

Note No: 08/11

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Secretary-General of the United Nations, and has the honour to refer to the Secretariat's note of 22 April 2010, which transmitted a letter from Mr Alexandre Tagore Medeiros de Albuquerque, Chairman of the Commission on the Limits of the Continental Shelf, submitting the "Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland In Respect of Ascension Island on 9 May 2008".

The United Kingdom is disappointed with the final recommendations of the Commission, which recommended that the United Kingdom ought not to establish limits of the continental shelf with respect to Ascension Island beyond 200 nautical miles. The United Kingdom has already expressed doubts as to whether the approach of the Commission to the United Kingdom submission is entirely consistent with the provisions of the Convention. The United Kingdom believes that there are issues of legal interpretation upon which the Commission would have benefited from taking expert legal advice before concluding its deliberations. The United Kingdom presented its views on these issues at a plenary meeting of the Commission on 12 April 2010 and they are reflected in the paper attached to this Note Verbale. The United Kingdom requests that this Note Verbale and attachment be placed on the web-site of the Division for Ocean Affairs and Law of the Sea.

The United Kingdom will await with interest the outcomes of future submissions which raise similar issues of legal interpretation of the Convention, and in particular those submissions which relate to the entitlement of coastal states to continental shelf areas beyond 200 nautical miles on the basis of mid-ocean ridges.

The Permanent Mission of the United Kingdom to the United Nations takes this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.



United Kingdom Mission
to the United Nations
11 January 2011

Paper Summarising the Presentation by the United Kingdom of Great Britain
and Northern Ireland to the Commission on the Limits of the Continental Shelf
on Points of Legal Interpretation made on 12 April 2010

Background

1 This paper raises principles of legal interpretation relevant to the United Kingdom's submission concerning its entitlement to establish extended continental shelf with respect to Ascension Island. The United Kingdom delegation met with the Subcommission established to consider the United Kingdom Submission on several occasions over the course of a year. It quickly became clear in discussions with the Subcommission that there were important differences between the Subcommission and the United Kingdom concerning a coastal State's entitlement to delimit extended continental shelf. The United Kingdom therefore sought permission to address the plenary session of the Commission on the legal principles which should properly govern the Commission's approach. In doing so, the United Kingdom addressed the Commission in the following terms.

Principles of Interpretation

2. The United Kingdom's submission regarding Ascension Island is the first of several that the Commission will be examining concerning islands on mid ocean ridge systems. The United Kingdom anticipates that many of the points of legal principle will be of importance to all State Parties to the UN Convention on the Law of the Sea ("the Convention"), bearing as they do on the delicate balance of interests preserved therein. We appreciate that the Commission will wish to ensure that its recommendations are made on a basis that is clear, equitable and consistent with legal principle. In raising these points, we stand ready to assist the Commission in further developing a consistent and clear modus operandi.

3. Given that we are dealing with the sovereign rights of States we believe, whilst acknowledging the heavy workload of the Commission, it is nevertheless important that we proceed here with caution. Parts of Article 76 of the Convention give rise to challenges of legal interpretation for State Parties and the Commission alike, and we believe it is important to consult widely on legal and technical issues in order to proceed on a consensual and legally firm basis.

4 Crucially, these issues raise difficult and sensitive issues of the respective roles of the Commission and the State Parties in interpreting the Convention. We appreciate that the Commission needs to be able to apply the provisions of Article 76 to fulfil its mandate as set out in Article 3 of Annex II, however, where there are fundamental questions concerning interpretation of the Convention, the rights of State Parties have to be borne in mind, to ensure the role of the Commission in applying its technical expertise is carried out within a proper legal framework. We invite the Commission to take its own legal advice in this regard.

5. We shall now turn to the specific points of principle which we would like to highlight.

6. The Ascension Island submission raised new questions about how Article 76 is to be interpreted and applied in connection with ridges. Through our dialogue with the Subcommittee, it emerged that we had significant differences of view on the proper interpretation of Article 76 in relation to three key areas.

- a. The meaning of "deep ocean floor" in Article 76(3),
- b. The meaning of "natural prolongation" in Article 76(1);
- c. The use of morphology over geology.

In this presentation, we propose to explore the nature and significance of these different areas of interpretation.

7. As part of its examination of the Ascension Island submission, the Subcommittee outlined five principles which it applied in assessing the technical data submitted in that case.¹

8. In articulating these principles, the Subcommittee sought to identify a principled approach to the determination of the outer limits of Ascension Island's continental shelf. However, the manner in which many of them have been applied by the Subcommittee is, in the United Kingdom's view, not always consistent with the legal requirements of Article 76.

A. Deep Ocean Floor

9. The first issue we wish to raise is the manner in which the Subcommittee approached the interpretation of the phrase "deep ocean floor" within the meaning of Article 76(3).

10. The Subcommittee maintained that mid oceanic ridges, and the Mid-Atlantic Ridge in particular, represent "deep ocean floor" within the meaning of Article 76(3),

¹ Those five principles were.

(1) The natural prolongation of the land territory is based on the physical extent of the continental margin to the outer edge (Article 76, paragraph 1), ie, "the submerged prolongation of the land mass." (Article 76, paragraph 3);

(2) The outer edge of the continental margin in the sense of Article 76(3) is established by applying the provisions of Article 76(4) through measurements from the foot of the continental slope (FOS);

(3) The FOS determined for this purpose is always associated with an identifiable base of continental slope, pursuant to Article 76(4)(b) (see also Scientific and Technical Guidelines of the Commission paragraphs 5.4.5 and 6.2.3)

(4) The principles of crustal neutrality applies, ie Article 76 is neutral regarding the crustal nature of the land mass of a coastal State;

(5) The regime of islands (Article 121) which states that the maritime zones of an island envisaged by the Convention "are determined in accordance with the provisions of this Convention applicable to other land territory." This implies that for the purposes of delineating the outer limits of the continental shelf all island States have a continental margin in the sense of Article 76(3).

which states that the "[continental margin] does not include the deep ocean floor with its oceanic ridges".²

11. The Subcommittee, concluded that Ascension Island, by virtue of sitting on the Mid-Atlantic Ridge, is on deep ocean floor, and thus can have no continental margin beyond 200 nm.³

12. If the Subcommittee's approach were to be extended to all mid-ocean ridge spreading systems, this would have implications for any coastal State seeking to establish outer continental shelf beyond 200nm

13. There is no definition in the Convention of the key terms in Article 76(3), ie "deep ocean floor" and "oceanic ridges". However, the question of the true meaning of deep ocean floor for the purposes of Article 76 has been considered by a number of expert bodies, including the International Law Association and DOALOS which considered that deep ocean floor must lie beyond continental margin.⁴ In order to establish the legal meaning of these words, we need to look at the words in their context as required by the Vienna Convention on the Law of Treaties, which provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",⁵ this includes considering their technical, geological, and

² SC_GBR-ASC_DOC_001_19-08-09, page 2, paragraphs 6 – 7: "given the important role of the Mid-Atlantic Ridge in the formation of the Atlantic deep ocean floor, there is little doubt that it is the most obvious contender for an 'oceanic ridge' of the 'deep ocean floor' . . ."; paragraphs 13-14: "the central valley of the Mid-Atlantic Ridge with its rift shoulders, it flanks and the deepest parts of the adjacent ocean basin belong to the deep ocean floor of the Atlantic Ocean"

SC GBR-ASC DOC 002, page 2, paragraph (c). "the the SC recognizes the flanks of the Mid-Atlantic Ridge in the Southern Atlantic, that dip at 0 1-0 2 degrees away from the central spreading axis, as belonging to the deep ocean floor" This is also repeated in the Recommendations at paragraph 26

SC Recommendations dated 18 March 2010, page 11, paragraphs 26 and 36. "The SC is of the view that the rugged seafloor between Ascension Island and the axis of the Mid-Atlantic Ridge is not part of a discrete seafloor high that is surmounted by Ascension Island but rather part of the normal deep ocean floor that includes the axial valley of the Mid-Atlantic Ridge"

³ SC Recommendations dated 18 March 2010, paragraphs 33-34. "It is the SC's view that Ascension Island's edifice sits directly on deep ocean floor and, thus, the application of paragraph 5 4 5 of the Guidelines places the base of the slope of Ascension Island at the bottom of the volcanic edifice, and not within the central valley or the fracture zones of the Mid-Atlantic Ridge, or where the gently westward-dipping seafloor merges with other provinces of the deep ocean floor or the adjacent continental margin" (paragraph 33); " the FOS associated with the submerged land mass of Ascension Island is located around the base of the edifice where the lower part of the insular slope of the island merges with the deep ocean floor of the Atlantic Ocean, and as such it does not generate an outer edge of the continental margin beyond 200M" (paragraph 34)

⁴ For example, the International Law Association's Committee on the Outer Continental Shelf states in its 2006 report that "the reference to the deep ocean floor and its oceanic ridges cannot lead to the exclusion of areas which form part o the natural prolongation of the land territory and meet the other criteria of article 76 which define the continental shelf". In the DOALOS publication "The Law of the Sea, Definition of Continental Shelf" it is noted that deep ocean floor is the "surface lying at the bottom of the deep ocean with its oceanic ridges, beyond the continental margin. The continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof" (page 42)

⁵ Article 31, Vienna Convention on the Law of Treaties 1969

morphological meanings, on which technical experts may quite properly have their view, but ultimately their interpretation is a matter of law.

14. It follows that terms and phrases in the Convention which may be technical terms of art, do not necessarily import a technical meaning for the purposes of the Convention. Article 31(4) of the Vienna Convention provides that "A special meaning shall be given to a term if it is established that the parties so intended (emphasis added)". It is clear for the purposes of Article 76 that the State Parties did not intend for a number of the concepts, (e.g. "deep ocean floor" in 76(3), or "continental shelf" in 76(1)) to be given their scientific or technical meaning.

15. In addition, we do not believe that the framers of the Convention had in mind that continental margin could be determined by first establishing the extent of deep ocean floor – the Subcommission takes this 'reverse' approach when it notes that "the deep ocean floor in the sense of Article 76 is the area seaward of the outer edge of the continental margin. However, the opposite also applies, i.e. that the continental margin is the area landward of the deep ocean floor."⁶

16. Such an approach prejudices the coastal State's ability to establish outer continental shelf. In our view, the Convention requires a land-based approach. The sovereign rights of coastal states with respect to continental shelf emanate from their sovereignty over the land territory.⁷

17. The need to take a land-based approach is also suggested by the CLCS Scientific and Technical Guidelines at 7.2.8 which state "Some ridges (including active spreading ridges) may have islands on them. In such cases it would be difficult to consider that those parts of the ridge belong to the deep ocean floor."⁸ It follows from this that where a continental margin extends to the flanks of a mid oceanic ridge, such as Mid-Atlantic Ridge, those parts of the ridge cannot be deep ocean floor.

18. However, in considering the Ascension Island submission, the Subcommission also expressed views on the meaning of "oceanic ridges" within the meaning of Article 76(3), and reached the view that the Mid Atlantic Ridge is part of the deep ocean floor.⁹ In the United Kingdom's view, the term "oceanic ridges" in Article 76(3) does not encompass all undersea ridges because 76(6) specifically

⁶ SC GBR-ASC DOC 002, page 3, paragraphs 33-36. The Subcommission make various comments about Mid-Atlantic Ridge being deep ocean floor on which Ascension Island sits.

⁷ Article 77 of the Convention.

⁸ The point is also recognised in the DOALOS definition: the "deep ocean floor is the surface lying at the bottom of the deep ocean with its oceanic ridges, beyond the continental margin." The Law of the Sea, Definition of the Continental Shelf, DOALOS United Nations. This reflects the IHO definition in its 2006 Report, at page 5.

⁹ For example, SC_GBR-ASC_DOC_001, paragraphs 6-7. "mid oceanic ridges are actually normal deep ocean floor that has aged, cooled and thermally subsided as the oceanic lithosphere moved away from the active spreading centre" and "there is little doubt that [the Mid-Atlantic Ridge] is the most obvious contender for an "oceanic ridge" of the "deep ocean floor".

refers to another category, i.e. "submarine ridges", and expressly recognises that extended continental margin may be established by reference to such ridges.

19. Therefore, some ridges, or parts of ridges, belong to the deep ocean floor; some ridges or parts of ridges do not. Ridges may also change their juridical status from margin to deep ocean floor as they move away from a land mass.

20. We of course recognise that there must be parts of mid oceanic ridges that are part of the deep ocean floor in both the scientific and legal sense. However, the Subcommission appears to have made the unwarranted assumption that all mid oceanic ridges are deep ocean floor. The United Kingdom does not accept this. Rather, one must first test whether the requirements of Article 76 for establishing continental margin have been met. If the assumption that the area around Ascension is deep ocean floor is removed, then we consider that the test of appurtenance can be demonstrated, in accordance with normal principles

B. Natural Prolongation of the Land Territory

21. The United Kingdom also considers that there are important issues at stake with respect to the concept of natural prolongation referred to in Article 76(1) of the Convention

22. The Subcommission has proceeded on the basis that the outer edge of the continental margin in the sense of Article 76(3), is established by applying the provisions of Article 76(4) through measurements from the foot of continental slope.¹⁰ By jumping immediately to the formulae in 76(4) in this way the Subcommission overlooks the requirement in Article 76(1) to first determine the extent of natural prolongation of the land territory. This is also recognised in Article 76(3) which refers to the continental margin comprising the submerged prolongation of the land mass

23. The United Kingdom therefore does not consider that natural prolongation, an inherent property of any landmass, can be defined by applying the formulae in Article 76(4).

24. This view is supported by the Virginia Commentary. It notes that State Parties to the Convention were concerned to come up with a formula for identifying outer continental shelf which did not compromise the sovereign rights of coastal states as a matter of customary international law.¹¹

25. Whether there is any natural prolongation of the submerged component of a land territory can only be established by an assessment of all of the available geo-scientific data as a whole

¹⁰ SC GBR-ASC DOC 002 dated 8 December 2009, page 2

¹¹ See UNCLOS 1982. A Commentary, Vol II, Marinus Nijhoff Publishers, page 846

C. Use of morphology over geology

26. Throughout its examination of the United Kingdom's submission, the Subcommission has shown a strong preference for relying on morphological over geological criteria. On a number of occasions morphological arguments have been adopted by the Subcommission as the only criteria, to the exclusion of geology. For example, in determining foot of slope positions, it noted that "more data and information on the geology, crustal structure and genesis of Ascension Island will not change this fundamental and natural morphological situation".¹² The United Kingdom finds no basis in the Convention for weighting one type of data over another. Indeed, there are instances in which the Convention recognises that data other than morphology should be used. Article 76(4)(b) states that "in the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in its gradient at its base." Thus the Convention specifically calls for the use of a range of data, not just morphology.¹³

27. We consider that natural prolongation of the landmass, and continental margin can be defined by a combination of criteria – such as geology, geophysics and geochemistry – in addition to morphology

28. The Subcommission has approached the Ascension Island submission on the basis that Article 76(3) requires establishment of "shelf, slope and rise". Whilst this represents a conventional understanding of continental margin, the Convention also needs to deal with situations that are not so typical. This is recognised in the DOALOS handbook on the Definition of the Continental Shelf which provides that "This simple categorisation of margin morphology into shelf, slope and rise is rarely found in practice owing to the variety of geomorphological forms of the continental margin resulting from different tectonic settings". Furthermore, it is noted that "many volcanic islands have no shelf, but rather a slope that plunges into the deep seabed. The common definitions of shelf, slope and rise do not apply in such settings"¹⁴ This supports our view that the provisions of the Convention are intended to encompass all manifestations of continental shelf.¹⁵

¹² The Subcommission place the FOS of the submerged land mass of Ascension is located around the base of the edifice as described in the views and general conclusions presented by the Subcommission on 19 August 2009. The Subcommission stated that more data and information on the geology, crustal structure and genesis of Ascension Island will not change this fundamental and natural morphological situation. The requirements to establish a particular morphology are also emphasised at paragraphs 15-16 of SC_GBR-ASC_DOC_001 and page 2 of AS GBR-ASC DOC 002. "the existence of a continental slope requires the existence of a distinct morphological feature rising from the level of the continental rise or deep ocean floor up to the continental shelf of the land mass of the coastal state"

¹³ In the case of Ascension Island, the Subcommission has proceeded on that basis that for oceanic islands it is necessary to have a discrete seafloor high, some kind of distinct morphological feature that rises above the ocean floor before it is entitled to establish "continental margin" and "continental shelf". Recommendations p11, paragraph 13 and 26

¹⁴ DOALOS Handbook, "Definition of the Continental Shelf", page 11

¹⁵ DOALOS Handbook, "Definition of the Continental Shelf", paragraph 35

29. In summary, the United Kingdom does not accept that there is any one scientific criterion which should be relied on to the exclusion of others in applying Article 76. We are satisfied that this was not the intention of the framers of the Convention. Why else would the Convention provide for a range of disciplines to be represented on the Commission?

Conclusion

30. To conclude, ultimately, the interpretation of Article 76 is a matter of law, it has always been accepted that the concept of the continental shelf in the Convention is a legal construct, which does not necessarily reflect its scientific meaning. More fundamentally, Article 76 appears in an international agreement, and would have to be interpreted in accordance with the Vienna Convention on the Law of Treaties and the principles laid down in many international judicial decisions.

31. The three principles the United Kingdom has outlined are fundamental to the proper interpretation of Article 76 and which the United Kingdom believes require serious consideration by the Commission and State Parties to the Convention. We know that certain other states share these concerns. This is understandable because States are always very sensitive about issues concerning the extent of their sovereign rights under international law. It is important to note that, under Article 3(1)(a) of Annex 2 of the Convention, the Commission's function is limited to "consider[ing] the data and other material ... and mak[ing] recommendations."

32. Whilst we are mindful of the eminence of the members of the Commission in those areas in which they have expertise, we respectfully suggest that it does not have a plenary right to interpret the Convention, which is a task for lawyers. In this connection, we note that the Commission's Rules of Procedure allow it to seek outside specialist advice. Since there are clear differences in legal interpretation between the United Kingdom and the Subcommission, we suggest that the Commission should consider seeking specialised outside legal advice on these questions.

33. The United Kingdom considers that these questions of legal principle have significance beyond Ascension Island, and will undoubtedly be of relevance to State Parties to the Convention who may in future seek to delimit extended continental shelf as the result of an association between a landmass and a ridge or ridge system. In addition, other State Parties to the Convention may consider that the principles at stake will have wider significance, bearing as they do on interpretation of Article 76 and the modus operandi of the Commission.

34. The United Kingdom would welcome the views of others, in particular State Parties to the Convention, on the questions raised for consideration here