by the coastal State in that

³⁸ The description of the part of the 1997 treaty boundary between points A51 and A79 in Kaye, *supra* n 6 at 57, otherwise an excellent work, is rather hard to follow: "the line lies at a point equidistant between the Australian EEZ and the legal prolongation of the continental shelf would have been entitled to in the absence of Indonesia". (Kaye's "A 70", a point where there is no sharp change in direction, also appears to be a misprint for A79, where there is.) The National Interest Analysis for the 1997 treaty, *supra* n 24, only partly clarifies matters, as the line between these points is said to be "following a median line between the respective seabed claims: the natural prolongation of Australia's land mass and the PFSEL [Provisional Fisheries Surveillance and Enforcement Line, on which see Kaye at 51-53] in the case of Indonesia." Yet the PFSEL does not extend this far west: see the 1981 Memorandum of Understanding which established it, reproduced along with a map in J.I. Charney and L.M. Alexander (eds), *International Maritime Boundaries*, Vol II (Dordrecht: Martinus Nijhoff, 1993), at 1229-1243.

³⁹ *Supra* n 5.

⁴⁰ That is, since Article 82 would apply to Australia if the area were on its side of the boundary, but not to Timor-Leste if the position were reversed, the two States' joint benefit from the area is maximised – at the expense of the ISA fund – by Timor-Leste gaining the whole area more than 200 miles from Australia, and it would pay Timor-Leste, up to a point, to compensate Australia in other areas or other ways for agreeing to abandon its claim to it. The same applies *mutatis mutandis*, of course, to the truncated part of the Argo region.

area.⁴¹ Paragraph 1 requires the coastal State exploiting the part of its continental shelf beyond 200 miles from its baselines to make payments or contributions in kind to the ISA; paragraph 2 specifies that the payments begin in the sixth year of production at a site at one per cent of the value or volume of production, rising by one per cent each year until the twelfth year, after which the rate remains at seven per cent.

It should also be noted that a purposive interpretation of Article 76, paragraph 8 in support of a 400-mile rule would be of no assistance in avoiding the need for the submitting State to make quasi-royalty payments to the ISA under Article 82 from the sixth year of exploitation.⁴² The clear purpose of Article 82 is not to avoid diminution of the seabed beyond national jurisdiction, but to require coastal States to share the gains from the legal recognition of their extended continental shelves. A teleological approach to Article 82 thus supports the view that such gains should only come about through a recommendation of the CLCS.

The boundaries of any such eleventh region would also have been a delicate matter. If the region extends north as far as the *thalweg* of the Timor Trough, which is further north than the northern boundary of the JPDA, it would have been necessary to decide where and how to depict the eastern and western boundaries of the notional region – an area where in due course Indonesia and Timor-Leste will have to delimit their EEZ boundary. This should not, however, have been an insuperable difficulty, as a similar problem in fact arose in the Australian submission with respect to the lateral boundaries in the region of the Australian Antarctic Territory. Here the outer limit lines on the maps in the Executive Summary enclose an area bounded by whichever of the median line and the continuation of the land boundary along the meridian is more favourable to Australia, but the lines between these extremes are dashed. An explanatory note applying to both the relevant maps indicates that

[t]he 200 nautical mile and extended continental shelf outer limits have been marked to take account of the fact that maritime boundaries have not been negotiated with States adjacent to the Australian Antarctic Territory. The extent of this marking does not reflect any view with regard to the merits of any delimitation methodology.⁴³

5. Conclusion

⁴¹ See e.g. R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd edn (Manchester: Manchester University Press, 1999), at 157; Virginia Commentary, *supra* n 26, at 834-835.

⁴² Although Ambassador Pardo's original expectation in proposing that the deep seabed beyond national jurisdiction become the common heritage of mankind was that the coastal States' continental shelves would be relatively narrow, leaving significant petroleum resources to be exploited under the international regime: L.B. Sohn and J.E. Noyes, *Cases and Materials on the Law of the Sea* (Ardsley, NY: Transnational, 2004) at 596, Article 76 as ultimately drafted defeats this intention. Since petroleum deposits are continental in origin, they do not occur under oceanic crust, and coastal States have thus ended up as the sole beneficiaries of the move to the Article 76 formula from the previous one in the 1958 Convention on the Continental Shelf, *supra* n 7. Although it has not yet been necessary to apply Article 82, developments in the Gulf of Mexico and on the Grand Banks of Newfoundland are bringing closer the day when the difficulties of interpretation that Article 82 engenders – see e.g. M.W. Lodge, "The International Seabed Authority – Its Future Directions", in M.H. Nordquist, J. Norton Moore and T.H. Heidar (eds), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff, 2004), 403-409 – will need to be resolved.

⁴³ Australian Executive Summary, *supra* n 10, at 12 (Figure 4), 13 (Figure 5) and 41 (explanatory note).

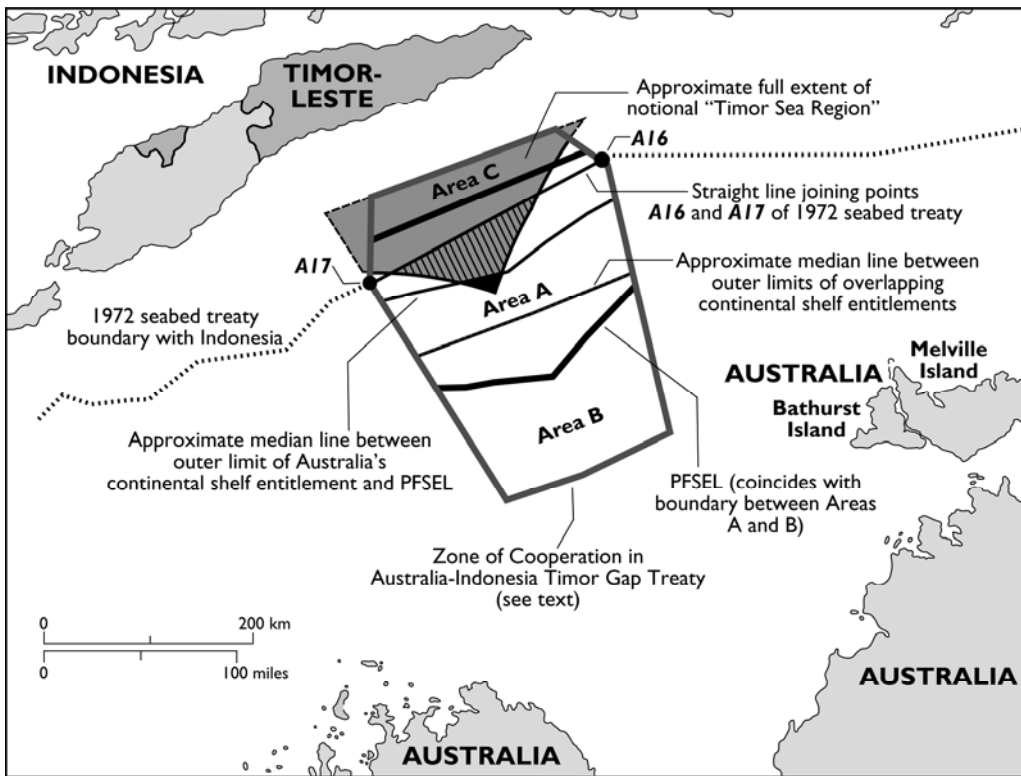
The better view must be that there is no 400-mile rule in UNCLOS Article 76 freeing coastal States of the consequences of failing to make a submission to the CLCS in respect of areas of continental shelf over which they wish to secure their rights *erga omnes* that lie beyond 200 miles from their own territorial sea baselines but within 200 miles of those of another State. The omission of one potential region of continental shelf beyond 200 nautical miles from the territorial sea baseline from Australia's 2004 submission to the CLCS and the part-omission of another have, however, been shown not to render the submission defective; the most that can be said is that it is in some respects incomplete. Neither omission poses a real threat to Australia's ability to exercise the sovereign rights attaching to continental shelf jurisdiction in the two areas mentioned – in the Timor Sea because Australia is very unlikely to gain the area anyway in any future delimitation with Timor-Leste, and in the northern part of the Argo region by virtue of its 1997 maritime boundary with Indonesia once it is in force. Even so, the non-inclusion of the Timor Sea region may handicap Australia in its postponed permanent maritime boundary delimitation with Timor-Leste. There may also be a link between the two omitted areas, in that any attempt by Australia to argue against the application of UNCLOS Article 82 in the northern part of the Argo region, should exploitation of the resources in that area prove feasible in the next few decades, would only exacerbate that self-imposed handicap in relation to the Timor Sea.

It also follows that China would be well advised, if it wishes to safeguard its legal interest in the seabed area on its side of the Okinawa Trough, to include it in its own forthcoming submission to the CLCS. It has nothing to lose by doing so, and would find its position *vis-à-vis* Japan weakened if it did not. Irrespective of what China does, though, Japan has nothing to gain by a public response, since lesser steps, such as simply reminding China of Article 76, paragraph 10 in bilateral dealings with it, would suffice to protect Japan's position. A protest if China includes this area would be misplaced for the reasons given in the International Law Association's study,⁴⁴ while a response if it does not along the *faux naïf* lines of the Timor-Leste position paper would simply afford China an opportunity to reconsider adding the area to its submission, to Japan's ultimate detriment. Given that there are only two such areas in the world, any precedent-based arguments for Japan to protest should carry little conviction.

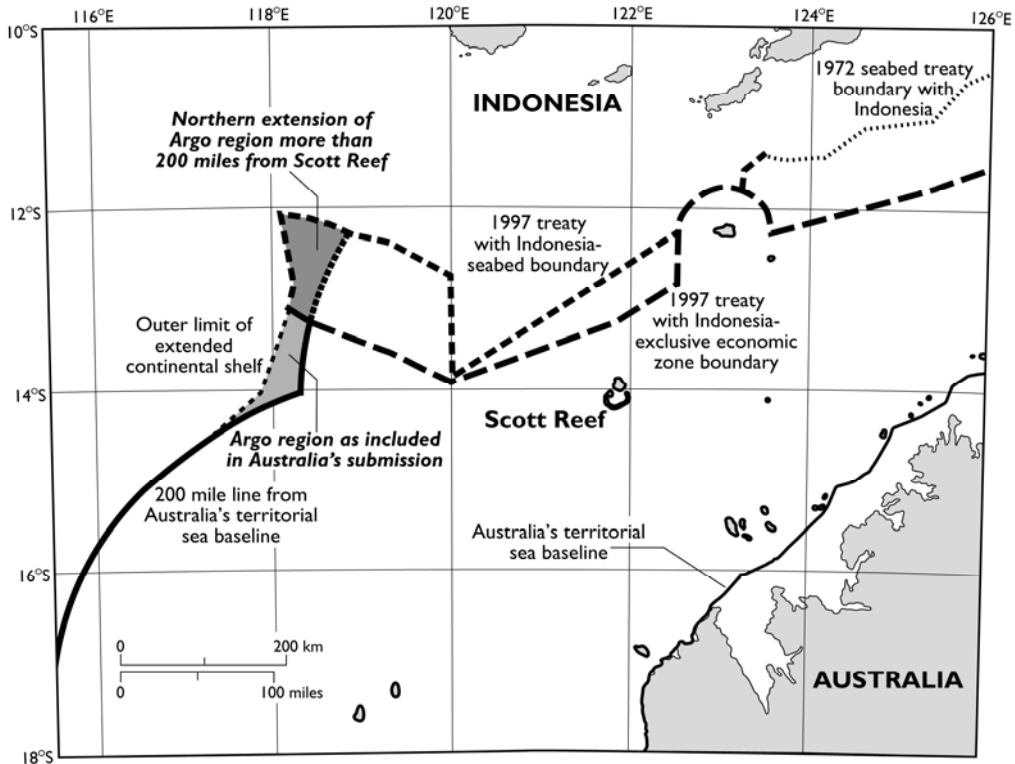
Biography: Andrew Serdy lectures in Public International Law and the International Law of the Sea at the School of Law, University of Southampton. Since 2004 he has also been a Visiting Fellow in the Faculty of Law at the University of Wollongong (NSW). Before his appointment to the University of Southampton in 2005, Mr Serdy was first briefly an employed solicitor with Freehill, Hollingdale & Page in Sydney and then worked for many years in the Australian Government Department of Foreign Affairs and Trade. There he first served in a number of diplomatic positions (including postings in Tokyo and Warsaw), before specialising from 1996 in the law of the sea in the Department's Sea Law, Environmental Law and Antarctic Policy Section, from 2002 as Executive Officer (i.e. deputy director). In this capacity he drafted significant parts of Australia's 2004 submission under the UN Convention on the Law of the Sea (UNCLOS) to the Commission on the Limits of the Continental Shelf on the outer limits of Australia's shelf where it extends beyond 200 miles from the territorial

⁴⁴ *Supra* n 14 and accompanying text.

sea baseline, as well as being a member of the team that formally presented the submission to the Commission, and interacted with the subcommission established to examine it, at its 15th session in New York in 2005. Earlier, Mr Serdy appeared for Australia in 2000 in the *Southern Bluefin Tuna* case – the first ever to come before an UNCLOS Annex VII tribunal. He is a member of the Board of Editors of Ocean Development and International Law.



Map 1 – The Timor Sea, showing the relationship between the area beyond 200 nautical miles from Australia's territorial sea baseline and a number of possible continental shelf boundaries between Australia and Timor-Leste.



Map 2 – The Argo region in Australia's submission to the Commission on the Limits of the Continental Shelf and its putative northern extension.