Some Views Are More Equal Than Others: Submissions to the Commission on the Limits of the Continental Shelf and the Strange Loss of Confidence in Article IV of The Antarctic Treaty

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I. Introduction

The genius of the Antarctic Treaty[1] in general and its Article IV, paragraph 2 in particular is to have put all disputes over territorial claims in Antarctica aside, without solving them, for 50 years now, to the great benefit of the human race by enabling cooperation in scientific and other fields to proceed unhindered by competition over sovereignty. The first sentence of this paragraph is the famous agreement to disagree:

> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica.

This means that all three views of territorial sovereignty in Antarctica — that the continent is: (a) claimable like any other territory elsewhere in the world and most of it, other than the unclaimed sector, has been successfully claimed (subject to resolution of the three claims that overlap) by one or more of Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom; (b) claimable in theory, but none of the claims to date satisfy the international law rules on acquisition of territory; (c) not claimable because the Antarctic has a special status of some kind, such as a global commons — are to be taken as equally valid under the Treaty. The consequence is that, for as long as the treaty remains in force, an attempt by any party to impose its views on other parties will be condemned in advance to failure. Another way of putting it is to say that Article IV, paragraph 2 makes the entry into force of the Treaty in 1961 the latest possible critical date should the underlying dispute[2] about sovereignty ever re-emerge and

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1 (1 December 1959); 402 UNTS 71.

2 In his pre-academic life the author came across an entrenched belief in certain quarters in the Australian Government that Australia's claim is 'undisputed' because there is no

need to be resolved — even though, paradoxically, the mutual accommodation of the various views depends on its remaining unresolved.[3]

While this much is generally agreed, it should also be noted that, in terms of what actually happens on the ground in Antarctica, the practical position is that only the seven claimant States are obliged to act differently under the Treaty from the way their view as territorial sovereigns would normally dictate. The comings and goings by foreign nationals to bases of other States in the various claimed sectors, and of course the scientific activities in between, take place without so much as a by-your-leave — something that is not even remotely imaginable on any other part of the claimants' territory. But this is the result of Article II and paragraph 1 of Article VIII of the Treaty,[4] not of anything in Article IV. The same applies to the freedom of inspection under Article VII of the treaty. Thus in a sense it is the seven claimant States that will come off worst if, as may be beginning to happen, they lose sight of the fact that the first sentence of Article IV, paragraph 2 does not require that claimants refrain from actions of other kinds that territorial sovereigns would normally be expected to take. Rather, its effect is merely that, when they take such actions, this will automatically be without prejudice to the position of other States adopting a different view.

One such expected action is the making of a submission to the Commission on the Limits of the Continental Shelf[5] (CLCS or Commission) under Article 76 of

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competing claim to it. But the situation clearly falls within the ordinary international law definition of 'dispute' in the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 328: for a dispute to exist '[i]t must be shown that the claim of one party [i.e. either legal proposition (b) or (c) as above] is positively opposed by the other' [as any claimant *ex hypothesi* must oppose it with legal proposition (a)]. No possible basis for the belief remains now that the Netherlands has explicitly referred to the 'dispute' between itself and Australia in this regard (in its Note cited below n 12). For the reason given at the very beginning of this article, no tears need be shed for the heresy.

3 The author is indebted for this point to an observation by James Crawford at the June 2009 Cumberland Lodge conference 'The Antarctic Treaty: 50 More Years of Preserving Peace?': see generally the report at <http://www.cumberlandlodge.ac.uk/Resources/Cumberland%20Lodge/Past%20Conferences%20Reports/Antarctic%20Treaty%20Summary%20Report%20July09.pdf> at 10 August 2009.

4 These provide respectively that 'Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.'; and 'In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under subparagraph 1(b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.'

5 The Executive Summary of Australia's submission may be viewed at <http://www.un.org/depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_web_delivery.pdf> at 4 June 2009 ('Australian Executive Summary').

the United Nations Convention on the Law of the Sea[6] (UNCLOS) where the configuration of the physical continental shelf extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured warrants this. By Article 4 of Annex II to UNCLOS, coastal States have ten years from the entry into force of UNCLOS for them to make a submission to the CLCS on where the outer limit beyond 200 miles should lie. Established by Article 1 of the same Annex, the CLCS is a technical body comprising geologists, geophysicists and hydrographers.[7] Its role is to examine the scientific and technical soundness of the submissions received by it and make any corrective recommendations it considers necessary in this regard. This serves to reassure other States that the submitting State does not obtain more continental shelf than is its entitlement, which under the complex rules of Article 76 extends roughly as far as the boundary between continental crust and oceanic crust. For present purposes, the details of the Article 76 formulae are less significant than their overall intended effect, which is to provide a definitive boundary between the continental shelf under the jurisdiction of the coastal States and the deep seabed beyond, where mineral resources come under an internationalised regime supervised by the International Seabed Authority (ISA), as set out in Part XI of UNCLOS and the subsequent implementing agreement.[8] In turn, by paragraph 8 of Article 76,

> 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 set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

As the first by any of the seven claimants to territory in Antarctica, Australia's November 2004 submission to the CLCS attracted attention for both including a region of prolongation of the landmass of the Australian Antarctic Territory (AAT) beyond 200 nautical miles from the territorial sea baseline,[9] and a request to the Commission not to consider that part of the submission "for the time being".[10] Although the request has attracted the admiration of some observers as an imaginative political and legal balancing act[11] and seems to have had the desired

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6 (10 December 1982); 1833 UNTS 3.

7 See art 2(1) of annex II to UNCLOS, above n 6.

8 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (28 July 1994); 1836 UNTS 3.

9 See the Australian Executive Summary, above n 5, 1–13.

10 See the Note accompanying the Australian submission, available online at <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf> at 4 June 2009. More precisely the request was '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'.

11 J Jabour, 'High Latitude Diplomacy: Australia's Antarctic Extended Continental

political effect by defusing the potential controversy,[12] this article argues that it comes at a cost to claimants' legal interests, as they would end up getting the worst of both UNCLOS and Antarctic Treaty worlds. Under UNCLOS, failure to make submissions or pursue them to the stage of recommendations received will at best deprive them of the benefit of a settled outer limit of the shelves off their claimed territories that is binding on States that accept their claims, and at worst on one interpretation could mean that any entitlement to a continental shelf extending beyond 200 nautical miles is lost.[13] Under the Antarctic Treaty the credibility of their claims will be damaged inasmuch as they will have treated their claimed Antarctic territories differently from the remainder of their territory in a context where the Treaty does not require this — not perhaps a cause for great worry now, but one whose repercussions for their claims could become much more serious were the Treaty ever to be terminated.

II. Antarctica in the Claimants' Submissions

Australia is not alone in what it has done. Norway made a submission on 4 May 2009 in respect of Dronning Maud Land along with a request identical in substance to Australia's,[14] while New Zealand's April 2006 submission did not include any

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Shelf' (2006) 30 *Marine Policy* 197 and, by the same author after the CLCS recommendations became known, 'The Australian Continental Shelf: Has Australia's High-latitude Diplomacy Paid Off?' (2009) 33 *Marine Policy* 429, 429, where the request is described as a 'masterstroke'.

12 Several States lodged diplomatic Notes with the Secretariat in response to this aspect of the Australian submission — in chronological order the United States <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_usatext.pdf>, Russia <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_russiantext.pdf>, Japan <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_jap.pdf>, the Netherlands <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_nl.pdf>, Germany <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_deu.pdf> and India <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_ind.pdf> all at 4 June 2009 — a majority of them expressly appreciative of Australia's gesture.

13 The better view, however, is that in these circumstances the fundamental entitlement to a shelf granted by art 77 of UNCLOS is not lost. A non-submitting State's sovereign rights over that part of the continental shelf beyond 200 nautical miles from its baselines 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. See conclusions nos 1 and 15 in the Second Report of the International Law Association Committee on Legal Issues of the Outer Continental Shelf, 2 and 19-20 respectively <http://www.ila-hq.org/download.cfm/docid/435A6BA1-4F85-47B3-9ED23A6F64924414> at 28 September 2009.

14 The executive summary is available online at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor_30_2009.executivesummary.pdf> and the accompanying Note at <http://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/nor2009_note.pdf> both at 4 June 2009. Only two States have so far lodged Notes equivalent to those cited above n 12 in response to Australia's submission: the US

information in respect of the Ross Dependency, but was described in an accompanying diplomatic Note 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…".[15] The United Kingdom appended a similar Note to its partial submission of May 2008 relating to Ascension Island,[16] as did France to its partial submission of February 2009 relating to *inter alia* the Iles Kerguelen.[17] In May 2009 Chile submitted preliminary information on its outer limit[18] including off its claimed sector of Antarctica, but included in this a

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<http://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/usa_re_nor_2009.pdf> and Russia <http://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/rus_15jun09_e.pdf> both at 21 August 2009.

15 The executive summary is available online at <http://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_exec_sum.pdf> and the accompanying Note at <http://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_doc_es_attachment.pdf> both at 4 June 2009. The idea of the partial submission rests on art 3 of annex I to the CLCS's Rules of Procedure (Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN doc CLCS/40/Rev.1 (2008)), but see below n 54.

16 See the UK executive summary and Note on the CLCS website at <http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/ascension_executive_summary.pdf> and <http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_nv_9may2008.pdf> respectively, both at 5 June 2009. Though nothing turns on the point, it is not clear why the UK chose to make this statement in its partial submission for Ascension Island and not in that for the Falkland Islands, South Georgia and the South Sandwich Islands (for which the executive summary is at <http://www.un.org/Depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf> at 10 August 2009), as the claimed sector is much closer to the latter.

17 The French executive summary and Note may be seen on the CLCS website at <http://www.un.org/Depts/los/clcs_new/submissions_files/fra09/fra_resume_2009.pdf> and <http://www.un.org/Depts/los/clcs_new/submissions_files/fra09/fra_note_feb2009.pdf> respectively both at 4 June 2009. France is in the distinctive position of being able to rely on an existing submission by its neighbour Australia with almost nothing to gain from a submission of its own in respect of Terre Adélie. This is because the outer limit submitted by Australia, which claims the two sectors adjacent to Terre Adélie, goes all the way across an area of potential delimitation being the latter's ocean frontage (with France's blessing: see Australian Executive Summary, above n 5, 11). Australia's outer limit here is formed by the 350–nautical-mile constraint line, measured from Australia's baseline on either side of the gap in it left for Terre Adélie between 136°E and 142°E, so presumably the same constraint line measured from the baseline of Terre Adélie itself, which has no marked landward concavity, might extend a mile or two further seaward but no more. Argentina, whose Antarctic claim is entirely overlapped by the UK's, could in theory also have relied on a submission by the latter, but has chosen a different course of action: see below n 20.

18 Pursuant to Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a), UN doc SPLOS/183 (2008), by which, for the reasons given in the document's title, the 2008 meeting of the States Parties to UNCLOS relaxed the substance of the requirement to make any submission within ten years of the entry into force of UNCLOS for the State

statement in the (by now) familiar language of other claimants and indicating that Chile had not yet decided whether to proceed to make a submission in respect of this area.[19] That leaves Argentina, which in April 2009 made a submission drawing no distinction between the shelf generated by its claimed sector of Antarctica, its undisputed mainland territory and the various islands in dispute with the United Kingdom.[20] There is a diplomatic Note echoing some of the words of those other claimants including the importance of continued stability under the Antarctic Treaty — but, crucially, it omits the request to the Commission not to take action for the time being in relation to the part of the outer limit generated by the Antarctic continent.[21] This, with one important caveat described below,[22] is in the author's view the correct approach. It remains so despite what may be called the United Kingdom's counter-request to the Commission of August 2009

> [C]onsistent with the approach taken by the United Kingdom and other parties to the Antarctic Treaty, the United Kingdom expects that the Commission will not, for the time being, take any action on that portion of the Argentine submission relating to areas…appurtenant to Antarctica…[23]

and communications in similar vein from the United States and the Russian Federation, which are not claimant States, but ones that take view (b) above and whose basis for future claims of their own is accordingly preserved by Article IV, paragraph 1(b) of the Antarctic Treaty:[24]

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concerned, by accepting that it 'may be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission': at [1(a)].

19 *Información Preliminar de la Plataforma Continental de Chile*, available online at <http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chl2009informepreliminar.pdf> at 4 June 2009, 18.

20 The executive summary is available online at <http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_esp.pdf> at 4 June 2009.

21 Available online at <http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg_nota_2009esp.pdf> at 4 June 2009.

22 See below n 44 and accompanying text.

23 Note No 84/09 dated 6 August 2009 from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the United Nations, 2-3, available online under the Argentine submission at <http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/clcs_45_2009_los_gbr.pdf> at 12 August 2009. In contrast to other Antarctic Treaty parties (with the possible future exception of Chile), the UK may have felt the need to take this step because the Argentine submission made no mention of the overlapping claims to the relevant part of the Antarctic coastline. See also below n 48.

24 The paragraph reads, so far as material:

> 1. Nothing contained in the present Treaty shall be interpreted as:
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> …(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise[.]

> The United States understands that the Commission will not take any action on that portion of Argentina's submission relating to areas of the seabed and subsoil adjacent to Antarctica.[25]
>
> [T]he Russian Federation expects that the Commission…will not take any action with respect to the section of the…submission by the Republic of Argentina that pertains to the seabed (continental shelf) and subsoil of the areas adjacent to the continent of Antarctica.[26]

Argentina had at the time of writing not yet responded to any of these Notes.

The contrast between submitting States' treatment of overlaps of the continental shelves beyond 200 nautical miles generated from different landmasses, one of which is the Antarctic continent, is also instructive. This is not an issue for Norway, since there is no overlap between the continental shelf off Dronning Maud Land and that generated by Bouvetøya.[27] Argentina's continental shelf as enclosed by the submitted outer limit is represented as a single contiguous area, an amalgam of the three overlapping but separate areas generated by the South American continent, the claimed insular territories and the claimed sector of Antarctica. By contrast, Australia's submission plays it both ways. In the text, even though no mention is made in words of the fact that the Kerguelen Plateau and AAT regions overlap, from the overall map[28] it is clear that the continental shelf generated by Heard Island and the McDonald Islands in the Kerguelen Plateau region overlaps with that generated by the AAT, and a single combined outer limit is depicted. On the other hand, the individual maps of the two regions[29] show only the area attributable to each landmass, with different outer limits, parts of which lie landward of the (undepicted) outer limit of the other region.[30]

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25 Unnumbered Note dated 19 August 2009 from the Permanent Mission of the United States of America to the Secretariat of the United Nations, available online under the Argentine submission at <http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/usa_re_arg.pdf> at 21 August 2009. By contrast with the UK's Note cited ibid, the US communication is not framed in terms of a request, but how it has come to this understanding, and with whom, is not made clear.

26 Translation by the Secretariat of Note No 2282/N dated 24 August 2009 from the Permanent Mission of the Russian Federation to the United Nations to the Secretary-General of the United Nations, available online under the Argentine submission at <http://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/rus_re_arg_2009e.pdf> at 26 August 2009.

27 See the map in the executive summary of Norway's submission, above n 14, 7.

28 Australian Executive Summary, above n 5, 7.

29 Ibid 12-13 (AAT region) and 19-20 (Kerguelen Plateau region).

30 Note too that, bearing in mind the distinction between points and lines in n 46 below, no attempt is made to maximise the area of Australia's continental shelf by linking points on the outer limits of the two regions that are less than 60 miles apart. This is at odds with the 'credible maximum' policy pursued elsewhere (see the text relating to slide 18 of 'Delimitation of the Outer Limit of the Australian Continental Shelf', a 2006 presentation by Mr Mark Alcock, an Australian official who played a central role in the submission, <http://marinesympo.nori.go.kr/files%5C2006Program&Papers/11.Alcock1.pdf> at 12 August 2009), including the Lord Howe Rise region, where the outer limit generated by Lord Howe Island was joined by a bridging line to

III. Possible Reasons for Australia to have Acted as it did

It may be asked why Australia did not take the approach advocated here. Much of the problem stems from an inconsistent attitude within the Government over time. Any submission including the area off the AAT would need a significant amount of scientific data to be collected in order to persuade the Commission that the outer limit of the continental shelf satisfied the Article 76 criteria. When in 1999 two Ministers announced that $A30 million would be spent acquiring the data to support Australia's sovereign rights over "an area the size of Queensland", the tone of their joint press release was such that one could be forgiven for thinking that they had the jurisdictional equivalent of cartoon dollar signs in their eyes.[31] But by 2004 the pendulum had swung to the other end of its arc: the same Government department that had pressed most strongly for inclusion of the Antarctic element, in the apparent belief that it would reinforce Australia's territorial claim,[32] was becoming acutely nervous about the damage that this might do to Australia's position in the Antarctic Treaty system, and this in part is the origin of the special request.

Enjoyable though the spectacle of legal and political acrobatics may be for observers, surely there is something more than faintly absurd, and not only from the point of view of the hard-pressed taxpayer, in a government having spent an eight-figure sum collecting data to support part of a submission that by its own subsequent request will not lead to recommendations from the Commission for an indefinite period — or possibly ever.[33] For it seems to be an underlying

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point 1 located on the 200-mile line drawn from the Australian mainland — see the map in the Australian Executive Summary, above n 5, 24. For practical reasons, it would have made sense to allocate this extra area to the AAT region rather than the Kerguelen Plateau region, on the basis that, while the area enclosed by the bridging line relies on the points at both ends being valid, the validity of the point at the AAT end would not, in accordance with Australia's request, be examined by the CLCS for the time being. (That the CLCS would not have accepted such a line, since in its Recommendations to Australia, below n 46, 19 [67] it did not accept the Lord Howe Rise line because the two landmasses there were 'not proven to be in morphological continuity', is not to the point here; in any event it ought not to have been a consideration given that art 76 does not require such continuity.)

31 Alexander Downer, Minister for Foreign Affairs and Robert Hill, Minister for the Environment and Heritage, 'Move to Claim Extended Antarctic Continental Shelf' (Press Release, 2 December 1999) <http://www.foreignminister.gov.au/releases/1999/fa132b_99.html> at 5 June 2009. The area enclosed by the outer limit ultimately submitted by Australia is in fact less than that of New South Wales, a much smaller State than Queensland.

32 By the first sentence of art IV(2) of the Antarctic Treaty, a submission could not actually strengthen the claim, but the author has some sympathy with the lesser proposition that the continued credibility of the claim demanded its making.

33 An additional factor that may be of interest to finance ministries in particular is that art 7 of the Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959 (4 October 1991), [1998] ATS 6, prohibits mineral resource activity other than scientific research south of 60°S, including all of the area within the outer limit submitted in respect of the AAT. Even if the formidable substantive requirements and procedural obstacles in art 25 that make a repeal of the prohibition all but impossible

assumption of many of those on all sides — not only those States who view Antarctica as a global commons incapable of reduction to national sovereignty, but also most who do not, but who appear to believe that they risk bringing the Antarctic Treaty System crashing down unless they indulge those who do — that in effect "not…for the time being" means "never". But is this necessary? Not if the first sentence of Article IV, paragraph 2 of the Antarctic Treaty, quoted above, is taken at full face value — as it surely should be, since that is what the basic rule of interpretation of treaties, Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties[34] ("in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose") calls for unless it leads, in the words of Article 32 of that Convention, to ambiguity, obscurity or a manifestly absurd or unreasonable result, which is certainly not the case in this instance.

IV. A Better Precedent

As an illustration of how the equality of views laid down in this provision is supposed to (and does) work, consider Australia's 1994 claim of an exclusive economic zone (EEZ) off the AAT, which in fact was legally more significant than the outer limit of the continental shelf beyond. This is because the shelf, unlike the EEZ, does not need to be claimed; rather, the issue of the delineation of its outer limit under UNCLOS Article 76 is about no more than the settling of the seaward boundary of a zone that a coastal State has automatically by Article 77, paragraph 3 of that Convention.[35] Not only was Australia prepared to make the claim,[36]

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once it becomes theoretically open to the parties in 2048 are overcome, the coastal State has an obligation under UNCLOS art 82 to contribute up to seven per cent of the volume or value of minerals produced beyond the 200-mile line. This makes their extraction even more uneconomic than the usual considerations of the cost of doing so in difficult physical conditions and distance from markets would suggest. If only because its true opportunity cost is thus small, the reaffirmed commitment to the mining ban in the two Ministers' press release, above n 31, rings true.

34 (23 May 1969); 1155 UNTS 331.

35 This is stressed in the language common to the diplomatic Notes mentioned in the text accompanying nn 14–21, above. The reference to Australia's 'claim' of a continental shelf off Antarctica in the Ministers' press release, above n 31, is therefore unfortunate (see also V Golitsyn, 'Continental Shelf Claims in the Arctic Ocean: A Commentary' (2009) 24 *International Journal of Marine and Coastal Law* 401, 401–02) and as far as the author is aware, has not been repeated in subsequent governmental statements.

36 The wisdom of doing so, without being prepared to enforce it against non-nationals, is another matter. Empty gestures, such as extending on paper only the prohibition of whaling (but not fishing) to non-nationals in the EEZ off the AAT, rarely make for good legal policy: see generally R Davis, 'Enforcing Australian Law in Antarctica: The HSI Litigation' (2007) 8 *Melbourne Journal of International Law* 142. If Australia's title to the AAT is sound, then the unlawfulness of Japanese whaling within the EEZ off the AAT would be far easier to prove than that of the same activity on the high seas, but one suspects that if the international litigation promised in the Australian Labor Party's 2007 federal election platform were to proceed, Australia would make no use of this, *ceteris paribus* potentially the strongest plank of its legal argument, for fear that Japan might successfully defend itself by denying Australia's

alongside those of Argentina, Chile and France,[37] but it attracted no protest as such. True, the United States did address a Note to Australia in response, but a careful reading of it reveals that all it did was make the obvious point that, since the United States does not recognise Australia's claim to territorial sovereignty over the AAT, it follows that the EEZ rights offshore resting on that claim would also not be recognised by it.[38] Here, therefore, both sides properly treated each other's view as equally valid, and no harm was done. *A fortiori* there is no legal reason for States not to be prepared to proceed the same way in respect of the continental shelf; all that sets this zone apart is the additional multilateral dimension of the CLCS process, by contrast with the unavoidably unilateral EEZ claim. It seems, however, that this is enough to make it politically controversial, or potentially so.

Note too that, if what claimant States are worried about is whether applying the UNCLOS Article 76 process to their Antarctic territorial claims is compatible with the Antarctic Treaty, then, supposing (contrary to the author's view) the answer to be no, it is the mere inclusion of this area in the submission that is in breach of the Treaty, and a request to the CLCS not to consider it for the time being, or even for ever, does not cure the breach.[39] In fact, however, the request was unnecessary, again thanks to the first sentence of Article IV, paragraph 2 of the Antarctic Treaty. This ensures that, even if the UNCLOS process were to be carried though to completion in respect of the area — the making of recommendations by the Commission to Australia and the subsequent establishment by Australia of the outer limits of the continental shelf off the AAT on the basis of those recommendations — other States would not be prejudiced. They could treat the continental shelf off the AAT exactly the same as they do the EEZ there: those fellow claimants who recognise Australia's title to the AAT would accept it, and all others could legitimately take the United States position of 1994 on it, of which Australia in turn would have no cause to complain.

V. A Potential Objection to the Preferred Position Anticipated

Is there any reason why the States concerned would not be satisfied with this? The only conceivable one is that the interaction with UNCLOS Article 76, paragraph 8 quoted above[40] would on one tendentious interpretation let the continental shelf tail wag the territorial sovereignty dog. If a claimant State can make a submission

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title. (If this occurred, not just Australia but the whole Antarctic Treaty system would be the loser, and a similar systemic danger lies in Australia succeeding on this point: see above, text accompanying n 3.)

37 D R Rothwell, 'Environmental Regulation of the Southern Ocean' in J Crawford and D R Rothwell (eds), *The Law of the Sea in the Asia Pacific Region: Developments and Prospects* (1995) 93, 112.

38 The US Note, said in J Green, 'Antarctic EEZ Baselines: An Alternative Formula' (1996) 11 *International Journal of Marine and Coastal Law* 333, 341, to be the only one of its type, is reproduced at (1996) 17 *Aust YBIL* 383; for Australia's reply see at 383–84.

39 Australia and the other claimants should therefore surely take legal courage from the fact that none of the Notes listed in n 12 above makes this charge.

40 See above, text following n 8.

off Antarctica and the resulting outer limits are, in the words of the last sentence of that provision, "final and binding" as against other States, the fear is that this might carry the logically necessary implication that the underlying claim to territorial sovereignty must thereby also have inevitably become final and binding, Antarctic Treaty or not, either absolutely or at least as far as its generation of a continental shelf for the claimant is concerned. Such fear is, however, misplaced: the proper interpretation of these words is that what is final and binding is merely the conclusion that the outer limit has been constructed in accordance with the other rules within Article 76.[41] Commission recommendations cannot cure any defect external to Article 76, such as the submitting State's use of a straight baseline not supported by Article 7,[42] or use of an island falling within Article 121, paragraph 3 as a basepoint,[43] or, as is potentially entailed here, its lack of title to relevant land territory. Any claimant prepared to make this concession, which should not be too much to ask of Argentina, all the more so now that the United Kingdom has requested the Commission not to examine the parts of its submission relevant to the territories in dispute between the two States, would deprive the objection of any force.[44] If it does so, then for the reasons above, it is submitted, it would be

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41 T L McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 *International Journal of Marine and Coastal Law* 301, 314–17 argues that the outer limit can only be 'final and binding' on the submitting State, but this seems less than satisfactory, as States would then be acting to their own legal detriment in going through the art 76 process, leaving them with no incentive to do so.

42 The CLCS has itself stated as much in its Scientific and Technical Guidelines: Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, UN doc CLCS/11 (1999), 28 [3.3.1].

43 Here too the CLCS has 'acknowledg[ed] that it has no role on matters relating to the legal interpretation of article 121 of the Convention': Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, UN doc CLCS/62 (2009), 12 [59]. This was prompted by Notes from China and the Republic of Korea <http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf> (English translation) and <http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf> respectively, both at 23 September 2009, requesting it to take no action on that part of Japan's November 2008 submission relying on the tiny (at high tide) feature of Okinotorishima as a basepoint. A number of views expressed by States on this matter were recorded in the report of the 2009 meeting of States Parties to UNCLOS (Report of the nineteenth Meeting of States Parties, UN doc SPLOS/203 (2009) 12–14 [70]–[80]) as to how the CLCS should react to defects of this kind, but none contradicts this point. Japan has, rightly in the author's view, told the Commission that it should disregard these Notes (Statement by the Chairman, cited in this n, 11 [54]). Beyond the above acknowledgment the Commission has not yet decided how to proceed: at [59].

44 Conversely, unwillingness to make it would raise questions as to whether the submitting State's real motive in going through the UNCLOS art 76 process is because it thinks this would indeed trump art IV(2) of the Antarctic Treaty. If so, many parties to either of the treaties could be expected to act to disabuse it, and this may not be the full extent of the backlash it would undoubtedly provoke.

improper for the Commission to refuse to examine the entire submission if that remains Argentina's wish.

VI. The Commission's Attitude

Whether the CLCS will adopt this preferable course remains to be seen; on present indications it must be doubted, since its consistent record is one of hypersensitive tiptoeing around legal issues in general and this one in particular. This has reached such an extent that in its recent recommendation on the Kerguelen Plateau region of Australia's submission, which would come within 200 miles of the AAT were it not cut off at that distance,[45] it made a specific point of declining (for fear of "prejudice to matters related to other treaties", i.e. the Antarctic Treaty) to make recommendations on the points of intersection between the outer limit in this region and the 200-mile line.[46] But this is completely unnecessary, not just for the reasons above, but also because the CLCS is misconceiving its role. Provided it does not stray outside its technical task, limited to whether or not submitted outer limits conform with the rules of UNCLOS Article 76,[47] it can safely assume (as distinct from accepting) the correctness of possibly mutually contradictory legal positions adopted by different submitting States that are extrinsic to Article 76 — questions such as with whom sovereignty over the Falkland Islands resides, or whether title to Antarctic territory can or does exist[48] — with no risk of prejudice

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45 See the description of points 732a and 960a in the Australian Executive Summary, above n 5, 17 (not identified by number there but rather on the map at 20).

46 Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by Australia on 15 November 2004 <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf> at 5 June 2009, 15 [53]. Anyone tempted to praise this for its subtlety should consider that the CLCS thereby undermines its own endorsement of the adjacent segments of line. Since art 76 is drafted in terms primarily of points and only secondarily of the lines joining them to form the outer limit, if it is not prepared to say the point at one end is valid, it cannot logically endorse the line linking it to the nearest point that it does regard as valid.

47 A significant body of opinion in the most recent (June 2009) meeting of the States Parties to UNCLOS was opposed to any attempt by the CLCS at interpretation of the Convention (other than of art 76 itself, presumably) — though some States took the view, not shared by the present writer, that the Commission enjoys complete independence in this regard. The matter arose in the context of art 121 (see above n 43), but the observations were mostly expressed in general terms.

48 Note that not all disputes about Antarctica relevant to submissions will involve risk of prejudice to questions of delimitation between opposite and adjacent States, eg, the one between the Netherlands and Australia (above n 2) does not. The provision in annex I to the CLCS's Rules of Procedure, above n 15, by which it declines to examine submissions affected by a dispute without the consent of all parties to the dispute — a problem that cannot any longer remain latent now that the UK and Argentina have both made submissions in respect of the Falklands and the former has objected to the latter (above nn 16, 20 and 23 respectively and text accompanying the last two of these) — is therefore pro tanto not supported by art 76, although that conclusion, as an anonymous reviewer has pointed out, may no longer hold given that only one State raised this point when the States Parties were invited by the CLCS to comment on an advanced draft of the Rules in 1998: Report of the Eighth Meeting of

arising. Examination by the CLCS of Argentina's submission, prior in time to the United Kingdom's, does not prevent it from later examining that of the United Kingdom (whether the existing partial submission in respect of the Falklands and other islands of the Southwest Atlantic or a yet to be made one concerning the British Antarctic Territory). If it does so, neither the order in which the submissions were lodged, nor (if reversed) that which in recommendations in response to them are made, can affect the strength of either State's territorial claims *vis-à-vis* the other. At any rate, created as it is by UNCLOS, it certainly cannot be any part of the Commission's business to police the Antarctic Treaty.

Another consideration that claimant States give no sign of having borne in mind is that, in situations where the CLCS for whatever reason (not necessarily related to Antarctica — it could for example be the veto that its Rules of Procedure wrongly give to other States over its consideration of submissions[49]) declines to carry out its task, an argument can be made that the coastal State should be able to have the co-ordinates of its outer limits as submitted treated as though the Commission had already issued a favourable recommendation on them. This is on the basis that the coastal State has done everything it was required to do by Article 76, and it is through no fault on its part that the Article 76 process has not gone to completion. The Commission lacks legal personality, so it is not possible for a coastal State denied examination of all or part of its submission to seek through the dispute settlement mechanism of Part XV of UNCLOS an order compelling it to do so.[50] In this situation, the argument would run, it would not be reasonable for the outer limit of the submitting State's continental shelf to be left in an indefinite legal limbo.[51] That reasoning may be attractive and available to Argentina in the light of the United Kingdom's objection to its submission, but it relies on the coastal State being the victim of a procedurally wrongful refusal by the CLCS to consider its submission — which will not occur where, as in Australia's and Norway's case, the submitting State has actually requested it not to examine the part off Antarctica. Thus the coastal State's legal interest — though not necessarily its political interest — lies in not shielding the Commission from the consequences of the latter's excessive nervousness.

States Parties, UN doc SPLOS/31 (1998) 11-12 [42]–[45], [48]. Suffice it to note that, if the argument of this article is correct, the UK's position would have been amply protected had it instead said it had no objection to the CLCS examining the whole of Argentina's submission provided the UK's own submission of 11 May 2009 and any subsequent submission in respect of the British Antarctic Territory would likewise be examined when their turns came.

49 See ibid.

50 See generally A G Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement' in A G Oude Elferink and D R Rothwell (eds), *Oceans Management in the 21st Century: International Frameworks and Responses* (2004) 107.

51 Such a rule would have the effect of giving pause to potentially objecting States, but would not, it is conceded, be of any avail where the Commission's deliberate inaction is *ex proprio motu*.

VII. Conclusion

None of the foregoing is intended to deny that politics has a proper place in international legal affairs, but too often diplomats forget that, while ordinary political positions can easily be reversed after a change of mind, legal rights abandoned for transient political reasons are usually gone for good. If, therefore, any claimant State really believes the Antarctic Treaty system is so fragile that Article IV can no longer bear the weight it was designed to support,[52] then a more fitting course of action would have been for it to make no submission at all off Antarctica, and the diplomatic arts could have been gainfully employed to have all seven claimants agree *en bloc* to forbear from doing so, and at the same time to dress up this perceived necessity as a virtue: a service rendered to the system. Having decided that its claim would be weakened by non-submission, however, the coastal State only damages its own position further by not seeing the submission through, which serves merely to draw attention to the difference between this part of its territory and the remainder.[53] This may not matter while the Antarctic Treaty is in force, but will diminish the strength of its territorial claim should the treaty ever be terminated. The fact that there is no sign of this happening in the foreseeable future is not a reason for ignoring this point: lawyers must think and plan in terms of plausible though unlikely contingencies. If anything, such an outcome is all the likelier to occur if, as this episode highlights, States continue to place — or assume each other to place — diminishing confidence in the first sentence of Article IV, paragraph 2 of the Antarctic Treaty, a robust non-prejudice clause that appears perfectly adequate to protect all parties' positions if only they were prepared to give effect to it according to its terms.

To conclude, inattention to the central provision of Article IV of the Antarctic Treaty within the Australian Government led it to overestimate first what Australia had to gain from a submission, and later what it had to lose by it — and also to underestimate the risks of swapping horses midstream. Fortunately, it is not too late for Australia and Norway, and probably[54] also the other claimants, to act on the reasoning set out here — the "for the time being" formulation usefully allows them to change their minds. Accordingly, all they need to do is advise the CLCS that once, say, the other submissions waiting in the queue for its attention have been dealt with, they will ask it to take up its duties in relation to the submissions off Antarctica. If Argentina and the Commission deal sensibly with the former's submission and the responses of varying degrees of negativity by three of the

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52 This was decidedly not the view of participants at the June 2009 symposium on the Treaty, above n 3.

53 See in this context above n 30 and accompanying text.

54 The note of doubt arises because on a strict reading of the ten-year rule in art 4 of annex II to UNCLOS it could be argued that the entirety of a submission (as opposed to a new or revised submission in response to CLCS recommendations) must be made within the ten years. If so, art 3 of annex I to the CLCS Rules of Procedure (above n 15) is contrary to art 76, and the claimants concerned may yet find that, having delayed the Antarctic portion beyond the ten years, they are denied the opportunity to complete their submissions.

States most immediately affected by Argentina's territorial claim on which it relies, then such a step will become politically all the easier to take.

It may be admitted that this would still leave the problem of whether the area enclosed by an outer limit does or does not fall within the area beyond national jurisdiction administered by the ISA, defeating the purpose of legal certainty concerning the boundary of the latter area that it was Article 76's aim to create. This is an issue that cannot be resolved under UNCLOS, and attempts to resolve it under the Antarctic Treaty are likely to be confounded by the fact that it goes to the heart of the latent dispute over territorial sovereignty on whose unresolved status the system as a whole relies.[55] For the foreseeable future, however, exploitation of the areas in question can be expected to remain prohibitively costly, so that realistically neither the claimant States nor the ISA will be motivated to seek a resolution.

Thus the better analogy for the uneasy halfway-house solution adopted by Australia and Norway is not with a bravura balancing act but more with an alpine hut. Such flimsy structures can provide basic overnight accommodation and shelter from passing storms, but are not normally good for much else. Argentina may have realised this and bravely continued on its Article 76 journey, but for better or worse, two of the remaining Antarctic claimant States appear to have decided to make their home in one, while the other four, as if paralysed by fear of what lies ahead, are still in the visitors' centre waiting, probably in vain, for a guarantee of lastingly good political weather.

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55 See above n 3.