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## Towards Setting the Outer Limits of the Continental Shelf in the Arctic: On the Norwegian Submission and Recommendations of the Commission

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On 27 March 2009, the Commission on the Limits of the Continental Shelf (the Commission) adopted its final recommendations in regard to the continental shelf submission made by Norway pursuant to Article 76 of the United Nations Convention on the Law of the Sea (LOS Convention). This was only the second time the Commission had adopted recommendations pertaining to the Arctic region.<sup>1</sup> The continental shelf in question is located in three separate seabed areas in the Arctic Ocean, the Barents Sea and the Norwegian and Greenland Seas, measuring in total approximately 235,000 square km.

In this chapter, the Norwegian submission and the Commission's recommendations are outlined and briefly explained. In addition, some remarks are offered on possible implications for other states in respect of the law of the sea with regard to pending maritime delimitations and disputed marine areas.

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<sup>1</sup> In 2001, the Russian Federation became the first state to make a submission to the Commission regarding the outer limits of the continental shelf in the Arctic; see attachment to UN doc. CLCS.01.2001.LOS, available at the webpages of the Division for Ocean Affairs and the Law of the Sea (DOALOS), of the UN Office of Legal Affairs, at <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)> (last accessed 31 July 2009). As regards the Central Arctic Ocean, however, the Commission recommended that Russia makes a new and revised submission in respect of its outer continental shelf; see UN doc. A/57/57/Add.1, para. 41. See further discussion McDorman, chapter 27 in this book.

## NORWAY'S SUBMISSION TO THE COMMISSION

Norway's submission for establishing the outer limits of the continental shelf beyond 200 nautical miles<sup>2</sup> from the baselines was lodged ten years after the entry into force of the Convention for Norway, on 27 November 2006. It was the seventh submission made to the Commission.<sup>3</sup> Work on drafting the submission started after Norway's ratification of the LOS Convention.<sup>4</sup> The task was undertaken under the direction of the Norwegian Ministry of Foreign Affairs, and in close collaboration with other institutions, especially the Ministry of Petroleum and Energy and the Norwegian Petroleum Directorate. Other institutions involved included the Norwegian Mapping Authority, the Universities of Oslo and Bergen and the Norwegian Polar Institute as well as peer institutions in Russia, Iceland and Denmark together with the Faeroe Islands and Greenland. The collaboration involved joint-venture acquisition of data and research analysis. Moreover, scientific research institutions in Germany, Sweden and the USA gathered data on the extent of the continental shelf, and Norway partnered in several Arctic research projects.<sup>5</sup> Acquisition of geological data was carried out in connection with the surveying of the extent of continental shelf areas beyond 200 miles until the year of submission.

In support of Norway's claim to continental shelf areas beyond 200 miles, and in accordance with Article 76(8) of the LOS Convention, the original submission contained a main body of analytical and descriptive matter, an executive summary and scientific and technical data. Pursuant to Rule 50 of the Rules of Procedure of the Commission,<sup>6</sup> a communication from the UN Secretary-General was circulated to all UN member states, and to other states parties to the LOS Convention, thus making public the executive summary of the submission, including charts and coordinates of the shelf areas in question.<sup>7</sup>

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<sup>2</sup> All references to 'miles' hereinafter are nautical miles.

<sup>3</sup> Previous submissions included those of the Russian Federation in 2001, Brazil in 2004, Australia in 2004, Ireland in 2005 and New Zealand in 2006 and the joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in 2006; see UN docs. CLCS.01.2001.LOS, CLCS/32, CLCS/48 and CLCS/52. On submissions and the work of the Commission, see further review by Jares, chapter 25 in this book.

<sup>4</sup> Norway ratified the LOS Convention on 24 June 1996.

<sup>5</sup> See UN doc. CLCS/54, para. 43.

<sup>6</sup> UN doc. CLCS/40/Rev.1 (Rules of Procedure of the Commission on the Limits of the Continental Shelf).

<sup>7</sup> UN doc. CLCS 07.2006.LOS.

### **An Early Submission**

Norway decided to make a submission already in 2006, even though the Meeting of State Parties had adopted 13 May 1999 as the date of commencement of the ten-year time period referred to in Article 4 of Annex II to the LOS Convention, for those states for which the Convention entered into force before that date.<sup>8</sup> There are probably several explanations for Norwegian compliance with the initial deadline.

First, compiling a dossier of the information required under Article 76 of the LOS Convention is a complex and long-term task with regard to the scientific methodology, the planning and organization, and Norway started this work soon after ratifying the Convention. Although substantial amount of data had already been collected and considerable expertise developed, the technology used would not necessarily be appropriate were the submission to be delayed by additional years. Also, a systematic review of the research had been ongoing in various ministries and institutions since Norway began drafting the submission. Returning to square one would require further rounds of long-term planning and fresh research, neither particularly desirable from a financial or organizational point of view.

A second reason might be of a legal nature, connected to the May 2001 decision of the Meeting of State Parties. Clearly, that decision can neither be regarded as a formal amendment to the LOS Convention,<sup>9</sup> nor as an agreement relating to the implementation of Article 4 of Annex II.<sup>10</sup> What the Meeting had done was to adopt a decision similar to the ones with respect to the postponement of the election of members of the International Tribunal of the Law of the Sea and of the Commission. But would this decision bind those states that became parties to the LOS Convention after the Eleventh Meeting of the State Parties?<sup>11</sup> Or would there be an opening for those states to oppose submissions made with a delay in relation to the original schedule under Article 4 of Annex II to the Convention? Questions of that sort would not arise in the case of a timely submission.

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<sup>8</sup> See UN doc. SPLOS/72 and Rule 45 of the Rules of Procedure of the Commission. For an overview of submission, see Vidas, chapter 23 in this book.

<sup>9</sup> Arts. 312 and 313 of the LOS Convention.

<sup>10</sup> For observations on the May 2001 decision by the Meeting of States Parties to the Convention, see also Treves, chapter 2 in this book.

<sup>11</sup> In May 2001, there were 135 parties to the LOS Convention, among which – in addition to Norway – there was only one other Arctic coastal state, Russia. As of 10 July 2009, however, there are 159 parties, since 24 additional states became parties to the Convention in the meantime. Among those are two Arctic coastal states – Canada and Denmark – who became parties to the Convention in November 2003 and November 2004, respectively. Other states are yet anticipated to become Convention parties; notably, one of those is an Arctic coastal state – the USA.

### Scope of Area

The information submitted by Norway was intended to support the claim that its continental shelf extended beyond 200 miles in three distinct areas: the Western Nansen Basin in the Arctic Ocean; the Banana Hole in the Norwegian and Greenland Seas; and the Loophole in the Barents Sea (see Figure 28.1). In geological terms, these areas are part of the continental margin surrounding the mid-Northeast Atlantic island of Jan Mayen and the continental margin adjacent to mainland Norway and the Svalbard archipelago. The latter extends from the Arctic Ocean in the north to the North Sea in the south. The former, on which the island of Jan Mayen is located, is in fact separate from both the American and Eurasian continents and constitutes the so-called Jan Mayen micro-continent. It is exceptionally small in size for a continent, but has all the characteristic morphological features of one.<sup>12</sup>

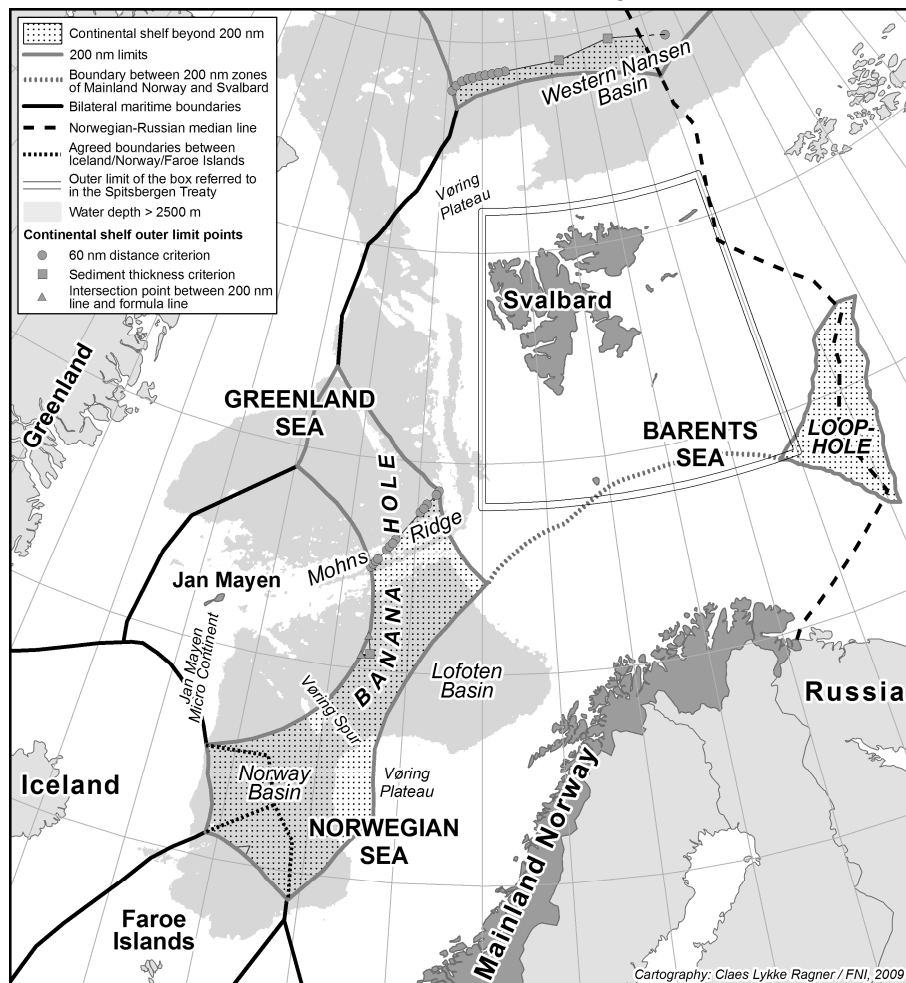
The executive summary attached to the Norwegian submission describes the individual shelf areas beyond 200 miles.<sup>13</sup> Two general maps illustrating the seabed areas concerned and the stipulated outer limits of the shelf were included, as well as three detailed maps of the seabed areas relating to each of the regions. A list of coordinates of fixed points for determining the exact outer limits of the shelf was attached, in addition to a short description of the provisions of Article 76 that Norway invoked in support of its claims for each of the continental shelf areas concerned.

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<sup>12</sup> See the executive summary of Norway's submission, available at the DOALOS webpage, <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)> (last accessed 31 July 2009), pp. 9–10.

<sup>13</sup> It is noted, in both the executive summary and in the continental shelf notification circulated by the UN Secretary-General, that the submission concerns only the outer limits of the continental shelf in Norway's high north maritime areas and that a further submission could be made in respect of other seabed areas beyond 200 miles. On 4 May 2009, Norway made a new submission for two such areas adjacent to Bouvet Island and Queen Maud Land. With reference to the special legal and political status of Antarctica under the provisions of the Antarctic Treaty (text in UNTS, Vol. 402, pp.71ff), Norway requested the Commission to consider only the information submitted in respect of Bouvet Island but not take any action for the time being with regard to the information relating to the shelf appurtenant to Antarctica, including Queen Maud Land; see letter to the UN Secretary-General from the Permanent Mission of Norway to the United Nations, accompanying Norway's submission of 4 May 2009, available at the DOALOS webpage, <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)> (last accessed 31 July 2009). At the time of writing, Norway's latest submission had not been presented to the Commission, though consideration of the submission is expected to be included in the provisional agenda of the twenty-fourth session of the Commission, to be held in New York from 10 August to 11 September 2009. For a discussion on legal difficulties related to continental shelf submissions in the Antarctic region and several options proposed, see D. Vidas, 'The Antarctic Continental Shelf Beyond 200 Miles: A Juridical Rubik's Cube', in D. Vidas (ed.), *Implementing the Environmental Protection Regime for the Antarctic* (Dordrecht: Kluwer Academic, 2000), pp. 261–272, especially at pp. 271–272.

Figure 28.1 The continental shelf of Norway beyond 200 miles in the Arctic Ocean, the Barents Sea and the Norwegian Sea



Alternative formulas for determining the location of the outer limits of the continental shelf were invoked by Norway's submission – commonly referred to as the 'Irish' and the 'Hedberg' formulas.<sup>14</sup> Straight lines not exceeding 60 miles were delineated,<sup>15</sup> connecting fixed points within the constraint lines pursuant to Article 76(5) of the LOS Convention. However, Norway deemed the continental shelf in the Loophole to cover the entire

<sup>14</sup> See Art. 76(4)(a)(i) and (ii) of the LOS Convention.

<sup>15</sup> See *ibid.*, Art. 76(7).

area beyond the 200 miles-limit of Norway and Russia. Accordingly, no fixed points were determined there in order to establish the outer edge of the continental margin and for delineating outer limits of the continental shelf. Furthermore, Norway maintained that its continental shelf extended up to the 200-mile limits of the Faeroe Islands and Iceland in the southernmost part of the Banana Hole.

#### THE COMMISSION'S CONSIDERATION OF THE NORWEGIAN SUBMISSION

The consideration of the submission was scheduled for the nineteenth session of the Commission, held in New York from 5 March to 13 April 2007.<sup>16</sup> A presentation of the Norwegian submission was made on 2 April by the Norwegian delegation. Substantive points of the submission were elaborated; it was also indicated that Norway had been assisted in the preparation of the submission by Harald Brekke, a Norwegian national and member of the Commission since 1997.

The Commission held the rest of its meeting in private and decided that the examination of the Norwegian submission should proceed through a subcommission, to consist of seven members.<sup>17</sup> Six meetings of the subcommission were held from 4 to 13 April 2007. Three times during that period it met with the Norwegian delegation, which held a number of presentations on these occasions.<sup>18</sup> On the basis of this preliminary work, the subcommission reported that it would need to continue its work during the twentieth session and decided to work individually on the submission during the intersessional period up until the election of the new Commission in June 2007.<sup>19</sup>

The subcommission continued its analysis prior to and during the twentieth session of the Commission (New York, 10–14 September 2007 and 21 January–1 February 2008),<sup>20</sup> as well as during the twenty-first session of the Commission (24–28 March and 15–18 April 2008). Several meetings were held with the Norwegian delegation, and training by Geocap representatives was provided to the subcommission members. The subcommission informed

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<sup>16</sup> UN doc. CLCS/54, paras. 41–54.

<sup>17</sup> As provided for in Art. 5 of Annex II to the LOS Convention and Rule 42 of the Rules of Procedure of the Commission. On the operation of the Commission and subcommissions; see Jares, chapter 25 in this book.

<sup>18</sup> The subcommission also received training in the use of specialized software known as Geocap, developed for hydrographic mapping and modeling and utilized by Norway for the purpose of the submission.

<sup>19</sup> UN doc. CLCS/54, para. 51.

<sup>20</sup> UN doc. CLCS/56, paras. 34–36.

the Norwegian delegation of its preliminary views with regard to certain sections of the submission; moreover, it was decided that the subcommission should meet again in the period 1–12 September 2008, following the plenary part of the twenty-second session of the Commission.<sup>21</sup>

In July 2008, the subcommission received a comprehensive response from Norway, which was of key relevance when it continued its analysis of the data during the twenty-second session of the Commission. Several additional meetings with Norway's delegation were held,<sup>22</sup> and during the resumed twenty-second session of the Commission (1–12 December 2008), the subcommission presented its 'Preliminary considerations regarding certain issues in the Barents Sea, the Western Nansen Basin in the Arctic Ocean, and the Banana Hole in the Norwegian and Greenland Seas' to the Norwegian delegation. Thereafter, during the twenty-third session of the Commission (2–13 March 2009), the subcommission finalized its draft recommendations and submitted the 'Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006'. These were introduced to the plenary of the Commission on 23 March 2009.<sup>23</sup> Two days later, pursuant to para. 15 of Annex II to the Rules of Procedure of the Commission, Norway made use of its right to offer a presentation related to its submission to the plenary of the Commission.<sup>24</sup> The presentation was made by the head of Norwegian delegation, Rolf Einar Fife, Director-General of the Legal Affairs Department of the Ministry of Foreign Affairs. The Commission thereafter, on 27 March 2009, adopted by consensus its recommendations, with amendments.<sup>25</sup> The recommendations were then submitted in writing to the coastal state and to the UN Secretary-General.<sup>26</sup>

### RECOMMENDATIONS OF THE COMMISSION

Pursuant to Annex III to the Rules of Procedure of the Commission, a summary based on excerpts of the recommendations was made public by the UN Secretary-General, in order to provide information which is neither confi-

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<sup>21</sup> UN doc. CLCS/58, paras. 24–28.

<sup>22</sup> UN doc. CLCS/60, paras. 15–18.

<sup>23</sup> UN doc. CLCS/62, paras. 16–19.

<sup>24</sup> See para. 15(*bis*) of Annex III to the Rules of Procedure.

<sup>25</sup> Summary of the recommendations is made available on the DOALOS webpage, <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)> (last accessed 31 July 2009).

<sup>26</sup> Art. 6(3) of Annex II to the LOS Convention.

dential nor might violate the proprietary rights of the coastal state.<sup>27</sup> The summary of the recommendations – like the executive summary of the Norwegian submission – is the ‘public face’ of the Commission’s work and is one of several annexes to the recommendations. The summary in regard to Norway’s submission describes each of the different shelf areas, with 13 maps and figures and an annex with one table of coordinates for the outer edge of the continental margin beyond 200 miles (and their corresponding foot-of-the-slope points) and one table of coordinates for the outer limit of the continental shelf fixed points beyond 200 miles and the corresponding foot-of-the-slope/base points. The recommendations were based on the data provided by the original submission and deal exclusively with issues related to the implementation of Article 76 and Annex II to the LOS Convention.

### **The Western Nansen Basin in the Arctic Ocean**

The Western Nansen Basin in the Arctic Ocean is bounded in the south by the continental slope of Norway and the Russian Federation. To the north, the Nansen Basin is bounded by the Gakkel Ridge, an active seafloor spreading system. The continental margin of Norway in the Nansen Basin constitutes the submerged prolongation of the landmass of Norway and was formed by the opening of the Eurasian Basin by seafloor spreading along the Gakkel Ridge. A number of fans and the Yermak Plateau belong to the continental margin in this area, including the so-called Franz-Victoria Fan.

In the Western Nansen Basin, the foot of the continental slope<sup>28</sup> was determined with reference to two critical ‘foot-of-the-continental-slope points’ intended to form the basis for the establishment of the outer edge of the continental margin. One point was located on the part of the continental margin associated with the Yermak Plateau, i.e. the northwestern margin of the Nansen Basin. Here, the base of the continental slope appeared to be morphologically identifiable. Following Norway’s clarifications of certain inconsistencies, the subcommission agreed with the method applied by Norway to establish the foot of the slope in this area. Regarding the other point – related to the continental margin of the Franz-Victoria Fan adjacent to the Barents Sea shelf – the Commission was of the opinion that Norway had not presented sufficient geological and geophysical data to support the establish-

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<sup>27</sup> Section V, para. 11(3) of Annex III.

<sup>28</sup> Under Article 76(4) of the LOS Convention, the foot of the slope is a key reference for both formulas used to identify where exactly the continental rise ends as it meets the deep seabed. Article 76(4)(b) defines the foot of the slope as ‘the point of maximum change in the gradient at its base’.

ment of the original foot-of-the-continental-shelf point contained in the submission. A revised foot-of-the-slope point was therefore defined (a more seaward position, in fact), following a series of communications between Norway and the subcommission.<sup>29</sup>

In determining the outer edge of the continental margin in the Western Nansen Basin, Norway, in its submission, relied partly on fixed points based on the sediment thickness provision in Article 76(4)(a)(i) of the LOS Convention. One of the two points based on this provision proved to be at a more seaward position, following the above-mentioned relocation of the easternmost foot-of-the-continental-shelf point. The remaining fixed formula points were based on arcs constructed at a distance of 60 miles from the foot-of-the-continental-shelf point, in accordance with Article 76(4)(a)(ii). The Commission recommended using these arcs and points – as applied in the Norwegian submission with the aforementioned changes – as the basis for delineating the outer limits of the continental shelf.<sup>30</sup>

Finally, turning to the delineation of the outer limits as provided for in Article 76(7) of the LOS Convention, the constraint lines in paragraphs 5 and 6 of that Article had to be taken into consideration. In respect of the Western Nansen Basin, Norway in its submission had invoked only the distance constraint criteria, i.e. the 350-mile rule for determining the maximum seaward extent of the continental rise. The territorial sea baselines of Norway in respect of the ‘outer continental shelf’ in the Nansen Basin are related to the Svalbard archipelago. As affirmed by the Commission, the fixed formula points clearly lie within the 350-mile limit in this area. Subsequently, the Commission recommended establishing the outer limits of the continental shelf in accordance with Article 76(7) of the LOS Convention, by straight lines not exceeding 60 miles in length, defined by coordinates of latitude and longitude.<sup>31</sup>

In the easternmost part of the Nansen Basin, however, the outer limits of Norway’s continental shelf connect to the outer limits of Russia’s continental shelf (see Figure 28.1). A part of the continental shelf is thus claimed by both Norway and Russia, and no maritime boundary agreement has yet been reached between the two states.<sup>32</sup> The connection of the easternmost fixed formula point of the outer limit of the continental shelf of Norway and the westernmost fixed formula point of the outer limit of the Russian contin-

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<sup>29</sup> Summary of the recommendations, pp. 11–13.

<sup>30</sup> *Ibid.*, pp. 14–15.

<sup>31</sup> *Ibid.*, pp. 15–17.

<sup>32</sup> For a description of the disputed area with coordinates, see UN doc. CLCS 01.2001.LOS/NOR.

ental shelf in this area is therefore pending a new and revised submission from the Russian Federation.<sup>33</sup> In respect of this part of the Nansen Basin, the Commission thus advised Norway to proceed by establishing the basis of the outer edge of the continental margin based on formula points on arcs constructed at a distance of 60 miles from the easternmost foot-of-the-continental-shelf point, in accordance with Article 76(4)(a)(ii) of the LOS Convention, observing in this connection also paragraphs 7, 8, 9 and 10 of Article 76.<sup>34</sup>

Concerning the westernmost parts of the Nansen Basin there are overlapping claims to seabed areas between Denmark (in respect of Greenland) and Norway (Svalbard). Only an agreement for the delimitation of maritime areas *within* 200 miles has been concluded and entered into force, on 2 February and 2 June 2006 respectively.<sup>35</sup> As stated in the preamble to that agreement, however, the parties intend to revert to the delimitation of the continental shelf beyond 200 miles when the outer limits have been established – north and/or south of the agreed delimitation boundary.<sup>36</sup>

### **The Loophole in the Barents Sea**

The Loophole is the central part of the Barents Sea, a shallow-water shelf area located north of mainland Norway and the Russian Federation. It is bounded in the north and west by the archipelagos of Franz Josef Land and Svalbard and in the east by Novaya Zemlya. The continental margin extends beyond 200 miles from the baselines of the two states. The seabed areas here are entirely enclosed by the exclusive economic zones (EEZs) of Norway and Russia, and of the fishery protection zone surrounding the Svalbard archipelago.

The Commission had previously considered and made recommendations related to the Loophole when it considered Russia's submission of 20 December 2001.<sup>37</sup> Norway, however, reminded the Commission in its submission that the recommendations of the Commission should be without prejudice to issues of bilateral delimitations between neighboring states and that the delimitation line would eventually represent the western boundary

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<sup>33</sup> See further McDorman, chapter 27 in this book.

<sup>34</sup> Summary of the recommendations, p. 16.

<sup>35</sup> See A.G. Oude Elferink, 'Maritime Delimitation between Denmark/Greenland and Norway', ODIL, Vol. 38, 2007, pp. 375–380.

<sup>36</sup> Text of the Agreement reprinted in *ibid.*, pp. 378–379.

<sup>37</sup> See UN doc. A/57/57/Add. 1, para. 39.

line of Russia's continental shelf, as well as the eastern boundary of Norway's continental shelf beyond 200 miles in the Barents Sea.<sup>38</sup>

Based on regional considerations and the technical and scientific information contained in Norway's submission, the Commission considered the Loophole to lie totally landward of any foot of the continental slope associated with the continental margins of Norway and Russia in the Barents Sea. Subsequently, the foot of the slope was deemed to lie *beyond* the Loophole, and the Commission had no need of further scientific documentation to support the conclusion set forth in the Norwegian submission. On this basis, the outer edge of the continental margin was considered to lie completely beyond the shelf area, so that the entire Loophole formed part of the submerged prolongation of the landmasses of mainland Norway and Svalbard, in accordance with Article 76(1) of the LOS Convention.<sup>39</sup>

With regard to the delineation of the outer limits of the continental shelf, taking especially into consideration the constraint criteria in Article 76(5) of the LOS Convention, the Commission agreed with Norway's application of 'the depth constraint' rule, according to which the entire Loophole is situated landward of the 2,500 meter isobath.<sup>40</sup> Accordingly, the entire area of the seabed and subsoil of the Barents Sea that lies beyond 200 miles from the baselines of Norway was considered by the Commission to be part of the continental margin. Norway was therefore under no compunction to delineate straight bridging lines between fixed points.<sup>41</sup>

Also in respect of the Loophole, the continental shelf area is subject to bilateral delimitation negotiations between Norway and Russia (see Figure 28.1).<sup>42</sup> In accordance with Article 84 of the LOS Convention, the Commission thus only advised Norway – acknowledging that both Norway and Russia share entitlement to (different parts of) the submarine areas in the Loophole – to deposit with the UN Secretary-General, upon entry into force of a maritime boundary delimitation agreement, a list of geographical coordinates of points showing the line of delimitation beyond 200 miles.<sup>43</sup>

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<sup>38</sup> Executive summary of the Norwegian submission, p. 12.

<sup>39</sup> Summary of the recommendations, p. 7.

<sup>40</sup> Meaning the line connecting the depth of 2500 meters; see Art. 76(5) of the LOS Convention.

<sup>41</sup> *Ibid.*, Art. 76(7).

<sup>42</sup> *Ibid.*, Art. 76(10). See also the executive summary of the Norwegian submission, p. 12.

<sup>43</sup> Summary of the recommendations, p. 9.

### **The Banana Hole in the Norwegian and Greenland Seas**

The Banana Hole is the submarine area in the Norwegian and Greenland Seas, enclosed in its entirety by the 200-mile EEZs off Iceland, Jan Mayen, the Faeroe Islands and Greenland in the south and west, and mainland Norway and the Svalbard archipelago in the north and east. Norway's continental margin in the Banana Hole is a prolongation of mainland Norway, Svalbard and Jan Mayen. The Norwegian submission identified two sub-areas with respect to the continental shelf beyond 200 miles in the Banana Hole: the Lofoten Basin (and the Greenland Sea), and the Norway Basin. The outer edge of the continental margin in respect of the former extends from mainland Norway into the Greenland Sea, partly overlapping the 200-mile fishery zone around Jan Mayen. The outer edge of the continental margin in the Norway Basin is marked by the submerged prolongations of the lands of mainland Norway and Jan Mayen.

The recommendations of the Commission in respect of the Banana Hole were made consistent with the dual-margin approach contained in the Norwegian submission. Numerous foot-of-the-continental-slope points were established by Norway to determine the foot of the slope in the Banana Hole area, predominantly associated with the continental margin of mainland Norway and Svalbard. The points with respect to the continental margin of Jan Mayen were located along the eastern flank of the Jan Mayen Micro-Continent and the Iceland Plateau. For the latter – in the southern part of the Banana Hole – the Commission agreed with Norway's delineation of the foot of the continental slope envelope, and that the slope-points should form the basis for the establishment of the outer edge of the continental margin. Initially, however, the Commission did not entirely agree with Norway's method of determining the foot of the continental slope in the northern Banana Hole. A series of exchanges between Norway and the subcommission followed, with Norway submitting five new points to replace those contained in the original submission and consistent with the approach used by Norway for determining the foot of the slope in the eastern part of the Western Nansen Basin. The Commission found the new points to fulfill the requirements of Article 76 of the Convention.<sup>44</sup>

The Commission agreed with the way Norway had established the outer edge of the continental margin in the Banana Hole area, applying the 60-mile-distance formula provided for in Article 76(4)(a)(ii) of the LOS Convention, in relation to both the continental margins of mainland Norway

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<sup>44</sup> In addition, also Chapter 5 of the Scientific and Technical Guidelines of the Commission; UN doc. CLCS/11.

and Svalbard and Jan Mayen. Based on Norway's submission, the application of the sediment thickness formula contained in Article 76(4)(a)(i) – associated with the continental margin of mainland Norway and Jan Mayen – also received the approval of the Commission and could therefore serve as the basis for delineating the outer limits of the continental shelf.<sup>45</sup>

To estimate the outer limits of the Norwegian continental shelf in the Banana Hole area, Norway used both distance and depth constraints, as provided for in Article 76(5) of the LOS Convention. The Commission in general agreed with the way Norway had combined these constraint criteria in order to establish the outer limits. Concerning the southernmost part of the Banana Hole, however, the Commission was of the opinion that between two fixed outer limits points a small triangular area constituting the submerged prolongation of the territory of Jan Mayen lay beyond the distance constraint line, and could not be said to be part of the Norwegian continental shelf on the basis of the depth-constraint criterion alone (see Figure 28.1). The Commission thus did not agree with Norway's use of the combined constraint line for a small part of the Banana Hole, and made its recommendations thereto.<sup>46</sup>

With regard to bilateral delimitation issues, also Iceland and Denmark/the Faeroe Islands are expected to document the extension of the continental shelf beyond 200 miles in the southern Banana Hole. In this area, however, the coastal states involved are in agreement on the delimitation of the continental shelf between them. An agreement was signed on 20 September 2006, stipulating the lines of delimitation between Iceland/Norway, the Faeroe Islands/Iceland and the Faeroe Islands/Norway respectively, based on the view that the whole area of the seabed beyond 200 miles in the southern Banana Hole consists of continuous continental shelf appertaining to any of the coastal states (see Figure 28.1).<sup>47</sup>

It is of course a possibility that a part of the seabed in the Banana Hole constitutes the seabed beyond the limits of national jurisdiction ('the Area') as defined in Article 1 of the LOS Convention. As mentioned above, a small fragment of the continental shelf contained in the Norwegian submission

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<sup>45</sup> Summary of the recommendations, pp. 23–30.

<sup>46</sup> Ibid.

<sup>47</sup> St.prp. nr. 43 (2008-2009) *Om samtykke til inngåelse av en avtale mellom Norge og Island av 3. november 2008 vedrørende grenseoverskridende hydrokarbonforekomster* [Proposition to the Storting No. 43 (2008-2009) *On consent to ratification of the Agreement between Norway and Iceland of 3 November 2008 relating to transboundary petroleum resources*], available at the webpage of the Ministry of Foreign Affairs of Norway, <[www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Propositions-to-the-Storting/2008-2009/stprp-nr-43-2008-2009-.html?id=547160](http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Propositions-to-the-Storting/2008-2009/stprp-nr-43-2008-2009-.html?id=547160)> (last accessed 31 July 2009).

was held to lie beyond the ‘outer continental shelf’ of Norway. It should be underlined, however, that the problem for Norway in this connection was not that this limited part of seabed did not constitute continental margin. According to the Commission’s recommendations, the problem was the maximum admissible extent of continental shelf beyond 200 miles to be in accordance with Article 76 of the Convention: i.e., that this part of the seabed lay beyond the distance constraint line and could not be confirmed as being part of the continental shelf of Norway by using the depth-constraint criteria provided for in paragraph 5 of that Article.<sup>48</sup>

The point to be made is the following: According to the ‘trilateral’ boundary delimitation agreement between Iceland, Norway and the Faeroe Islands in the southern Banana Hole, this part of the seabed is located far south of the maritime boundary drawn up between the latter two. Consequently – and recalling in particular that the Commission had affirmed this area was part of the submerged prolongation of the landmass of Jan Mayen<sup>49</sup> – it is more than likely that the Faeroe Islands will document in due time its continental shelf as covering that part of the seabed. This area would therefore most likely have formed part of the legal continental shelf of the Faeroe Islands anyway, and not Norway. In other words, the only way Norway could have been said to ‘lose’ this (or any smaller) part of the seabed in this area would have been if the delimitation line between Norway and the Faeroe Islands were to be stipulated somewhere in the vicinity of the 200-mile limit of the latter (see Figure 28.1). This is clearly not the case, and is probably the reason why this issue seems to have been of no particular concern to Norway in the aftermath of having received the Commission’s recommendations.

#### INTERESTS AND REACTIONS OF OTHER STATES: PENDING MARITIME DELIMITATIONS AND DISPUTED MARINE AREAS

For each of the three seabed areas into which Norway’s continental shelf extends beyond 200 miles and for which the outer limits are currently being established under the Article 76 of the LOS Convention, other states may have potential interests. None of these have indicated – prior to, in connection with or following the adoption of recommendations – any objections, either to Norway or to the Commission. On the occasion of Norway’s submission, certain states did react, but only diplomatically noting that some of the areas under consideration by the Commission were or could become the object of claims from neighboring states, referring in particular to unre-

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<sup>48</sup> Summary of the recommendations, p. 29.

<sup>49</sup> Ibid.

solved maritime borders and that the outer limits in the end might depend on delimitation between states.<sup>50</sup>

There are several reasons for states to prefer such an approach. First, from a legal viewpoint, the disputes in question are well known. For several decades, Norway and Russia have pursued negotiations to settle the borders of their continental shelves (and EEZs/fishery protection zone around Svalbard) in the Barents Sea and northwards towards the Arctic Ocean.<sup>51</sup> Moreover, states in general appear to have a greater understanding of the meaning of the detailed rules of Article 76 of the LOS Convention and, it follows, the limited mandate enjoyed by the Commission in light of the Convention's provisions. Assessments of the physical properties of a continental margin are not to be understood in legal terms as delimiting the continental shelf between neighboring states. That the time-limits for making a submission to the Commission are close to expiry long before many states have settled the boundaries of their shelf areas toward neighboring states, was hardly uppermost in the mind of the drafters of the LOS Convention in the 1970s. But as Article 76 of the Convention and the Commission's own Rules of Procedure make clear, the establishment of outer limits of the continental shelf beyond 200 miles is not to affect (often delicate) issues of delimitation of maritime spaces. Quite the contrary: the rules of the LOS Convention provide the legal basis for extending the continental shelves to the maximum permitted breadth, so that once the 'global acceptance' to those is given on the basis of international law, states can proceed to tackle unresolved delimitation issues.

Another factor to attract widespread attention in Norway – clearly with a substantial effect on policy making – is the status of the seabed areas adjacent to the Svalbard archipelago. The interpretation of the Svalbard Treaty<sup>52</sup> and clarification of its scope – not least as regards the legal status of the seabed and extraterritorial waters around the archipelago – are problematic. A detailed analysis of these complex political and legal issues will not be pursued here, apart from mentioning the crux of the dispute: the geographical scope of the Treaty. According to the Svalbard Treaty, nationals of the parties shall enjoy equal rights with regard to specific activities, such as fishing, hunting, or mining.<sup>53</sup> In its wording, the Treaty applies only to the terri-

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<sup>50</sup> Reactions in respect of the submission made by Norway were made by Denmark, Iceland, the Russian Federation and Spain; all available at the DOALOS webpage, <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)> (last accessed 31 July 2009).

<sup>51</sup> See further R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas – The Case of the Barents Sea* (London: Routledge, 1992), pp. 54–89.

<sup>52</sup> Treaty concerning the Archipelago of Spitsbergen, done in Paris 9 February 1920; text in LNTS, Vol. 2, p. 7 (Svalbard Treaty).

<sup>53</sup> Arts. 2 and 3 of the Svalbard Treaty.

tory of Svalbard (and islands mentioned in Article 1) and, in certain cases, territorial waters. The continental shelf and the EEZ, as a legal institution, emerged only after the Svalbard Treaty was negotiated and entered in force in the 1920s. Understandably, the Treaty contains no explicit provisions addressing these matters.

The question has therefore arisen as to whether Norway may claim sovereign rights to the marine resources in the waters beyond the territorial sea and on the continental shelf surrounding the archipelago as provided for by the law of the sea, or whether the Treaty's equal rights provisions should apply in that respect as well. Norway claims that the Treaty's equal treatment provisions do not apply on the continental shelf or adjacent waters beyond the territorial sea. It is argued that one cannot apply the Svalbard Treaty's provisions on the assumption that the states would have widened the scope of application to the continental shelf and the adjacent waters, had they been aware of these legal arrangements in 1920; and that Norwegian sovereignty is to apply when the Treaty does not contain limitations.<sup>54</sup> For the continental shelf, moreover, Norway claims sovereign rights as derived from its sovereignty over mainland Norway, of which the shelf is a continuous prolongation.<sup>55</sup>

It could also be argued that Norwegian jurisdiction over the continental shelf should respect the limitations that follow from the Treaty, one being that nationals of the parties 'may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality'.<sup>56</sup> However, the question is not about Norway's jurisdiction *per se*, but *how* this jurisdiction should be practiced – with or without the substantive limitations that follow from the Treaty.

Some legal writers have framed their arguments differently, appearing indeed to assume that the waters and shelf surrounding Svalbard should be regarded as high seas (and, presumably, that the seabed is a part of 'the Area' under the LOS Convention). In such a line of argument, fishery and oil extraction, for instance, are subject solely to the authority of the flag state.<sup>57</sup> This view is highly problematic. 'Svalbard' is not a 'coastal state' in its own

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<sup>54</sup> St.meld. nr. 40 (1985-86) *Svalbard* [Report to the Storting No. 40 (1985-86) *Svalbard*], p. 9.

<sup>55</sup> See in particular C.A. Fleischer, 'Oil and Svalbard', *Nordic Journal of International Law*, Vol. 45, 1976, pp. 7–13; and C.A. Fleischer, 'The Northern Waters and the New Maritime Zones', *German Yearbook of International Law*, Vol. 22, 1979, pp. 100–118.

<sup>56</sup> See Art. 3 of the Svalbard Treaty. For a comprehensive analysis following this line of argument, see G. Ulfstein, *The Svalbard Treaty – From Terra Nullius to Norwegian Sovereignty* (Oslo: Scandinavian University Press, 1995), pp. 421–441.

<sup>57</sup> A.N. Vylegzhanin and V.K. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas* (Utrecht: Eleven International, 2007), p. 57.

right: it is a part of Norway. And there is nothing – either in the Svalbard Treaty or the provisions of the law of the sea – to indicate a ban against establishing maritime zones around the archipelago.<sup>58</sup>

The issue concerning Svalbard's adjacent waters and ocean floor is clearly not a 'geological' one and does not primarily concern the determination of the outer limits of the continental shelf beyond 200 miles. When treating the continental shelf surrounding the Svalbard archipelago as *sui generis* – demarcated by maritime boundaries towards adjacent zones of its neighboring territories or by the so-called 'Svalbard box'<sup>59</sup> – this is generally not in the sense that there exist physical features at the bottom of the sea that preclude application of the term 'natural prolongation', as contained in Article 76(1) of the LOS Convention, which indeed reflects a consolidated international law on the continental shelf.<sup>60</sup> Thus, when Norway in 2006 made its submission to the Commission, only two states – Russia and Spain – pointed to the problem with regard to the Svalbard Treaty. Neither, however, made any objection to the Commission issuing recommendations thereto.<sup>61</sup>

Be it as it may, setting the outer limits of the shelf could be said to impinge on at least one aspect of the problem regarding the seabed areas around Svalbard. If one accepts the view that Norway has no form of jurisdiction over the shelf on which Svalbard lies, the issue would seem obvious: Can implementation of the formula contained in Article 76 of the Convention be interpreted as a recognition by other states that Norway has established a right to a continental shelf around the archipelago, the only substantive constraints to which would flow from the Svalbard Treaty?

The Commission has affirmed the existence of a continental shelf around Svalbard in a geological sense, while also recognizing the legal entitlement of Norway to delineate the continental shelf beyond 200 miles in this area.<sup>62</sup> Should any state seek to claim that the seabed area around Svalbard is 'void of authority', it would be logical to ask that state why it had not brought its concerns to the attention of Norway in accordance with the procedure provided for under Article 76 of the LOS Convention. Just as Norway's jurisdiction over the seabed is not conditional on other states' acceptance or recognition – but on sovereignty over a territory – there cannot be a duty on other states to reserve their understanding, either in relation to Norway's right to claim the outer continental shelf or the scope of Norwegian jurisdic-

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<sup>58</sup> Churchill and Ulfstein, *Marine Management in Disputed Areas*, pp. 39–40.

<sup>59</sup> *Ibid.*, pp. 32–33.

<sup>60</sup> *Ibid.*, pp. 40–41.

<sup>61</sup> Reactions available at the DOALOS webpage, <[www.un.org/Depts/los/index.htm](http://www.un.org/Depts/los/index.htm)>.

<sup>62</sup> Summary of the recommendations, p. 11.

tion. Reactions, or rather their absence, may nonetheless be symptomatic of what most observers see as the crux of the issue regarding the shelf around Svalbard: Norway's *jurisdiction* as such is not contested – it is how that jurisdiction should be *practiced* within the areas now are on verge of being defined as part of Norway's continental shelf. This does not determine whether Norway's jurisdiction should be subject to the rules set out in the Svalbard Treaty or not. Yet it does indicate a dilemma when claims are made to the effect that the seabed around the archipelago – including submarine areas beyond the 200-mile zone – cannot under any circumstances be subject to Norwegian jurisdiction. Such reasoning in particular appears to disregard the development of international law to its present stage and the well-established rules concerning coastal state rights to adjacent maritime zones. The common appreciation of the need to create effective national regulatory mechanisms has brought enormous areas of seabed, previously under the high seas regime, to national jurisdiction of coastal states. The failure of the concept of exclusive flag-state jurisdiction in meeting the challenges faced was among the concerns which propelled the work on a new international legal order that today covers the world's oceans – including the Arctic.

#### CONCLUDING REMARKS

In light of the recommendations by the Commission issued on the submission by Norway, it now remains to incorporate the outer limits of the related segment of the Norwegian continental shelf into domestic law. The outer continental shelf limits of Norway will, it is assumed, be codified in the form of a regulation issued pursuant to Act No. 72 of 29 November 1996 relating to petroleum activities,<sup>63</sup> possibly not before negotiations on the delimitation of the respective seabed areas concerning the continental shelf beyond the 200 mile-limit have been concluded. Only then will the limits achieve 'final and binding' legal force, as provided for under Article 76(8) of the LOS Convention. For Norway, it will be important to follow closely the recommendations that the CLCS issues to other states – not least in the Nansen Basin, where Norway's shelf extends into that of Russia; and in the southernmost part of the Banana Hole, where the Faeroe Islands and Iceland can document the continental shelf extending beyond the 200-mile limit.

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<sup>63</sup> Text in H. Flock and B. Stuevold Lassen (eds), *Norges Lov (1687–2006)* (Mikkeli: St. Michel Print Oy, 2007), pp. 2096–2112.

