SOLVING THE RIDGES ENIGMA OF ARTICLE 76 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Written by: George Taft
Presented by: George Taft

(The views contained herein are those of the author and do note necessarily represent the views of the United States.)

Biography: George Taft, Attorney, U.S. Department of State. He was formerly Director of the Department's Office of the Law of the Sea Negotiations and Member of the U.S. delegation to the Third U.N. Conference on the Law of the Sea. Amongst other current responsibilities, he advises the Department on the law and policy regarding the continental shelf. He was a contributing author to, and a member of the Editorial Board of, "Continental Shelf Limits – The Scientific and Legal Interface," Oxford University Press. B.A. Economics, University of Michigan; JD, Georgetown University Law Center; LL.M., University College London.

Abstract: The 1982 Law of the Sea Convention provides a complex, but workable, approach for determining the outer limit of the continental shelf of a coastal State where it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The continental shelf does not include the deep ocean floor with its oceanic ridges or the subsoil thereof beyond 200 nautical miles. Submarine ridges, undefined, but which are not submarine elevations that are natural components of the continental margins, are limited to 350 nautical miles from such baselines (article 76, paragraph 6). However, it is problematic whether the submarine ridge provision has any

applicability. Indeed, there is no general understanding that it applies anywhere in particular. In any event, it does not apply to that which is an oceanic ridge, over which coastal State rights cannot extend beyond 200 nautical miles under any circumstances. The legal framework of the Convention must not be breached. The deep seabed must not be arrogated by a very few coastal States to themselves. That was not the intent of the drafters of the Convention; that is not the meaning of the words of the Convention; that is not in the interest of the common heritage of mankind; and that is not in the interest of international stability in the oceans. The submarine ridges provision must not be the wedge of the very few to undermine the legal, political and economic interests of the overwhelming majority of both developing and developed nations. Indeed, the integrity of the geographical scope of the Area beyond national jurisdiction is at stake.

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The Third United Nations Conference on the Law of the Sea convened in 1973, after several years of preparatory work. It sought, inter alia, to arrest and reverse movement towards excessive territorial sea and resource claims and to agree on the outer limits and the particulars of the regimes therein. It sought to establish a regime of resource exploration and exploitation of the seabed and subsoil beyond the limits of the continental shelf. It necessarily sought an agreed formula to establish the outer limit of the continental shelf of a coastal State. It sought to do more. It sought essentially to codify and develop the international law of the oceans.

The Conference sought to ensure a creative balance to satisfy, in broad stroke, the interests of coastal States and landlocked and geographically disadvantaged States,

developed and developing States, powerful and less powerful States, as well as those States with excessive claims and those with claims of a more cautious, if not traditional, nature.

The resulting 1982 Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of that Convention accommodate most States of all persuasions. Even when the United States objected to the deep seabed mining regime of the Convention, it did not object to the geographical scope of the so-called Area, the deep seabed beyond the continental shelf. It did not seek to diminish the area of the Area. The continental shelf as codified and developed in the Convention did not, does not and cannot include the Area, or any significant part thereof.

The 1958 Geneva Convention on the Continental Shelf recognized the continental shelf as the natural prolongation of the land territory adjacent to the territorial sea where the depth of water admitted of exploitation of the resources thereof. That formulation was adequate for a time, but was not sufficient to define the boundary between coastal State resource jurisdiction on the continental shelf and the resource authority of the International Seabed Authority. Greater precision, stability of expectations and finality were needed.

Article 76 of the Convention provides a definition of the continental shelf which expressly recognizes that the coastal State's continental shelf extends to, and includes, the continental margin to a defined outer limit where it extends beyond 200 nautical miles

from the baselines from which the breadth of the territorial sea is measured in accordance with international law. The formulation, while complex, is workable. It is scientifically based, legally defensible and politically acceptable. The science must be applied within the strict legal framework of the Convention. The science applied cannot extend beyond that legal framework. While scientists and lawyers might individually have preferred a different formulation, they must, nevertheless, as a matter of law, professional ethics and common sense work within the framework given. Otherwise they defy, amongst other things, the rule of law, a most fundamental tenet of civilization.

The ridges enigma must be considered strictly within the legal framework. In this regard, the fundamental aspect of the definition of the continental shelf is provided in paragraphs one and three of Article 76, to wit:

> 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 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.
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> 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of

> the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. (Emphasis added.)

Paragraphs 1 and 3 provide the central aspects of the framework. Together, with other provisions, the Convention provides unequivocally that the continental shelf comprises the natural prolongation of the coastal States land territory to the outer edge of the continental margin where it extends beyond 200 nautical miles and in all events, save boundaries between opposite and adjacent States, to 200 nautical miles; the continental margin consists of the seabed and subsoil of the shelf, the slope and the rise; it does not include the deep ocean floor with its oceanic ridges or the subsoil thereof; and the same rules apply to islands, in the same way, and not with any dispensation, as continental land masses.

Treaties are interpreted by reference to the plain meaning of the words, in context, and considering the object and purpose of the agreement. Customary international law is clear in this regard. Thus, in approaching the text of Article 76, one must consider what was the continental shelf as understood. Clearly, the continental shelf had a generally understood meaning, both legally and scientifically. First, and foremost, it is continental in origin. It is not oceanic in character. If one considers the 30 to 40 States with potential continental shelf entitlements beyond 200 nautical miles, as considered by the Conference, those States' continental shelves seemed to meet the requirements distinguishing continental from oceanic characteristics. Thus, for example, the mid-oceanic ridge system is essentially oceanic and part of the deep seabed, notwithstanding

its proximity to certain islands. The islands continental shelf entitlement in such cases cannot extend beyond 200 nautical miles.

Paragraph 4 of Article 76 further refines and limits the outer limit of the continental shelf. It provides the sediment thickness test, i.e., by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental shelf. Alternatively, it provides for reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

Paragraph 5 of Article 76 provides further refinement that the fixed points referred to in paragraph 4 shall not exceed 350 nautical miles from the baselines or shall not exceed 100 nautical miles from the 2500 meter isobath. Thus, paragraphs 4 and 5, in turn, limit paragraphs 1 and 3. Amongst other things, all the paragraphs mentioned, and indeed every paragraph of Article 76, exclude from their sweep the deep ocean floor with its oceanic ridges.

However, paragraph 6 is an enigma which must be addressed as a legal question. It provides:

> 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is

> measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

Paragraph 6 qualifies paragraph 5. It does not qualify paragraphs 1, 3 or 4. Thus, it does not provide an exception to the exclusion of the deep ocean floor with its oceanic ridges from coastal State sovereign rights. It does not provide an exception to the inclusion of submarine elevations that are natural components of the continental margin as subject to coastal State sovereign rights. However, it does not define the "submarine ridges" to which it refers. As oceanic ridges cannot, as a matter of law, be covered by the term, and as continental margin components are not included and are therefore not limited by paragraph 6, the first sentence may either have no applicability or perhaps there are ridges that are neither oceanic nor continental in character.

At the Conference, clearly there was no general understanding that the first sentence of paragraph 6 had any particular application. While lawyers may quibble about its theoretical applicability, there was no understanding of its practical impact, if any. At the time of its inclusion, there was no agreement on the existence of a ridge which was neither oceanic nor continental in character. Indeed, while it was recognized that a ridge might have mixed lineage, there was no recognition or acceptance of the applicability of paragraph 6 to such ridges.

It is true that one State seemed to assert that part of the deep seabed appertained to it in light of its oceanic character. However, there is no legal support for that assertion. If, for example, an island State asserts that it is oceanic in nature, that its natural prolongation is similar in nature, and that it is entitled to a continental shelf to 350 nautical miles under paragraph 6, the answer must be that such an analysis is legally flawed. First, the text is clear that the continental shelf does not include oceanic ridges, regardless of the geological makeup of the land territory. Second, an oceanic ridge of the deep ocean floor does not become something else when it merely crosses the 350 nautical mile limit, i.e., it is at 300 or 350 nautical miles, what it is at 400 nautical miles. Third, an oceanic ridge of the deep ocean floor does not change its character, as a matter of law or geology, because it is linked to land. Thus, in analyzing paragraph 6, one must proceed from the land seaward and from the sea landward; and one must look at the geology of the ridge, including but not limited to geomorphology.

It is thus clear that paragraph 6 has no known applicability and in any event cannot apply to oceanic ridges of the deep seabed, including but not limited to the mid-oceanic ridge system. Any other conclusion is legally unsound, scientifically suspect and politically explosive.

Fortunately, only a very small number of States have claimed or are openly considering claiming oceanic ridges of the deep seabed beyond 200 nautical miles as subject to their sovereign rights. These States may be found in five of the six permanently inhabited continents, only one of which is in the western hemisphere.

The political backlash looms ahead. State Parties to the Convention with a continental shelf beyond 200 nautical miles are obligated to submit information on such limits to the Commission on the Limits of the Continental Shelf established by the Convention. The Commission is mandated to make recommendations to the coastal State on matters related to the establishment of the outer limits of their continental shelf. The limits of the continental shelf established by a coastal State on the basis of these recommendations are final and binding.

If and when a coastal State makes a submission to the Commission, the fact of submission and proposed outer limit are publicized in accordance with the Commission's rules of procedures. The information thus made public should be significant and meaningful. Should a State make a submission that includes an oceanic ridge referred to in paragraph 3, or a submarine ridge referred to in paragraph 6, it can expect diplomatic or other protests and public queries. Indeed, even before any submissions have been made to the Commission, at least two ridge assertions have been protested. The matter can be expected to be raised in various international fora. Hopefully any such controversy will be confined to ridges and not raise questions about the essence of the continental shelf regime.

The Commission itself is comprised of experts in geology, geophysics or hydrography. The members are required to be scientific experts, not lawyers. They must be cautious in

addressing the question of ridges. They must not substitute their personal judgments on legal and political matters. They should reject unfounded assertions as detailed above.

Indeed, in all situations, the Commission should not make a recommendation that is outside the limits of generally accepted science. The Commission may, within its competence, state that more research and general discussion should occur before it will make a recommendation with the requisite confidence to the coastal State, recognizing its direct impact on the international community.

A coastal State may act in a manner that does not prejudice its interests, as it may perceive them. No State Party to the Convention need make a submission prior to May 2009. That date springs from the decision of the May 2001 Meeting of States Parties. Moreover, as a matter of law, a State Party may, before or after that date, make a submission for only part of its continental shelf without prejudice to making a subsequent submission or submissions regarding the remainder of its extended continental shelf. A coastal State may make a partial submission, for example, when there is a lack of consensus on the evaluation of certain data. In this latter regard, scientists know now much more about the geology of the continental shelf than they knew when Article 76 was negotiated. No doubt much more will be known in the years ahead. To the extent exploitation of the Area in close proximity to the outer limit of the continental shelf is not imminent, no prejudice or instability will result by a delay.

The Convention was negotiated to foster stability in ocean space. As stated heretofore, perhaps 30 to 40 States have a continental shelf beyond 200 nautical miles. Realistic expectations are a necessity. The balance of the Convention should not be buffeted or put at serious risk by actions which are outside its legal framework and which cannot be confined to narrow issues.

The legal framework of the Convention must not be breached. The deep seabed must not be arrogated by a very few coastal States to themselves under the guise of the continental shelf definition. That was not the intent of the drafters of the Convention; that is not the meaning of the words of the Convention; that is not in the interest of the common heritage of mankind; and that is not in the interest of international stability in the oceans. The submarine ridges provision must not be the wedge of the very few to undermine the legal, political and economic interests of the overwhelming majority of both developing and developed States. The developing States were so influential in ensuring that the deep seabed regime was an integral part of the Convention. For a very few coastal States to attempt to include tens of thousands of square miles of the deep seabed in their continental shelf submissions is not justifiable. Indeed, the integrity of the geographical scope of the Area beyond national jurisdiction is at stake.