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The Outer Limits of the Continental Shelf Under Customary International Law

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Abstract

"Seldom has an apparent major change in international law been accomplished by peaceful means more rapidly and amidst more general acquiescence and approval," Lauterpacht observed of continental shelf claims nearly seventy years ago. When considered today, this observation merits a caveat, as the question of how far the continental shelf extends into the sea is not yet fully settled. This article explores the customary international law applicable for determining continental shelf limits and also examines the legal procedures used by states to gain international acceptance of those limits.

Since President Truman's Proclamation of 1945,[1] the legal regime of the continental shelf has occupied an important place in customary international law. The Truman Proclamation has been cited as establishing "instant customary international law"[2] or, perhaps more accurately, as a Grotian moment marking the rapid development of customary international law.[3] Although the basic concept of coastal state jurisdiction over its continental shelf has been accepted for more than seventy years, the question of just *how far* that jurisdiction extends into the sea has a more complex history. The Truman Proclamation did not specify a geographic outer limit of the continental shelf,[4] nor did the subsequent practice of states coalesce around common rules for determining the outer limits of the continental shelf. Having undergone considerable evolution, the rules for determining the seaward limit of the continental shelf are now codified in the 1982 UN Convention on the Law of the Sea (LOS Convention).[5] This article examines whether these rules are now part of customary

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[1] Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12303 (1945) [hereinafter Truman Proclamation].

[2] *See, e.g.,* Donald R. Rothwell & Tim Stephens, The International Law of the Sea 101 (2010), *citing* H. Lauterpacht, *Sovereignty over Submarine Areas*, 27 Brit. Y.B. Int'l L. 376, 431 (1950).

[3] Michael P. Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments 107–22 (2013).

[4] A White House press release accompanying the Proclamation referred to limits based on water depth: "[g]enerally . . . no more than 100 fathoms (600 feet) of water . . . ." 13 Dep't St. Bull. 484 (Sept. 30, 1945).

[5] United Nations Convention on the Law of the Sea, Art. 76, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter LOS Convention].

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international law, and thus applicable to all states. The article also examines the legal status of the LOS Convention's procedures relating to continental shelf limits, including whether they are open to participation by coastal states that are not parties to the LOS Convention.

Although most coastal states have joined the LOS Convention[6] and are therefore bound *inter se* by treaty law, the customary status of the Convention's continental shelf rules and procedures is important to all states. First, so long as the United States and other coastal states—such as Colombia and Venezuela—remain non-parties to the LOS Convention, they must rely on customary international law to determine their continental shelf limits. Second, parties to the LOS Convention presumably wish their own treaty-based continental shelf limits to be opposable to *all states*, and not just other parties. Whether or not they are depends on customary and not treaty law. Third, the growing interest in deep seabed mineral exploitation underscores the need to geographically define the international seabed Area.[7] It is the outer limits of all coastal states' continental shelves, including those of non-parties, that collectively constitute the boundary defining the Area beyond national jurisdiction, in which non-living resource exploration and exploitation is administered by the International Seabed Authority (ISA).[8]

I. Introduction to Continental Shelf Limits Under International Law

Motivated by the "long range world-wide need for new sources of petroleum and other minerals," the 1945 Truman Proclamation asserted that:

> the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[9]

From a scientific perspective, the continental shelf is the flat or gently sloping seabed and subsoil adjacent to a continent or around an island; its outer limit is generally located near what is referred to as the shelf break, where the shelf ends and a marked increase in ocean depths begins.[10] The geologic continental shelf, however, has never been coincident with the *legal* one, and in the decade following the Truman Proclamation, uncertainty persisted as to the seaward extent of the legal continental shelf under customary law. During this period, coastal states enacted an abundance of new and varied maritime claims, some of which were more far reaching than the Truman Proclamation in terms of both the type of jurisdiction claimed and also the geographic extent of that jurisdiction. Such claims, for instance, included the assertion by some Latin American states of "exclusive sovereignty and jurisdiction" over the entire sea (not just the seabed and the subsoil), extending a "minimum distance" of 200 nautical miles from shore.[11]

[6] The UN Division for Ocean Affairs and the Law of the Sea (DOALOS) lists 168 parties, including the European Union (http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

[7] LOS Convention, *supra* note 5, Art. 1(1) (defining the "Area" as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"), Part XI (setting forth provisions pertaining to "The Area").

[8] *Id.* Arts. 1(2), 133, 137(2) (introducing the International Seabed Authority (ISA) and defining "resources"). The ISA has entered into twenty-seven contracts with entities to undertake deep seabed mineral exploration. International Seabed Authority, *at* https://www.isa.org.jm/deep-seabed-minerals-contractors.

[9] Truman Proclamation, *supra* note 1.

[10] *See, e.g.,* Hydrographic Dictionary, IHO Pub. S-32 (5th ed. 1994).

[11] Declaration on the Maritime Zone, Aug. 18, 1952, Chile-Peru-Ecuador, 1006 UNTS 323, at 326–27.

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The proliferation of such claims, including their indeterminacy and inconsistency with respect to seaward limits, led to international efforts, extending from the 1950s to the 1980s, to codify the law of the sea into treaty law. These efforts bore fruit in the form of the four Geneva Conventions on the Law of the Sea adopted in 1958[12] and, later, the 1982 LOS Convention, which created a single comprehensive "legal order for the seas and oceans."[13] One of the 1958 conventions, the Convention on the Continental Shelf, marked the first treaty law definition of the continental shelf.[14] Its Article 1 defined the "continental shelf" as follows:

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas . . . .[15]

Thus, the 1958 Convention described the continental shelf as "adjacent" to the coast and set forth two criteria for determining its outer limits, one based on water depth (200 meters) and another based on the more elastic notion of resource "exploitability." In its 1969 *North Sea* judgment, the International Court of Justice (ICJ) considered that Article 1 of the 1958 Convention was part of customary international law, and elaborated further that the continental shelf "constitutes a natural prolongation of [a coastal state's] land territory into and under the sea."[16]

Notwithstanding the ICJ's acceptance of Article 1 of the 1958 Convention as part of customary international law, this continental shelf definition was increasingly regarded by states as inadequate, due to the mounting interest in the potential mineral riches of the deep seabed beyond the limits of national jurisdiction.[17] In this regard, determining the *seaward limit* of the continental shelf gained additional significance because it served a dual role of also defining the *landward limit* of seabed beyond national jurisdiction. Thus, shortly after *North Sea*, the UN General Assembly stated that Article 1 of the 1958 Convention "does not define with sufficient precision the limits [of the continental shelf] . . . and that customary international law on the subject is inconclusive."[18]

Against this backdrop, defining the seaward extent of the continental shelf with "sufficient precision" became a major concern of the Third UN Conference on the Law of the Sea (UNCLOS III, or Third Conference), which extended from 1973 to 1982. As early as

[12] On April 29, 1958, the First UN Conference on the Law of the Sea adopted four conventions and an optional protocol. *See* UN Office of Legal Affairs, *at* http://legal.un.org/avl/ha/gclos/gclos.html.

[13] LOS Convention, *supra* note 5, preamble.

[14] Convention on the Continental Shelf, Apr. 29, 1958, TIAS 5578, 499 UNTS 311 [hereinafter CSC].

[15] *Id.* Art. 1. *See also* Bernard H. Oxman, *The Preparation of Article 1 of the Convention on the Continental Shelf*, 3 J. Mar. L. & Com. 245 (1972).

[16] North Sea Continental Shelf (Ger. v. Den.), 1969 ICJ Rep. 3, para. 63, at 39–40 (Feb. 20) [hereinafter *North Sea*] ("reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf . . ."); *id.*, para. 19.

[17] Under an extreme interpretation of the exploitability criterion, the jurisdiction of coastal states might eventually extend to the entire ocean floor, in line with their growing technological capacity to exploit seabed resources at greater depths and distances from the coast. This was not, however, the intent of the drafters. *See* Oxman, *supra* note 15, at 250–51.

[18] GA Res. 2574 (XXIV) (Dec. 15, 1969).

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1975, as part of a larger package deal,[19] the negotiators at UNCLOS III arrived at a basic juridical definition of the continental shelf that would eventually appear as paragraph 1 of Article 76 of the 1982 LOS Convention. This definition describes a seaward limit of the continental shelf based on either of two criteria: (1) "the outer edge of the continental margin" or (2) "a distance of 200 nautical miles" from the coast, where the outer edge of the continental margin does not extend beyond 200 nautical miles.[20]

In the later years of UNCLOS III, negotiators fleshed out the implementation rules for determining the precise location of the "outer edge of the continental margin."[21] Paragraphs 2 to 7 of Article 76 provide such rules, and their intricacies are discussed *infra* in Part III. For present purposes, it suffices to say that the provisions are highly complex, and their application requires a detailed understanding of the shape, depth, and composition of the seabed. Recognizing such complexities, the Convention's drafters developed a treaty body and a procedure to help avoid disputes by enhancing certainty and assisting coastal states in implementing Article 76. Specifically, paragraph 8 of Article 76 requires coastal states to submit "[i]nformation on the limits of the continental shelf beyond 200 nautical miles" to the Commission on the Limits of the Continental Shelf (CLCS, or Commission). This body of twenty-one scientific experts is charged with reviewing data and other materials submitted by coastal states concerning the outer limits of the continental shelf beyond 200 nautical miles and making "recommendations" to coastal states.[22] Article 76 became applicable as treaty law when the LOS Convention entered into force on November 16, 1994, one year after the UN received the sixtieth instrument of accession.[23] The Convention now has 168 parties.[24]

As is apparent from this brief recitation of the law of continental shelf limits, the "interplay of custom and international agreements [on the law of the sea] has a long history."[25] The continental shelf regime was born under customary international law, but without rules specifying the precise geographic limits of the shelf. The first rules pertaining to continental shelf limits were codified in treaty form in 1958 and considered by the ICJ to be part of customary law in 1969. By 1982, subsequent treaty law—Article 76 of the LOS Convention—provided new and more detailed rules (including procedural ones) pertaining to outer limits.[26] As will be explored in this article, the LOS Convention also had the effect of altering customary law, and in 2012 the ICJ held that paragraph 1 of Article 76 "forms part of customary international

[19] On the "package deal," see *infra* Section II(2).

[20] Informal Single Negotiating Text, Part II, Art. 62, UN Doc. A/CONF.62/WP.8/PartII (1975). *See also* University of Virginia, Center for Oceans Law and Policy, II UN Convention on the Law of the Sea 1982: A Commentary 848–55 (Satya Nandan & Shabtai Rosenne eds., 1993) [hereinafter UVA Commentary] (summarizing the third, fourth, and fifth sessions, 1975 to 1976).

[21] *See* UVA Commentary, *supra* note 20, at 855–73 (summarizing the sixth through eleventh sessions, 1977–1982).

[22] LOS Convention, *supra* note 5, Annex II, Arts. 2(1), 3(1)(a).

[23] *See id.* Art. 308(1).

[24] DOALOS, *supra* note 6.

[25] Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 Wash. L. Rev. 971, 984 (1986). *See also* J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 Ocean Dev't & Int'l L. 239 (2014).

[26] For states that are party to both the 1958 and 1982 conventions, Article 311(1) of the 1982 LOS Convention, *supra* note 5, provides that it "shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

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law."[27] For the United States, this custom-treaty interplay is an unusual one. Even while remaining a party to the 1958 Continental Shelf Convention, the United States considers itself bound by customary international law reflected in Article 76 of the LOS Convention.[28] Although the United States has yet to accede to the LOS Convention, the U.S. Extended Continental Shelf Project is currently delineating the U.S. continental shelf in areas beyond 200 nautical miles in accordance with the rules set forth in paragraphs 1 to 7 of Article 76 of the LOS Convention.[29]

Parts II, III, and IV of this article examine, in succession, whether paragraph 1, paragraphs 2 to 7, and paragraph 8 of Article 76 are part of today's customary international law.[30] Each of these Parts contains three sub-sections that (1) explain the rules in question as they appear in the Convention; (2) briefly consider the formation of these rules at UNCLOS III; and (3) examine whether the provisions in question are now part of customary international law. This third sub-section within Parts II, III, and IV presents the relevant state practice and *opinio juris* in the context of the traditional understandings of customary international law doctrine.[31] Although this article sidesteps "the theoretical torment that accompanies custom"[32] and is more empirically focused, it may nonetheless serve as a useful case study for those focused on doctrinal challenges associated with the identification of customary international law. Part V of this article pivots away from customary international law and addresses the question of whether the LOS Convention's procedures relating to the Commission on the Limits of the Continental Shelf, set forth in paragraph 8 of Article 76 and Annex II of the Convention, are open to non-parties. Prior to concluding, the article addresses the benefits of joining the Convention from the perspective of the United States as a major coastal state, maritime power, and consumer of resources found in its own and foreign continental shelves.

II. Article 76(1): Definition of the Continental Shelf

The Rules

Paragraph 1 of Article 76 states:

[27] Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 ICJ Rep. 624, 666, para. 118. (Nov. 19) [hereinafter *Nicaragua v. Colombia I*]. The Court considered that "it does not need to decide" the status of paragraphs 2 through 8. *Id.*

[28] U.S. Dep't of State, Office of the Legal Adviser, Cumulative Digest of U.S. Practice in International Law 1981–1988, at 1878–79 (1993), *citing* Memorandum from Assistant Secretary John D. Negroponte to Deputy Legal Adviser Elizabeth Verville, Nov. 17, 1987 [hereinafter Negroponte Memorandum] (stating "that the delimitation provisions of Article 76 . . . reflect customary international law and that the United States will use these rules when delimiting its continental shelf and in evaluating the continental shelf claims of other countries" and variously referring to paragraphs 1 to 7 of Article 76). The memo referred to "delimitation"; the correct term under Article 76 is "delineation."

[29] *See* U.S. Extended Continental Shelf Project, *at* http://www.continentalshelf.gov/faq/index.htm.

[30] This article does not substantively address paragraphs 9 and 10 of Article 76.

[31] The author has found the work of the International Law Commission's special rapporteur on the identification of customary international law to be particularly valuable in the preparation of this article. See Report of the International Law Commission, 68th Sess., UN Doc. A/71/10, at 102–06 (2016) [hereinafter ILC Draft Conclusions] and other reports of the special rapporteur, Michael Wood, *at* http://legal.un.org/ilc/summaries/1_13.shtml.

[32] Omri Sender & Michael Wood, *Custom's Bright Future: The Continuing Importance of Customary International Law*, *in* Custom's Future: International Law in a Changing World 360, 365 (Curtis A. Bradley ed., 2016).

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> 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.

Paragraph 1 sets forth the basic rule regarding the outer limits of a coastal state's continental shelf, providing two distinct bases for entitlement: one based on a 200 nautical mile (M)[33] distance from shore (distance criterion) and another based on the physical characteristics of the seabed (continental margin criterion). For any particular location, the more favorable of the two criteria may be used by the coastal state. To understand what is meant by the "outer edge of the continental margin," it is necessary to refer to paragraph 4 of Article 76, which is discussed in Part III, *infra*.

Despite the existence of two distinct criteria in paragraph 1, "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf," as the Tribunal pointed out in the Arbitration between Barbados and Trinidad and Tobago.[34] Accordingly, a coastal state's sovereign rights relating to exploring and exploiting the continental shelf apply to the entirety of the continental shelf, whether within or beyond 200 M.[35] Further, these rights are *exclusive* ("no one may undertake these activities without the express consent of the coastal State") and *inherent* ("[t]he rights . . . do not depend on occupation, effective or notional, or on any express proclamation").[36]

Formation of the Rules

The 200 M distance criterion and the continental margin criterion contained in Article 76(1) of the Convention have separate lineages.

200 M Distance Criterion

The 200 M distance criterion in Article 76(1), which gained early and widespread acceptance at UNCLOS III, developed in concert with the newly emerging exclusive economic zone (EEZ). While the EEZ regime is not the focus of this article, broad consensus among states had emerged by the mid-1970s for an economic zone extending a maximum of 200 M from shore. This economic zone concerned a coastal state's sovereign rights to explore and exploit living and non-living resources found in the water column, and also the seabed.[37] Owing to the symmetry of seabed rights for the EEZ and the continental shelf, a 200 M distance limit

[33] A nautical mile (M, but sometimes abbreviated "nm") is equivalent to approximately 1,852 meters or 1.15 miles.

[34] Arbitration Between Barbados and Trinidad and Tobago, RIAA, Vol. XXVII, at 147, 208–09, para. 213 (Apr. 11, 2006) [hereinafter *Barbados v. Trinidad & Tobago*].

[35] LOS Convention, *supra* note 5, Art. 77(1). With respect to substantive continental shelf rights, see also Articles 77(4) (concerning "natural resources"), 78 (legal status of the superjacent waters and air space and the rights and freedoms of other states), 79 (submarine cables and pipelines), 80 (artificial islands, installations and structures), and 81 (drilling).

[36] *Id.* Arts. 77(2), 77(3).

[37] *Id.* Art. 56(1).

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for the continental shelf was virtually inevitable. By 1985, the ICJ had held that the 200 M distance criterion in Article 76(1) forms part of customary international law.[38]

Despite early consensus on a 200 M distance criterion for the continental shelf, negotiating states nevertheless disagreed as to whether this distance should represent the absolute maximum outer limit of a coastal state's continental shelf entitlement. Some negotiating states took the view that the Third Conference should fully transform the existing rule on continental shelf limits (then reflected in Article 1 of the 1958 Convention) into one based purely on a 200 M distance from shore.[39] Other states rejected this view, considering that continental shelf limits must extend beyond 200 M, if justified by the physical characteristics of the continental margin.[40]

Continental Margin Criterion

Agreement at UNCLOS III to include the continental margin criterion in Article 76(1) can be explained by three main factors. The first factor is the concept of "natural prolongation," the phrase coined by the ICJ in its 1969 *North Sea* judgment to describe the continental shelf as the underwater extension of a coastal state's land territory.[41] Many states equated the concept of "natural prolongation" with the "continental margin." In other words, states interpreted natural prolongation in a physical sense, considering the continental margin—the geologic shelf, slope, and rise—as the submarine feature that is the natural prolongation of the land territory (see Figure 1 below).

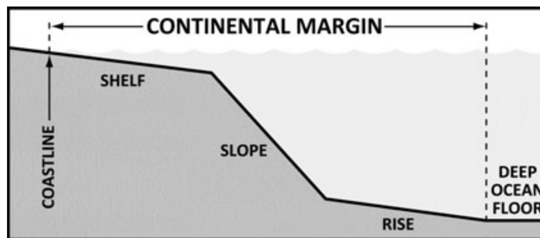

FIGURE 1. Simplified two-dimensional representation of the continental margin, consisting of the shelf, slope, and the rise. (Source: Barry Eakins, National Oceanic and Atmospheric Administration.)

As early as 1971, for instance, Australia described natural prolongation as a concept under which the continental shelf extends "out to the lower edge of the margin, where it slopes down to and merges in[to] the deep ocean-floor or abyssal plain."[42] This view was shared by many

[38] Case Concerning the Continental Shelf (Libya v. Malta), 1985 ICJ Rep. 13, 55–56, para. 77 (June 3) [hereinafter *Libya/Malta*]. The 200 M distance criterion in Article 76(1) is now accepted unquestionably as part of customary law and, therefore, this article does not examine the state practice and *opinio juris* related to that provision.

[39] D.N. Hutchinson, *The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law*, 56 BRIT. Y.B. INT'L L. 111, 171 (1985) (stating that thirty-nine states subscribed to this view).

[40] *Id.* at 171–72 (listing thirty-nine states subscribing to this view).

[41] *North Sea*, *supra* note 16.

[42] UNITED NATIONS, NATIONAL LEGISLATION & TREATIES RELATING TO THE LAW OF THE SEA, UN Doc. ST/LEG/SER.B/16, at 115, 117 (1974) [hereinafter NATIONAL LEGISLATION].

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other states at UNCLOS III[43] and is plainly evident today in the text of Article 76(1), which refers to the "*natural prolongation* of [the coastal state's] land territory *to the outer edge of the continental margin*." As the International Tribunal for the Law of the Sea (ITLOS) would later confirm, the terms "natural prolongation" and "continental margin," as used in Article 76, "refer to the same area."[44]

A second and more subtle factor that shaped the development of the continental margin criterion was Article 1 of the 1958 Convention. In *North Sea*, the Court deemed Article 1, with all its deficiencies and imprecision, to be part of customary international law. With such widespread acceptance, many states considered that they had already acquired rights under the 200-meter depth and the exploitability criteria of the 1958 Convention (or the customary international law reflected therein), including in some areas beyond 200 M from their coasts.[45] Therefore, simply forgetting Article 1 existed was not an option at UNCLOS III, as evidenced by the firm rejection by many states to the fixing of a 200 M absolute maximum extent of the continental shelf. Instead, what can be seen from state practice prior to UNCLOS III, and statements made during UNCLOS III, is that Article 1 of the 1958 Convention was increasingly understood as being consistent with the view that the continental margin either is, or should be, the determinant of the outer limits of the continental shelf.[46] Whether this is a sound interpretation of Article 1 may be debated, but the logic is clear: the original and sustaining rationale for continental shelf rights was access to offshore hydrocarbon resources, and the continental margin—consisting of the "shelf, slope, and rise"—was well understood to be the submarine area where such hydrocarbon deposits lie.[47] In this sense, the outer edge of the continental margin can be understood as the seaward limit of where hydrocarbon resources might reasonably become exploitable, even if not yet exploitable.

Even as a party to the 1958 Convention, the United States had already begun by 1969 to identify the continental margin as the appropriate limit of the juridical continental shelf. At

[43] *See, e.g.*, Statement by Amb. C.W. Pinto (Sri Lanka) to Negotiating Group 6, Apr. 5, 1979, *reprinted in* Platzöder, 1979, Vol. II, at 825 *et seq*. (stating that the Court in *North Sea* signaled "the 'continental margin' as the geomorphological feature by reference to which resource jurisdiction would henceforth be demarcated"). The validity of this interpretation, however, has been questioned. *See, e.g.*, Hutchinson, *supra* note 39, at 146–59.

[44] Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal, Judgment, paras. 434, 435, 437 (ITLOS Mar. 14, 2012) [hereinafter *Bay of Bengal*].

[45] *See, e.g.,* Beesley Statement, on Behalf of Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, and Norway, UN Doc. A/CONF.62/SR.46 (1974), *in* I Official Records of the Third United Nations Conference on the Law of the Sea 203 [hereinafter Official Records] (stating that "The sponsors [of the Working Paper being introduced by Canada setting forth the continental margin criterion] had drawn on the language of the [*North Sea* case and] . . . believed that it would be unrealistic and inequitable to ignore the legal position of coastal States which had long ago established their sovereign rights to the edge of the continental margin through State practice, legislation, the issue of permits"). *See also id.*, Statement of Chile (a co-sponsor) (stating that the proposal "reflected the criterion of exploitability, which was part of customary international law, and the acquired rights it connoted"); Hutchinson, *supra* note 39, at 188.

[46] Australia, for instance, fused the *North Sea*'s notion of natural prolongation to the 1958 Convention, saying that both concepts "point to the outer edge of the margin as the limit of the coastal State's rights." National Legislation, *supra* note 42.

[47] Special Study on United Nations Suboceanic Lands Policy, Hearings before the Senate Comm. on Commerce, 91st Cong., at 90–91 (1969) [hereinafter Special Senate Study] (National Petroleum Council statement). Representatives of various legal and industry associations similarly conveyed the view that "the entire submerged continental land mass, including the Shelf, slope, and portions of the continental rise" fell within national jurisdiction. Rep. by the Spec. Subcomm. on Outer Continental Shelf to the Comm. on Interior and Insular Affairs, U.S. Senate, 91st Cong., at 9–10, and Appendices A (ABA), E (American Branch, ILA), and E-1 (NPC) (Comm. Print 1970).

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that time, Executive Branch officials testified before the U.S. Senate that the 1958 Convention's exploitability criterion should be interpreted in line with the limits of the continental margin.[48] A year later, the United States Oceans Policy promulgated by President Nixon in 1970 used the continental margin as division between areas that should be regulated by the coastal state (the margin) and areas that should be regulated by "agreed international machinery" (beyond the margin).[49]

A third factor that shaped the development of the continental margin criterion at UNCLOS III was the negotiating process itself. The Third Conference was a complex and protracted negotiation characterized by a consensus-driven process aimed at producing a package deal acceptable to more than 150 negotiating states. At the broadest level, negotiating states regarded the Convention itself as a unified package. More narrowly, many states considered that a range of provisions dealing with landlocked and geographically disadvantaged states, "the peaceful settlement of disputes, and the outer limits of the continental shelf constituted a package and should be dealt with together . . . ."[50] Within this cluster of issues, still smaller package deals eventually enabled full acceptance of the continental margin criterion, including the detailed provisions in paragraphs 2 to 7 of Article 76 and the inclusion of a treaty body that would become the Commission on the Limits of the Continental Shelf (paragraph 8 of Article 76).

The Convention's negotiating history reveals a particularly tight connection between Article 76(1) and Article 82. Article 82 provides that, after five years of mineral exploitation on its continental shelf beyond 200 M, a coastal state must share with other states a portion of the resulting revenues.[51] Article 82 was instrumental in securing acceptance of the continental margin criterion by those states—mostly landlocked and geographically disadvantaged—that favored an absolute maximum limit of 200 M.[52]

At the close of UNCLOS III in 1982, what was the status of the continental margin criterion in Article 76(1) under customary international law? The *North Sea* judgment, amplified by subsequent scholarship, has identified three ways by which treaties can contribute to the formation of customary international law: (1) by codifying existing customary international law; (2) by causing an emerging rule to crystallize into customary international law; and (3) by setting forth conventional law that may later progressively develop into new customary international law.[53] Although the origins of the continental margin criterion pre-date UNCLOS

[48] Special Senate Study, *supra* note 47, at 61–62 ("The Department of Commerce's position is that article 1 [of the 1958 Convention] should be interpreted to go out as far as we can technically exploit which might be to the continental margin . . . . I don't feel we would want to go beyond the continental margin . . . .").

[49] Statement About United States Oceans Policy, May 23, 1970, *Public Papers of the Presidents*, at 454–56 (1971).

[50] 102d Plenary meeting, IV Official Records 57, UN Doc. A/CONF.62/SR.102 (1978) (Mexico, speaking on behalf of a group of coastal states).

[51] LOS Convention, *supra* note 5, Art. 82 (referring to "payments or contributions" from exploitation being distributed through the ISA "to States Parties to this Convention, on the basis of equitable sharing criteria"). Although the legal status of Article 82 is not addressed in this article, its entry into the corpus of customary international law faces some of the same obstacles as Article 76(8), discussed in Section IV *infra*, including a lack of relevant state practice and its institutional nature (pertaining to the ISA).

[52] UVA Commentary, *supra* note 20, at 834–35 (stating that these provisions "embody the essence of the final compromise that was . . . based on the acceptance of the continental margin as the outer limit of the continental shelf beyond the exclusive economic zone, coupled with the system of revenue sharing embodied in article 82"); *see also id.* at 848–55.

[53] *North Sea*, *supra* note 16, paras. 64, 65, 71, 73. *See also* ILC Draft Conclusions, *supra* note 31, at 102–06.

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III, it cannot be argued credibly that the Third Conference codified *existing* customary international law in Article 76(1). To the contrary, UNCLOS III set out to change existing customary international law (then reflected vaguely in Article 1 of the 1958 Convention) by giving greater clarity to the seaward limit of the continental shelf.

A more plausible view is that UNCLOS III contributed to crystallizing or clarifying a rule of customary international law that was emerging. In the early years of the Third Conference, nearly all of the thirty-nine states that supported the continental margin criterion "maintained this to be the present state of general customary law."[54] By the close of the Third Conference, at least fifteen coastal states had actually incorporated the continental margin criterion into their domestic law.[55] Still, this conclusion could be questioned. A considerable diversity of state practice remained during the 1960s and 1970s.[56] Moreover, for states that favored a strict 200 M limit, the continental margin criterion was acceptable only as part of the broader compromise expressed in treaty form.[57] Nevertheless, following UNCLOS III, the ICJ leaned toward the view that all of Article 76(1) was part of customary international law. In 1984, the ICJ's Chamber in the *Gulf of Maine* referred to the "consensus reached [at UNCLOS III] on large portions of the instrument" and stated that the provisions of the Convention concerning the continental shelf (and EEZ), despite "bear[ing] the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."[58] The next year, in *Libya/Malta*, the full Court similarly suggested the validity of the continental margin criterion under customary international law.[59] The status of Article 76(1) under customary international law is examined in more detail in the following subsection.

Status of Article 76(1) Under Customary International Law

In 2012, more than twenty-five years after its *Gulf of Maine* and *Libya/Malta* judgments, the ICJ stated plainly in *Nicaragua v. Colombia I* that it considers the entirety of paragraph 1 "part of customary international law."[60] Considering some commentary on the subject, this outcome was not a foregone conclusion, and may still be doubted by some. Suarez's comprehensive examination of the continental shelf, published in 2008, states that "there is a widely-accepted view that the continental shelf beyond 200 [nautical miles] is not part of customary international law."[61] In his 2012 treatise, Tanaka considered that "it would be difficult to argue that the continental shelf beyond 200 nautical miles is part of customary international

[54] Hutchinson, *supra* note 39, at 173 (also citing Buzan that forty-nine states adhered to this view by the end of 1974).

[55] *See* 1970s-era enactments of coastal states, cited *infra*.

[56] *See, e.g.*, Special Senate Study, *supra* note 47, "Survey of National Practice," at 80–84.

[57] *See* UVA COMMENTARY, *supra* note 20, at 848–55 (summarizing the third, fourth, and fifth sessions, 1975–1976).

[58] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ Rep. 246, 294, para. 94 (Oct. 12).

[59] *Libya/Malta*, *supra* note 38, at 33, para. 34 (referring to the validity of the 200 M distance criterion "where the continental margin does not extend as far as 200 miles from the shore").

[60] *Nicaragua v. Colombia I*, *supra* note 27, para. 118.

[61] SUZETTE V. SUAREZ, THE OUTER LIMITS OF THE CONTINENTAL SHELF: LEGAL ASPECTS OF THEIR ESTABLISHMENT 181 (2008).

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law" owing to the difficulty of finding widespread state practice and *opinio juris*.[62] Vladimir Golitsyn, the president of ITLOS, wrote in 2009 that Article 76 "can hardly be viewed as a reflection of customary international law."[63] At the final session of UNCLOS III, the president of the Conference, Tommy Koh, stated his view that "a State which is not a party to the Convention cannot invoke the benefits of article 76."[64] These views are contradicted by some scholars.[65] Common to most of these appraisals, including those of the ICJ, is an absence of evidentiary support for the conclusions reached. The remainder of this section attempts to fill this gap.

Brief Doctrinal Considerations

The formation of customary international law requires "evidence of a general practice accepted as law," to borrow the wording of the ICJ Statute.[66] This formulation reflects the two well-known elements required for the formation of customary law: state practice and *opinio juris*. The state practice element refers to what states actually do and may take a wide variety of forms. The *opinio juris* element is the subjective attitude of the state that accompanies state practice. Although often difficult to discern, this element is necessary to ensure that the state practice in question "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" and does not instead reflect "courtesy, convenience or tradition."[67] The formation of a rule of customary law requires that the relevant practice of states be "both extensive and virtually uniform in the sense of the provision invoked," including "States whose interests are specially affected."[68] The Court in *North Sea* also considered that a treaty provision should have a "norm-creating character" in order to pass into customary international law.[69]

[62] YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 140 (2012).

[63] Vladimir Golitsyn, *Continental Shelf Claims in the Arctic Ocean: A Commentary*, 24 INT'L J. MARINE & COASTAL L. 401, 405 (2009). The author, however, also refers to the "overlapping continental shelves" of the United States and Canada "both within *and beyond 200 nautical miles*." *Id.* at 403 (emphasis added).

[64] 193d Plenary Meeting, Closing Statement by the President, XVII OFFICIAL RECORDS 135–36, UN Doc. A/CONF.62/SR.193 (1982). This statement was made in light of Article 82 of the Convention (see *supra* note 51 and corresponding text); Koh considered that non-parties would not participate in "revenue-sharing on the continental shelf beyond 200 miles." *Id.* Other authors take a similar view, for instance that a non-party asserting continental shelf beyond 200 M should make international payments or contributions that are the same or similar to what it "would be obliged to provide under article 82 if it were a state party." B.M. Magnússon, *Can the United States Establish the Outer Limits of its Extended Continental Shelf Under International Law?,* 48 OCEAN DEV'T & INT'L L. 1, 11 (2017). *See also*, JOANNA MOSSOP, THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: RIGHTS AND RESPONSIBILITIES 86–91 (2016).

[65] *See, e.g.*, Ted L. McDorman, *The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime*, 10 INT'L J. MARINE & COASTAL L. 165, 167 (1995); Tullio Treves, *Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report*, 21 INT'L J. MARINE & COASTAL L. 363, 363 (2006); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 274 (8th ed. 2012). *See also* ROTHWELL & STEPHENS, *supra* note 2, at 106 ("Article 76(1), (2), and (3), has almost certainly now become part of customary international law."); the authors expressed no view on paragraphs 4 to 7, though Article 76(2) refers to those subsequent paragraphs.

[66] Statute of the International Court of Justice, Art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 8 UNTS 993.

[67] *North Sea*, *supra* note 16, at 44–45, paras. 74, 77. *See also*, ILC Draft Conclusions, *supra* note 31, at 97.

[68] *North Sea*, *supra* note 16, at 43, paras. 73–74. In *North Sea*, the Court considered states whose interests are "specially affected" to be those with coasts. *Id.* Here, the analysis focuses on states with coasts, although it may be said that even landlocked states have some interests in Article 76, considering that it affects the geographic extent of the deep seabed Area, which is the common heritage of mankind. LOS Convention, *supra* note 5, Arts. 134(3), 136.

[69] *North Sea*, *supra* note 16, at 39–41 and 43, paras. 63–66, 72.

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With respect to the continental shelf, it is considered here that the assertion by a coastal state of the geographic extent of its continental shelf rights has an inherently legal character, as it represents a claim of rights—and concomitant obligations of other states—on the international plane. Such assertions, by their nature, cannot be made out of "considerations of courtesy, convenience or tradition"[70] with no legal implication. Despite this, ensuring that state practice is accompanied by the requisite *opinio juris* presents significant challenges with respect to continental shelf limits. Because the rules under examination here are set forth in a widely ratified treaty, it cannot be assumed that an assertion of continental shelf rights in a particular area is based on customary law rather than treaty law. As stated in the International Law Commission's (ILC) Draft Conclusions on the identification of customary international law, it must be shown that states "engage[d] in the practice . . . out of conviction that the rule embodied in the treaty is or has become customary international law."[71]

Accordingly, actions regarding the continental shelf taken by a party to the LOS Convention are unlikely to be probative as to whether Article 76 is part of customary international law, as it is difficult to ascertain whether the party undertook such actions solely pursuant to treaty law or also out of a conviction that the treaty provision embodied customary law. In an effort to ensure the requisite *opinio juris*, the practice assessed here focuses primarily on non-parties to the Convention. However, the practice of current LOS Convention parties is also considered relevant (1) if it occurred during the period prior to entry into force of the Convention for those states (i.e., before they became parties)[72] or (2) when undertaken in relation to non-parties (i.e., acts of parties against non-parties).[73] Attention is paid, in other words, to the practice of states in situations not governed by the LOS Convention.

Evidence of State Practice and Opinio Juris

For analytical and presentational convenience, evidence of state practice and *opinio juris* is grouped into three categories: enactments, statements, and treaties (primarily maritime boundary treaties).[74]

1. Enactments. This category includes domestic laws, decrees, proclamations, ordinances, or other similar enactments by legislative or executive bodies that constitute state practice and, for the reasons discussed above, also indicate acceptance of the continental margin criterion in Article 76(1) as customary international law. New Zealand's 1977 amendment to its Continental Shelf Act is an example of an enactment that, considering the context, evidences acceptance of the continental margin criterion as customary law. This act asserts New

[70] *Id.* at 45, para. 77.

[71] ILC Draft Conclusions, *supra* note 31, at 103 (brackets added).

[72] State practice is generally not included here if it preceded the LOS Convention's entry into force by less than one year. Such enactments may have been made in full anticipation of the Convention's entry into force.

[73] ILC Draft Conclusions, *supra* note 31, at 98 (stating that, "when States act in conformity with a treaty by which they are not bound, or apply conventional obligations in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law . . ."). *See also id.* at 106.

[74] For a discussion of forms of state practice and *opinio juris*, see generally, *id.*, at 91–92,d 99–101 (draft conclusions 6 and 10). The three categories used here are not overly precise and may overlap and blend into one another. Enactments, for instance, may include declaratory statements regarding customary international law and/or be supported by statements made in a diplomatic context. *See, e.g.*, Costa Rica, *infra* notes 178 and 187.

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Zealand's exclusive rights to its continental shelf and defines "continental shelf" in a manner consistent with the continental margin criterion in Article 76(1) of the Convention.[75] Although New Zealand is now a party to the LOS Convention, this enactment in 1977 long preceded the Convention's entry into force for New Zealand in 1996. (Indeed, it pre-dated even the Convention's adoption in 1982.) The international legal basis for New Zealand's continental shelf assertion, therefore, appears to have been customary international law, despite the direct influence of the Convention. Other coastal states with similar enactments made prior to the entry into force of the Convention for that state include: Antigua and Barbuda,[76] Argentina,[77] Bangladesh,[78] Brazil,[79] Canada,[80] Chile,[81] Cook Islands,[82] Costa Rica,[83] Dominican Republic,[84] Ecuador,[85] Grenada,[86] Guyana,[87] Iceland,[88] India,[89] Madagascar,[90] Mauritania,[91] Mauritius,[92] Mexico,[93] Mozambique,[94]

[75] Continental Shelf Act, No. 28 of 3 November 1964, as Amended by Territorial Sea and Exclusive Economic Zone Act 1977, Act No. 28 of 26 September 1977, § 2(1) (New Zealand) (defining the continental shelf with reference to the "outer edge of the continental margin"), *reprinted in* UN Office of Ocean Affairs & the Law of the Sea, The Law of the Sea: National Legislation on the Continental Shelf 175, UN Sales No. E.89.V.5 (1989).

[76] Maritime Areas Act, § 6 (1982) (Antigua and Barbuda) (defining the continental shelf in accordance with Article 76(1) and also 76(3)). Unless otherwise noted, national legislation is available from DOALOS's maritime claims database, *at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES.

[77] Act No. 23.968, Art. 6 (1991) (Argentina) (defining the continental shelf with reference to the "outer edge of the continental margin").

[78] Territorial Waters and Maritime Zones Act, § 7 (1974) (Bangladesh) (defining the continental shelf with reference to "the outer limits of the continental margin bordering on the ocean basin or abyssal floor").

[79] *See infra* note 177.

[80] Oceans Act, § 17 (1996) (Canada) (defining the continental shelf in accordance with Article 76(1) and 76 (3)). Canada became a party to the Convention in 2003.

[81] Chile statement, *infra* note 181. *See also*, *Final Act*, *infra* note 198.

[82] Continental Shelf Amendment Act, amending the Continental Shelf Act 1964, § 2 (1977) (Cook Islands) (defining the continental shelf with reference to the "outer edge of the continental margin").

[83] *See infra* note 178.

[84] Act No. 573 (amending Act No. 186 of 1967), Art. 7 (1977) (Dominican Republic) (defining the continental shelf with reference to the "outer edge of the continental terrace").

[85] Ecuador's enactment, *infra* note 182. *See also*, *Final Act*, *infra* note 198.

[86] Territorial Sea and Maritime Boundaries Act, § 10 (1989) (Grenada) (defining the continental shelf in accordance with Article 76(1) and 76(3)).

[87] Maritime Boundaries Act, § 9 (1977) (Guyana) (defining the continental shelf with reference to the "outer edge of the continental margin").

[88] Law No. 41, Art. 5 (1979) (Iceland) (defining the continental shelf with reference to the "outer edge of the continental margin"). *See also* Iceland's enactment of 1985, *infra* note 183.

[89] Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, § 6 (1976) (India) (defining the continental shelf with reference to the "outer edge of the continental margin").

[90] *See infra* note 184.

[91] Ordinance 88–120, Art. 4 (1988) (Mauritania) (defining the continental shelf with reference to the "outer edge of the territorial [continental] margin").

[92] Maritime Zones Act, § 5 (1977) (Mauritius) (defining the continental shelf with reference to the "outer edge of the continental margin").

[93] Federal Act Relating to the Sea, Art. 62 (1986) (Mexico) (defining the continental shelf with reference to the "outer edge of the continental margin").

[94] Law 4/96, Art. 13 (1996) (Mozambique) (defining the continental shelf with reference to the "outer edge of the continental margin"), *available at* http://faolex.fao.org/docs/pdf/moz22054.pdf (English translation by author).

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Myanmar,[95] Namibia,[96] Norway,[97] Pakistan,[98] Russian Federation,[99] St. Kitts and Nevis,[100] St. Lucia,[101] Senegal,[102] Seychelles,[103] South Africa,[104] Sri Lanka,[105] Syria,[106] Timor-Leste,[107] Trinidad and Tobago,[108] United Arab Emirates,[109] Vanuatu,[110] Venezuela,[111] and Yemen[112] (of these states, Syria, UAE, and Venezuela remain non-parties). These coastal states asserted continental shelf rights under customary international law based on the continental margin criterion in Article 76(1). In doing so, these states are also accepting that other states may do the same, and that they are obliged to respect the corresponding continental shelf rights asserted by other coastal states.[113]

2. Statements. This category includes official statements of government positions, including statements by foreign ministries, written or oral representations in judicial or arbitral proceedings, government memoranda made publicly available, diplomatic protests, and the like. Some statements expressly accept the continental margin criterion in Article 76(1) as part

[95] Territorial Sea and Maritime Zones Law, § 12 (1977) (Myanmar) (defining the continental shelf with reference to the "outer edge of the continental margin").

[96] Namibia's enactment, *infra* note 179.

[97] Act No. 11 Pertaining to Petroleum Activities, § 4(f) (1985) (Norway) (defining the continental shelf with reference to the "natural prolongation . . ., but no less than 200 nautical miles from the base lines . . ., and not beyond the median line in relation to other states"). *See also* statements of Norway, *infra* note 119.

[98] Territorial Waters and Maritime Zones Act, § 5 (1976) (Pakistan) (defining the continental shelf with reference to the "outer edge of the continental margin").

[99] Federal Law on the Continental Shelf of the Russian Federation, Art. 1 (1995) (defining the continental shelf in accordance with Article 76(1) and 76(3)). Russia became a party to the Convention in 1997.

[100] Maritime Areas Act, § 7 (1984) (St. Kitts and Nevis) (defining the continental shelf in accordance with Article 76(1), (3)).

[101] Maritime Areas Act, § 7 (1984) (St. Lucia) (defining the continental shelf in accordance with Article 76(1), (3)).

[102] Act No. 85-14, Art. 6 (1985) (Senegal) (defining the continental shelf with reference to the "outer edge of the continental margin").

[103] Maritime Zones Act, § 11 (1999) (Seychelles) (defining the continental shelf with reference to the "outer edge of the continental margin").

[104] South Africa's enactment, *infra* note 180.

[105] Maritime Zones Law No. 22, § 6 (1976) (Sri Lanka) (defining the continental shelf with reference to the "outer edge of the continental margin").

[106] Law No. 28, Art. 26 (2003) (Syria) (defining the continental shelf with reference to the "outer edge of the continental margin"). Syria is not a party to the LOS Convention.

[107] Law No. 7/2002, Art. 8 (2002) (Timor-Leste) (defining the continental shelf with reference to the "outer edge of the continental margin"). Timor-Leste acceded to the LOS Convention in 2013.

[108] Trinidad and Tobago's enactment, *infra* note 185.

[109] Federal Law No. 19, Art. 17 (1993) (United Arab Emirates) (defining the continental shelf with reference to the "outer edge of the continental margin"). UAE is not a party to the LOS Convention.

[110] Maritime Zones Act No. 23, § 8 (1981) (Vanuatu) (defining the continental shelf with reference to the "outer edge of the continental shelf of the continental margin"), UN Office of Ocean Affairs & the Law of the Sea, I The Law of the Sea: Current Developments in State Practice 127, UN Sales No. E.87.V.3 (1987).

[111] Ley Orgánica de los Espacios Acuáticos e Insulares, Art. 61 (2002) (Venezuela) (defining the continental shelf with reference to the "outer edge of the continental margin") (English translation by author). Venezuela is not a party to the LOS Convention.

[112] Act No. 45, Art. 2 (1977) (Yemen) (defining the continental shelf with reference to the "outer edge of the continental margin").

[113] Byers explains this dynamic with the concept of reciprocity in international relations, in that states will only claim rights under customary international law "which they are prepared to see generalized . . . because a generalized right subjects the State to corresponding obligations *vis-à-vis* other States." Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law 90 (1999).

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of customary international law, making them the "clearest indication" of *opinio juris*.[114] When taken in context, many of these statements also constitute state practice; for instance, if they affirmatively assert continental shelf rights or are made in the context of a bilateral dispute. An example is the 2013 Note Verbale from Colombia (a current non-party) to the UN recognizing that Article 76(1) is part of customary international law and asserting that Colombia's continental shelf extends to the outer edge of the continental margin.[115] Canada,[116] France,[117] Guatemala,[118] Norway,[119] Venezuela (a current non-party),[120] and Vietnam[121] have made similar statements asserting their own continental shelf rights using the continental margin criterion (without a treaty law basis). Other coastal states—including Australia,[122] Belize,[123] Costa Rica,[124] Denmark,[125] Germany,[126]

[114] ILC Draft Conclusions, *supra* note 31, at 99.

[115] Note Verbale, Apr. 29, 2013, from the Permanent Mission of Colombia to the UN addressed to the Secretary-General, UN GAOR, 67th Sess., Doc. No. A/67/852 (2013) (declaring, inter alia, that "[i]n accordance with customary international law, the Republic of Colombia's continental shelf . . . extend[s] . . . to the outer edge of the continental margin, or to a distance of 200 nautical miles . . ."); *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 117 ("Colombia accepts that paragraph 1 of Article 76 reflects customary international law . . . .").

[116] Canadian statements, *infra* note 186.

[117] France statement, *infra* note 188.

[118] Letter Dated Mar. 4, 1994 from the Minister for Foreign Affairs of Guatemala Addressed to the Secretary-General Concerning the Situation of the Territorial and Maritime Limits Between Guatemala and Belize, *in* UN Office of Ocean Affairs & the Law of the Sea, IV The Law of the Sea: Current Developments in State Practice 155–56, UN Sales No. E.95.V.10 (1995) (The letter is a "declaration regarding Guatemala's official position on the matter" and states Guatemala's view as a then-non-party to the Convention that its continental shelf extends "to the outer edge of the continental margin.").

[119] Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.) [hereinafter *Jan Mayen*], Counter-Memorial of Norway, 1993 ICJ Rep. 38, 19, para. 66 (May 11, 1990) ("Along the west coast of mainland Norway, the continental shelf in some areas continues to the outer edge of the continental margin considerably beyond 200 miles from land."). *See also id.* at 171–72, paras. 601–03 (objecting on scientific and not legal grounds regarding "the location of a 'continental margin' more than 200 nautical miles from the coast of Greenland").

[120] Communication Dated Mar. 9, 2012 Addressed to the UN Secretary-General Concerning the Submission of Guyana to the Commission on the Limits of the Continental Shelf (CLCS) ("Venezuela, in accordance with customary international law, and irrespective of the fact that it is not a party to the [LOS Convention], has a right to the continental shelf extending to the outer edge of the continental margin . . . .").

[121] Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, para. 4 (1977) (Vietnam) (defining the continental shelf with reference to the "outer edge of the continental margin").

[122] National Legislation, *supra* note 42 (Australia statement).

[123] Letter Dated Mar. 23, 1994 from the Hon. Dean Oliver Barrow [to the UN Secretary-General], *in* Current Developments, *supra* note 118, at 153–54 (stating, in reference to a letter from Guatemala, *supra* note 118, that "Belize welcomes Guatemala's acknowledgement, as a non-party to the 1982 [Convention], of the evolution into customary international law of the Convention's definition and regulation of the continental shelf. Belize notes Guatemala's incorporation of the language of articles 76 and 77 of the Convention . . . .").

[124] *See infra* note 187.

[125] *Jan Mayen*, *supra* note 119, Memorial of Denmark, at 64, para. 221 (July 31, 1989) ("A number of the rules adopted in the Convention on the Law of the Sea, 1982, must be regarded as innovations within the sphere of international law. *Other rules of the Convention must be considered as a codification based on customary international law being developed before or during UNCLOS III*; this applies inter alia to the provisions relating to . . . the *continental shelf* (*Article 76.1* and Article 77).") (emphases added).

[126] Diplomatic Protest by Germany in 1986 of the Continental Shelf Declaration of Chile (*infra* note 181), *reprinted* in Tullio Treves, *Codification de Droit International et Pratique des États dans le Droit de la Mer*, 223 Recueil des Cours 97 (1990) (stating that Chile has not proven the existence of the "special conditions" for continental shelf beyond 200 miles that are found in Article 76). Treves considers that Germany's 1980s-era diplomatic protests of enactments by Chile and Ecuador have added legal significance in the transformation of Article

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Honduras,[127] Libya,[128] Malta,[129] Nicaragua,[130] Peru,[131] Trinidad and Tobago,[132] Tunisia,[133] the United States,[134] and Uruguay[135]—have also made statements evidencing acceptance of the continental margin criterion without a treaty law basis, typically in the course of judicial proceeding or other bilateral disputes (of these states, Peru and the United States remain non-parties).

3. Treaties. This category primarily includes treaties that delimit the continental shelf in areas beyond 200 M that were concluded prior to the entry into force of the LOS Convention for one or both parties. As ITLOS remarked in its *Bay of Bengal* judgment, "[d]elimitation [of a maritime boundary] presupposes an area of overlapping entitlements."[136] It is reasonable, therefore, to assume that neighboring coastal states that conclude such maritime boundary treaties have satisfied themselves that they each have a legal entitlement to the continental shelf being divided. If the boundary treaty is concluded prior to the LOS Convention's entry into force for one or both parties, the validity of that entitlement beyond 200 M depends upon customary international law.[137] Boundary treaties meeting this

76 into customary law because Germany is not among the countries able to assert continental shelf beyond 200 M. *Id.* at 100. He also notes, however, some ambivalence in Germany's protest, since it notes that the LOS Convention is not yet in force and also references the CLCS. *Id.*

[127] Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hon.), Counter-Memorial of Honduras, 2007 ICJ Rep. 659, at 59–60, paras. 4.5–.7 (Mar. 21, 2002) (referring to the assertion made by Nicaragua in its Memorial that "the principles laid down in the 1982 Convention in cases of maritime delimitation . . . have now acquired customary value and form part of general international law," Honduras states that this is an "obvious point," cites the Court's 1982 judgment in *Libya/Malta*, and adds "[this] is, in particular, the case for [various articles relevant to delimitation, including Article] 76 . . . referring to . . . the definition of the Continental Shelf").

[128] Continental Shelf (Tunis. v. Libya), Counter-Memorial of Libya, 1982 ICJ Rep. 18, at 162, para. 404 (Feb. 2, 1981) (stating "Article 76 of the [draft LOS Convention], by defining the continental shelf in terms of the natural prolongation of land territory, is not enunciating a new trend in the law of the sea but is rather codifying the principle of natural prolongation described in the North Sea Continental Shelf Cases") [hereinafter *Tunisia/Libya*]. *See also Libya/Malta*, *supra* note 38, Memorial of Libya, at 89, paras. 6.20, 6.21 (Apr. 26, 1983) (referring to Article 76(1), and then stating "In sum, therefore, it can be asserted that 'natural prolongation' remains the fundamental basis of legal title").

[129] *Libya/Malta*, *supra* note 38, Counter-Memorial of Malta, at 266, para. 61 (Oct. 26, 1983) (stating that the "definition in Article 76 . . . must in this respect be regarded as reflecting the present state of customary international law.").

[130] Nicaragua statement, *infra* note 189.

[131] Peru statement, *infra* note 190.

[132] Trinidad and Tobago statement, *infra* note 191.

[133] *Tunisia/Libya*, *supra* note 128, Memorial of Tunisia, at 165, para. 6.45 (May 27, 1980) ("[T]he continental shelf of a State in the legal sense is the natural prolongation . . . [that] encompasses the continental margin, that is to say the shelf, the slope and the rise.") (English translation by the author).

[134] Negroponte Memorandum, *supra* note 28. For U.S. practice, see text at notes 219 (1980s practice) and 221 and 222 (modern practice), *infra*.

[135] Uruguay declaration made upon signature of the Convention (Dec. 10, 1982): "Uruguay *reaffirms* that, as stated in article 76, the continental shelf *is* the natural prolongation of the territory of the coastal State to the outer edge of the continental margin." Emphases added to indicate previous acceptance not in connection with the declaration made upon ratification of the Convention.

[136] *Bay of Bengal*, *supra* note 44, para. 397.

[137] Because the continental margin criterion in Article 76(1) may not be the only legal basis for continental shelf entitlement beyond 200 M, other circumstantial evidence has also been considered to discern reliance on Article 76. This includes commentary associated with a boundary treaty.

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criteria include the 1980 treaty between Indonesia and Papua New Guinea (Pacific),[138] the 1988 treaty between the United Kingdom and Ireland (Atlantic),[139] the 1990 treaty between the United States and Russia (Bering Sea and Arctic),[140] the 1990 treaty between Trinidad and Tobago and Venezuela (Caribbean),[141] the 1992 treaty between Australia and France (Pacific),[142] the 2000 and 2017 treaties between Mexico and the United States (Gulf of Mexico),[143] and the 2017 treaty between Cuba and the United States (Gulf of Mexico).[144] While not a boundary treaty, evidence of acceptance of the continental margin criterion as customary international law can also be found among the practice of thirty-three states under the Antarctic Treaty system.[145]

Assessment

With respect to the *extensiveness* of state practice and *opinio juris*, the evidence described above comes from about seventy different coastal states. In considering whether this is sufficiently widespread, geographic and legal considerations should be borne in mind, as it would be unrealistic to expect every state to have relevant practice pertaining to the continental margin. First, with respect to geography, among the community of states, only about 150 have coasts, and for those that do have coasts, a continental shelf beyond 200 M is often geographically impossible. Given their geographic setting, some coastal states might consider that they have no need to craft domestic law or otherwise assert that their continental shelf extends to the "outer edge of the continental margin."[146] Second, with respect to legal considerations, the ICJ, the 1958 Convention, and the 1982 Convention all confirm that continental shelf

[138] Agreement Between the Government of the Republic of Indonesia and the Government of Papua New Guinea Concerning the Maritime Boundary Between the Republic of Indonesia and Papua New Guinea and Cooperation on Related Matters, Dec. 13, 1980, *in* INTERNATIONAL MARITIME BOUNDARIES 1767, 1770 (J.L. Charney & L.M. Alexander eds., 1993) [hereinafter IMB], at 1039, 1045–46, Rpt. No. 5–10, preamble ("[t]aking account of the recent developments in the Law of the Sea regarding the regime of the continental shelf and exclusive economic zone"), Art. 1 (defining continental shelf in accordance with Article 76(1)), and Art. 2(3) (referring to the possibility of "to extend such boundary further by drawing straight lines, on the basis of the principle specified in paragraph 1 of this Article . . . up to the outer limits of [the parties'] respective continental shelves . . .").

[139] *See infra* note 194.

[140] Agreement Between the United States of America and The Union of Soviet Socialist Republics on the Maritime Boundary, June 1, 1990, *entered into force provisionally* June 15, 1990, S. TREATY DOC. NO. 101–22, 29 ILM 941 (1990). The agreement extends beyond 200 M in the Bering Sea and Arctic Ocean.

[141] *See infra* note 195.

[142] Agreement on Marine Delimitation Between the Government of Australia and the Government of the French Republic, Jan. 4, 1982, *in* IMB, *infra* note 138, at 905, 906, 911–12, Rpt. No. 5-1, preamble ("taking into consideration the work of the United Nations Third Conference on the Law of the Sea"), Art. 1 (establishing a maritime boundary beyond 200 M, from points R18 to R22), Art. 3(1) (providing that the treaty boundary "do[es] not prejudice the respective positions of each of the two States with respect to the outer edge of the continental shelf").

[143] Treaty Between the Government of the United Mexican States and the Government of the United States of America on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, June 9, 2000, 2143 UNTS 417; Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Maritime Boundary in the Eastern Gulf of Mexico, Jan. 18, 2017 (not in force).

[144] *See infra* note 197.

[145] *See infra* note 198.

[146] Although this factor may contribute to a diminished quantity of state practice, the fact that some such states do accept the continental margin criterion remains legally significant. *See infra* note 150 and corresponding text.

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rights are inherent and exist even without any express proclamation by the coastal state.[147] Where a right exists *ipso facto*, as here, an express claim to it may be regarded as superfluous, such that some coastal states may not feel compelled to perform legal acts asserting their rights. This can frustrate an assessment of the extensiveness of state practice. In fact, about one-third of all coastal states appear to have no domestic legislation whatsoever defining their continental shelf. The inherency of continental shelf rights may also lead to complacency, as some coastal states maintain clearly outdated enactments.[148]

The direct supportive evidence that Article 76(1) is part of customary international law comes from a diverse array of states, including representation from all geographic regions of the world and from states with varying continental margin sizes. Evidence from states with particularly large continental shelves includes all five Arctic coastal states[149]—Canada, Denmark, Norway, Russia, and the United States—and also Argentina, Australia, Brazil, Chile, France, India, South Africa, New Zealand, and the United Kingdom. Numerous geographically disadvantaged coastal states, such as those bordering semi-enclosed seas like the Persian Gulf and Mediterranean Sea, have likewise demonstrated acceptance of the continental margin criterion in Article 76(1), notwithstanding that they have little to gain from the continental shelf extending beyond 200 M.[150]

With respect to the *uniformity* of state practice and *opinio juris*, the evidence identified is remarkably consistent in its alignment with Article 76(1). State practice and *opinio juris* that varies from what is presented above is better explained by inertial forces or other factors, rather than a rejection of Article 76(1). Approximately fifteen coastal states, for instance, maintain outdated legislation based on the 1958 Convention. Yet such legislation is almost certainly not reflective of current government views, as many of these states are LOS Convention parties and have made submissions to the CLCS based on Article 76.[151] Approximately a dozen coastal states—mostly those bordering semi-enclosed seas, such as the Baltic states—define their continental shelf limits with specific geographic coordinates or maritime boundaries. Such enactments are not contrary to Article 76; rather, they merely assert more geographically specific limits that are appropriate in light of national circumstances. Enactments of a handful of other states merely refer to "natural prolongation," which could readily be interpreted to be consistent with the continental margin criterion,[152] but is not regarded here as definitive. Most

[147] CSC, *supra* note 14, Art. 2(3); LOS Convention, *supra* note 5, Art. 77(3); and *North Sea*, *supra* note 16, at 39–41, paras. 63, 66.

[148] *See, e.g., infra* note 151 and corresponding text.

[149] Acceptance of Article 76 is further evidenced by the Ilulissat Declaration, signed in May 2008 by the five coastal states bordering on the Arctic Ocean. This Declaration states that "the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf [and other matters]. We remain committed to this legal framework . . . ." The phrase "law of the sea" cannot be construed strictly as the LOS Convention as treaty law, since the United States has no treaty relations with other Ilulissat signatories.

[150] *See* ILC Draft Conclusions, *supra* note 31, at 86 (noting that "practice of a State that goes against its clear interests . . . is more likely to reflect acceptance as law"). *See also* Treves's observations with respect to Germany, *supra* note 126.

[151] The Bahamas, Denmark, Malaysia, Nigeria, Papua New Guinea, the Philippines, and Portugal, for instance, appear to maintain legislation based on Article 1 of the 1958 Convention, yet made submissions to the CLCS pursuant to Article 76. *See* DOALOS, *at* http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

[152] The terms "natural prolongation" and "continental margin," as used in Article 76, "refer to the same area." *Bay of Bengal*, *supra* note 44, para. 434. Enactments of Bulgaria, Cyprus, Iran, and Qatar refer to "natural prolongation."

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importantly, this review of state practice and *opinio juris* has identified *no states* in the period following UNCLOS III that have expressed the view that the continental margin criterion in Article 76(1) is *not* part of customary international law.

Finally, to the extent that a treaty law provision must possess a "norm-creating character" in order to pass into customary international law, there is little doubt that the continental margin criterion in Article 76(1) (as well as the detailed rules in paragraphs 2 to 7) has such a character. While there is no definition as to what constitutes a "norm-creating provision"[153] that is amenable to entering into customary law, the rules in question are generalizable and substantive rules of law. In *North Sea*, the ability of parties to the 1958 Continental Shelf Convention to make treaty reservations to its Article 6 (on boundary delimitation) contributed to the ICJ's conclusion that this provision was not norm-creating and instead "purely conventional" and not part of customary law.[154] The LOS Convention does not permit reservations.[155]

The state practice and *opinio juris* presented above constitute an overwhelming amount of "evidence of a general practice accepted as law," with respect to the continental margin criterion in Article 76(1). The ICJ was justified in its 2012 holding to that effect. A contrary holding would be untenable, as it would imply that *only* the 200 M distance criterion[156] in Article 76(1) is part of customary international law. Aside from ignoring the evidence presented here, such a conclusion would create a jarring inconsistency in the historical evolution of continental shelf law by untethering this juridical regime from its origins, which are rooted in the physical characteristics of the seabed and not a particular distance from the coast. None of the juridical concepts in play during the 1950s through the 1970s—depth, exploitability, natural prolongation, or the continental margin—are consistent with a distance-from-shore based limit, and subsequent state practice has not coalesced around 200 M as a maximum limit. Considering the practice of states before, during, and after UNCLOS III, the customary international law of continental shelf limits has never been strictly limited to 200 M.

III. Article 76(2) to (7): The Details

The analysis of paragraphs 2 to 7 of Article 76 begins with the conclusion reached above, namely that the continental margin criterion in paragraph 1 of Article 76 is part of customary international law. This Part considers whether the same can be said for paragraphs 2 to 7, which implement the continental margin criterion in paragraph 1.

The Rules

Paragraphs 2 to 7 provide the detailed rules for how a coastal state is to determine the outer limit of its continental shelf when using the continental margin criterion in Article 76(1):

[153] *See, e.g.*, Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, 6 Max Planck Y.B. of UN L. 37, 126–27 (2002).

[154] *North Sea*, *supra* note 16, at 43, para. 72 (considering the ability to make reservations to Article 6 "does add considerably to the difficulty . . . [and would] seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess"). *See also id.* at 39–41, paras. 63, 66.

[155] LOS Convention, *supra* note 5, Art. 309.

[156] This criterion is widely accepted as part of customary law. *See, e.g.*, *Libya/Malta*, *supra* note 38.

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2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

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.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
   (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
   (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

   (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines . . . or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

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 . . . . 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.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines . . . , by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

Paragraph 2 of Article 76 provides the first textual indication that the extent of the "continental margin"—referred to in paragraph 1—is not necessarily the same as the extent of the legal "continental shelf." In other words, as will be seen in "paragraphs 4 to 6," the outer edge of the continental margin may, or may not, be the outer limit of the legal continental shelf.

Paragraph 3 defines the components of the continental margin (the shelf, the slope, and the rise), and paragraph 4 provides two formulas for establishing the "outer edge of the continental margin." Both formulas are applied with reference to the "foot of the continental slope," which is the point of maximum change in the gradient at the base of the continental slope. One formula is based on distance, and results in a line that is 60 M from the foot of the continental slope. The other formula is based on the thickness of the sediment beneath the seafloor, and results in a line where the thickness of the sediment is at least 1 percent of the

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shortest distance back to the foot of the continental slope[157] (see Figure 2 below). It is the outer-most line formed by the application of both formulas—distance and sediment thickness—that establishes "the outer edge of the continental margin."

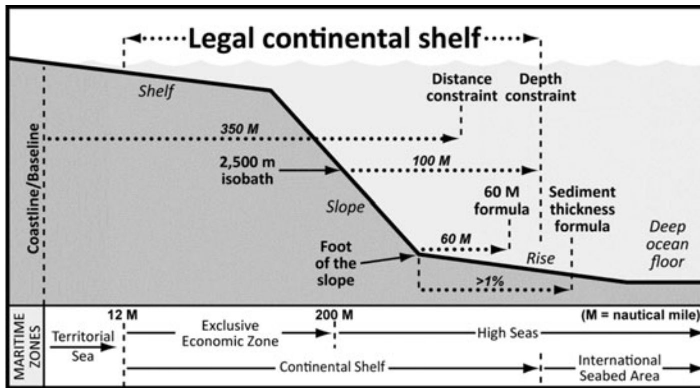

FIGURE 2. The outer limit of the continental shelf under Article 76. In this example, the outer edge of the continental margin is determined by the sediment thickness formula, which is more seaward than the limit generated by the 60 M distance formula (paragraph 4). However, because the outer edge of the continental margin exceeds the depth and distance constraints (paragraph 5), the outer limit of the continental shelf is located at the more seaward of these two constraints which, in this example, is the depth constraint. (Source: Barry Eakins, National Oceanic and Atmospheric Administration.)

Paragraph 5 describes two constraint lines. The first constraint is based on distance from the coast: "350 nautical miles from the baselines from which the breadth of the territorial sea is measured" (distance constraint). The second constraint is based on water depth: "100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres" (depth constraint). Paragraph 5 provides that the outer limits of the continental shelf "either shall not exceed" the distance constraint "or shall not exceed" the depth constraint (see Figure 2 above). Paragraph 6 provides specific rules with respect to applying the constraints to various seafloor highs, including "submarine ridges" (from which the distance constraint must be applied) and "submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs" (from which either constraint may be applied). Paragraph 7 provides rules for the overall delineation of the outer limits of the continental shelf in areas beyond 200 M from the coast, and also assists with the implementation of paragraph 4, which refers in two places to paragraph 7.

The interplay between the provisions above illustrate that the "outer *edge* of the continental *margin*" is not necessarily the "outer *limit* of the continental *shelf*." Taking paragraphs 1 to 7 together, there are four possibilities for the locating the outer limit of the continental shelf:

(1) 200 M, where the outer edge of the margin does not extend this far (paragraph 1)

(2) The outer edge of the continental margin (paragraph 4)

[157] For example, for the limit line to extend 100 kilometers from the foot of the slope requires that the sediment at that location be 1 kilometer thick; thicker sediment means a more seaward limit.

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(3) 350 M (distance constraint, paragraph 5 or 6)

(4) 100 M from the 2,500 meter isobath (depth constraint, paragraph 5).

Formation of the Rules

As previously described, the continental margin criterion in paragraph 1 of Article 76, coupled with a 200 M distance criterion, was arrived at relatively quickly in the first few years of the Third Conference. Negotiations on rules for determining the precise outer limits of the continental shelf beyond 200 M, however, stretched from the Conference's Third Session in 1975 through its Ninth Session in 1980 and were shaped by textual proposals introduced by the United States, the Evensen Group, Ireland, the Soviet Union, Australia, and others.[158] While it is not necessary for present purposes to recount the intricacies of these complex negotiations, several observations are warranted.

First, the objective of the negotiators was to achieve *geographic precision* regarding the seaward limit of the continental shelf. The indeterminacy of the 1958 Convention's exploitability criterion, it should be recalled, represented the problem to be solved at UNCLOS III. Merely settling on the "outer edge of the continental margin" in paragraph 1 would have been an improvement, but still unsatisfactory given the uncertainties attendant in identifying its location. Developing rules to achieve more precise limits would serve not only the interests of coastal states with broad continental shelves, but also the entire international community because the collective outer limits of coastal states' continental shelves also delimits the remaining seabed area that is beyond any state's jurisdiction (i.e., the Area). Indeed, the First Committee at UNCLOS III was dedicated to developing a new regime for exploitation of minerals in the deep seabed Area beyond the limits of national jurisdiction.[159]

Second, despite negotiators' satisfaction with the continental margin criterion in paragraph 1 —which was unchanged from 1975 until the adoption of the Convention in 1982—some delegations sought to weaken this criterion during the subsequent negotiation of its implementation provisions, now found in paragraphs 2 to 7. This dynamic again reflects the zero-sum relationship between the continental shelf and the Area beyond national jurisdiction; an expansion of the former necessarily diminishes the latter, and *vice versa*. The concerns of some states about unreasonable encroachment upon the Area can be seen in paragraphs 5 and 6; when the constraints in these paragraphs are applicable, they deny a coastal state a continental shelf that extends fully to the outer edge of its continental margin. In this way, paragraphs 2 to 7 not only implement the continental margin criterion in paragraph 1, they substantively alter it as well. As Ireland noted at the conclusion of UNCLOS III, the rules adopted in Article 76 "in fact involve cutting off from national jurisdiction parts of the [continental] margin."[160]

Third, returning to the role UNCLOS III played in forming customary international law, it is apparent from a review of the negotiating history of Article 76 that paragraphs 2 to 7 did not codify existing rules of international law. Aside from the first sentence of paragraph 3

[158] *See* UVA COMMENTARY, *supra* note 20, at 848–50, 857, 868. The Evensen Group was an informal group of experts convened by Norwegian Ambassador Jens Evensen.

[159] LOS Convention, *supra* note 5, Arts. 1(1) (defining the Area), 134(3) (clarifying that the limits of the Area are set forth in Part VI concerning the continental shelf), and 136 (providing that "[t]he Area and its resources are the common heritage of mankind").

[160] 186th Plenary Meeting, XVII OFFICIAL RECORDS 24, UN Doc. A/CONF.62/SR.186 (1982).

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(defining the continental margin as the "shelf, the slope, and the rise") these provisions were unknown prior to UNCLOS III.[161] Still, despite the novelty of the detailed rules, at least some states considered that they comported with existing international law. For example, at the close of UNCLOS III, the United Kingdom stated that the provisions of Article 76 "make more precise what is inherent or implicit in existing international law. . . . [A]rticle 76 accurately reflects the evolution and development of the concept [of the continental shelf]."[162] Similarly, the United States considered that "[i]n describing the outer limits of the continental shelf, the Convention applies, in a practical manner, the basic elements of natural prolongation and adjacency fundamental to the doctrine of the continental shelf under international law."[163]

Status of Article 76(2) to (7) Under Customary International Law

Scholarly opinion has varied on whether the implementation rules of Article 76 are part of customary law.[164] Kwiatkowska expressed doubt in 1991 as to whether the "highly technical" provisions of Article 76 were even capable of entering into customary law.[165] As of 1995, McDorman considered it "difficult to accept that . . . the technical criteria of article 76 . . . have emerged as customary international law."[166] Treves, in 2006, took the view that "the basic substantive rules" of Article 76 are part of customary law, but that "it remains open how many of the details and figures set out in these rules partake in this transmigration into customary law."[167] In 2008, Oude Elferink stated that "the detailed provisions of article 76" are "[p]robably not" part of customary international law, though paragraph 1 "arguably is."[168]

Others have regarded the detailed provisions in Article 76 as part of, or likely to become, customary law. In 1985, Hutchinson's thorough examination of continental shelf limits under customary international law concluded that "it is quite likely that Article 76 of the UN Convention, although not yet wholly reflecting the position at customary law, will act as a clear and authoritative guide for future State practice."[169] Around the same time, Moore considered the non-seabed mining portions of the Convention to be the "best evidence of customary international law absent a pattern of state practice to the contrary."[170] In 1987, Clingan went further, writing that "Article 76 does in fact represent the state of the

[161] *See, e.g.,* Oxman, *supra* note 15, at 252–53 (citing the 1966 edition of the U.S. Naval Oceanographic Office, Glossary of Oceanographic Terms, defining "continental margin" as "the continental shelf, slope, and rise").

[162] 189th Plenary Meeting, XVII Official Records 79, UN Doc. A/CONF.62/SR.189 (1982).

[163] Note by the Secretariat, XVII Official Records 244, UN Doc. A/CONF.62/WS/37 and Add.1-2 (1983).

[164] Those that consider paragraph 1 to lack customary international law status, *a fortiori*, would seem to hold the same view of paragraphs 2 to 7. *See* Suarez, Tanaka, and Golitsyn, *supra* notes 61–63, and corresponding text.

[165] Barbara Kwiatkowska, *Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice*, 22 Ocean Dev't & Int'l L. 153, 157–58 (1991).

[166] McDorman, *Entry into Force*, *supra* note 65, at 168.

[167] Treves, *Remarks on Submissions to the Commission*, *supra* note 65, at 363 (2006). *See also* Treves, *Codification*, *supra* note 126, reaching similar conclusions.

[168] A.G. Oude Elferink, *The Outer Limits of the Continental Shelf Beyond 200 Nautical Miles Under the Framework of Article 76 of the United Nations Convention on the Law of the Sea (LOSC)*, at 10–11 (Ocean Policy Research Foundation, 2008).

[169] Hutchinson, *supra* note 39, at 188.

[170] J.N. Moore, *Customary International Law After the Convention*, *in* The Developing Order of the Oceans 41, 43 (Robert B. Krueger & Stefan A. Riesenfeld eds., 1985).

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law . . . ."[171] In 1990, Brownlie considered that Article 76 "will probably be recognized as the new standard of customary law" pertaining to the shelf.[172] Crawford, in 2012, considered Brownlie's forecast to have been accurate, stating that "Article 76 is generally recognized as representing the new standard of customary law for the shelf," a statement seemingly not limited to Article 76(1).[173] For its part, the ICJ considered in 2012 that "it does not need to decide" whether the detailed provisions of Article 76 form part of customary international law.[174] With the notable exception of Hutchinson's detailed review of this topic more than three decades ago, views expressed have not typically been accompanied by an assessment of state practice and *opinio juris*.

Evidence of State Practice and Opinio Juris[175]

With respect to the practice and attitudes of states today, it is clear that coastal states with continental shelf beyond 200 M are widely implementing paragraphs 2 to 7, as seen in the content of the large number of submissions made by coastal states to the CLCS.[176] Once again, however, the challenge is to tease out evidence showing the acceptance of these provisions as customary rather than treaty law. The assessment below uses the same three categories of evidence described in Part II—enactments, statements, and treaties.

1. Enactments. The enactments of some coastal states referred to in Part II, such as those of Brazil,[177] Costa Rica,[178] Namibia,[179] and South Africa[180] appear to have accepted all of paragraphs 1 to 7 through a general statutory acceptance of Article 76. The enactments of other

[171] Thomas A. Clingan Jr., *The Law of the Sea in Prospective: Problems of States Not Parties to the Law of the Sea Treaty*, 30 GERMAN Y.B. INT'L L. 101, 111 (1987).

[172] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 223 (4th ed. 1990).

[173] CRAWFORD, *supra* note 65.

[174] *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 118. In related proceedings, Judge Robinson later remarked that the parties to a dispute could apply paragraphs 2 to 7, but "there is no general agreement that they form part of customary international law." Question of the Delimitation of the Continental Shelf Beyond 200 Nautical Miles (Nicar. v. Colom.) [hereinafter *Nicaragua v. Colombia II*], Decl. of Judge Robinson, para. 14 (Int'l Ct. Justice Mar. 17, 2016).

[175] State practice and *opinio juris* is not assessed for each individual provision within paragraphs 2 to 7. Because these provisions are all closely interrelated, evidence relating to any single one of these provisions could be considered relevant to the entirety of paragraphs 2 to 7. For instance, paragraph 2 refers to paragraphs 4 to 6; paragraph 4 refers to paragraph 7; paragraphs 5 and 6 cannot be implemented without implementing paragraphs 4 and 7; and paragraph 6 refers to paragraph 5. Evidence related solely to paragraph 3, however, is *not* considered evidence related to paragraphs 2, 4, 5, and 7. Paragraph 3 provides a general definition of the continental margin that largely pre-dates the Convention. *See* Glossary of Oceanographic Terms, *cited in* Oxman, *supra* note 161.

[176] *See* Submissions, *supra* note 151.

[177] Law No. 8.617, Art. 11 (1993) (Brazil) (referring to the continental margin criterion in Article 76(1) and also providing that "[t]he outer limits of the continental shelf will be established in accordance with article 76"). Brazil's statute was enacted on January 4, almost two years prior to entry into force of the Convention for Brazil.

[178] Decree 18581-RE, para. 6 (1988) (Costa Rica) ("The regulations of the Convention that refer to the zones of national jurisdiction . . . reflect contemporary International practice and have been considered to derive from prevailing international customary law.").

[179] Act No. 3, § 6 (1990) (Namibia) ("The continental shelf as defined in the [1982 LOS] Convention . . . shall be the continental shelf of Namibia.").

[180] Maritime Zones Act, § 8 (1994) (South Africa) ("The continental shelf as defined in article 76 of the United Nations Convention on the Law of the Sea . . . shall be the continental shelf of the Republic."). South Africa acceded to the LOS Convention on Dec. 23, 1997.

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coastal states, such as Chile,[181] Ecuador,[182] Iceland,[183] Madagascar,[184] and Trinidad and Tobago,[185] utilize one or more of Article 76's formulas (paragraph 4) or constraints (paragraphs 5 and 6).

2. Statements. Similarly, the statements of some coastal states referred to in Part II go beyond paragraph 1 and also cover some or all of the detailed rules that follow in Article 76. These include statements by Canada,[186] Costa Rica,[187] France,[188] Nicaragua,[189] Peru,[190] Trinidad and Tobago,[191] and the United

[181] Declaration by the Ministry of Foreign Affairs (1985) (Chile) (referring to a 350 M limit as applicable to the continental shelf of Easter Island and Sala y Gomez Island).

[182] Declaration on the Continental Shelf (1985) (Ecuador) (referring to the depth constraint in paragraph 5 of Article 76—"a distance of 100 miles measured from the 2,500 metre isobath"—as applicable to the continental shelf of Ecuador's Galápagos Islands).

[183] Regulation No. 196, Arts. 2, 3 (1985) (Iceland) (referring to "segments" of the continental shelf that are "defined by the 350 nautical mile distance limit" of paragraph 5 of Article 76 and justifying this by also stating that the continental shelf limits extend beyond that limit "if defined on the basis of the foot of the slope").

[184] Law No. 85-013, Art. 7 (1985) (Madagascar) (defining the continental shelf limit in part with paragraph 5 of Article 76, as "100 nautical miles from the 2,500-metre isobath"); Act No. 99-028 (1999) (defining the continental shelf in accordance with the continental margin criterion in Article 76(1) and with reference to provisions in Article 76 paragraphs 2 to 6), *reprinted in* DOALOS, 56 LAW OF THE SEA BULL. 67 (2005). Madagascar became a party to the Convention in 2001.

[185] Act No. 43 of 1969, as amended in 1986, § 2 (1986) (Trinidad and Tobago) (providing that the continental margin is "determined in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea").

[186] *See* Statement by the Delegation of Canada, XIII OFFICIAL RECORDS 102, UN Doc. A/CONF.62/WS/4 (1980) (quoting a statement of Canada from May 1975: "Canada does not intend to give up its *existing* sovereign rights to the edge of the continental margin." Emphasis added); Memorandum of the Department of External Affairs, Legal Bureau, Mar. 26, 1987, 25 CAN. Y.B. INT'L L. 409 ("In our view, elements of [the provision of the Law of the Sea Convention] on delimitation of the continental shelf . . . probably do reflect current international law." Brackets in original.); Case Concerning Delimitation of Maritime Areas Between Canada and the French Republic (Can. v. Fr.), 31 ILM 1145, 1171–72 (June 10, 1992) [hereinafter *St. Pierre and Miquelon*] (Canada disagreed with France's application of the detailed provisions of Article 76, but not their legal availability: "In its Counter Memorial [Canada] states that although the continental margin off Newfoundland generally extends beyond 200 nautical miles, the point at which France is making its claim may, in fact, lie beyond the edge of that margin determined in accordance with Article 76 of the 1982 Convention on the Law of the Sea. . . . Canada adds that it does not accept the French assertion concerning the location of the outer edge of the continental margin and observes that France itself does not know the location of the outer edge of the margin . . . ."). Canada became a party to the Convention in 2003.

[187] 139th Plenary meeting, XIV OFFICIAL RECORDS 66, UN Doc. A/CONF.62/SR.139 (1980) (expressing the view "that the legal regime which now governed . . . the continental shelf [reflected in the draft convention] formed part of customary international law and was already binding upon all States . . .").

[188] *St. Pierre and Miquelon*, *supra* note 186, at 1171, para. 75 (citing France's Memorial, the Court states: "Invoking Article 76, para. 4 a) ii) of the 1982 Convention on the Law of the Sea, France claims rights over the continental shelf beyond 200 miles, asserting that its shelf in the area extends as far as the outer edge of the continental margin"). France became a party to the Convention in 1996.

[189] *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 116 ("Nicaragua states that the provisions of Article 76, paragraphs 1 to 7 . . . have the status of customary international law.").

[190] Maritime Dispute (Peru v. Chile), 2014 ICJ Rep. 3, 65, para. 178 (Jan. 27) (referring to Peru's constitutional application of the term "maritime domain" as "consistent with the maritime zones set out in the 1982 Convention"). *See also* Memorial of Peru, at 260, para. 7.25 (Mar. 20, 2009) (referring to "the customary rule codified in Article 76 of the 1982 Convention . . .").

[191] *Barbados v. Trinidad & Tobago*, *supra* note 34. Although the governing law in these proceedings was the Convention and not customary law, Trinidad and Tobago indicated acceptance of the detailed delineation provisions of Article 76 as customary international law. "With respect to the area it claims beyond 200 nm from its coast . . . , Trinidad and Tobago argues that pursuant to Articles 76(4)–(6) of UNCLOS, coastal States have an entitlement to the continental shelf out to the continental margin. In addition, with reference to the specific area

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States[192] (Peru and the United States remain non-parties). Statements made by one coastal state, Colombia (a non-party), in the course of judicial proceedings indicate *non-acceptance* of paragraphs 2 to 7 as part of customary international law.[193]

3. Maritime boundaries. The maritime boundary treaties concluded between Ireland and the United Kingdom[194] before they were parties to the Convention and between Trinidad and Tobago and Venezuela[195] (Venezuela remains a non-party) were developed on the basis of the detailed rules in Article 76, and not merely paragraph 1.[196] The treaty concluded between the United States (a non-party) and Cuba in 2017 reflects acceptance of Article 76's delineation provisions.[197] Paragraphs 2 to 7 were also accepted in the aforementioned practice under the Antarctic Treaty system. In 1988, six years before to the entry into force of the LOS Convention, thirty-three Consultative and Contracting Parties to the Antarctic Treaty agreed that "paragraphs 1 to 7 of Article 76 of the United Nations Convention on the Law of the Sea" constitute the "international law" for determining "the geographic extent of the continental shelf."[198] This agreement states the clear legal position of the participating

beyond its EEZ, but within 200 nm of Barbados, Trinidad and Tobago contends: 'Under general international law as well as under the 1982 Convention, claims to continental shelf are prior to claims to EEZ.' Trinidad and Tobago argues that the older regime of the continental shelf cannot be subordinated to the later regime of the EEZ." *Id*., paras. 174–75.

[192] Negroponte Memorandum, *supra* note 28; J.A. ROACH & R. SMITH, EXCESSIVE MARITIME CLAIMS 194–97 (3d ed. 2012) (reprinting U.S. diplomatic protests of enactments of Chile and Ecuador, *supra* notes 181, 182). *See also*, text following note 219, *infra*. For modern U.S. practice, see text at notes 221 and 222, *infra*.

[193] *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 117.

[194] Agreement Between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland Concerning the Delimitation of the Continental Shelf Between the Two Countries, Nov. 7, 1988, *in* IMB, *infra* note 138, at 1770, Rpt. No. 9-5 ("Point 94 was chosen according to the criterion of the foot of the slope plus 60 n.m.; Point 132 according to that of the 2500 meters isobath plus 100 n.m., thereby taking into account Article 76 . . . ."). *See also* DOALOS, LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 141 (1994) ("The continental shelf delimitation line agreed between Ireland and the UK in 1988 was apparently fixed on the basis of the criteria in article 76, paragraphs 4 and 5 of the Convention.").

[195] Treaty Between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas, Apr. 18, 1990, *in* IMB, *supra* note 138, at 675, 686, Rpt. No. 2-13(3). Art. II(2) states that "[b]oth parties reserve the right, in case of determining that the outer edge of the continental margin is located closer to 350 nautical miles from the respective baselines, to establish and negotiate their respective rights up to this outer edge in conformity with the provisions of International law . . . ." According to the accompanying report, "[t]his may be the first agreement in the world whereas the edge of the margin was calculated on the basis of the thickness of the sedimentary rocks as equal to 1 percent of the shortest distance from the slope, and whereby the potential extension of the boundary to a point close to the 350-n.m. limit (LOS Convention, Art. 76, No. 4 and 5) was virtually pre-empted by the parties . . . ." *Id.* at 681. Venezuela is a non-party to the Convention.

[196] Other boundary treaties cited in Part III of this article may also have been developed using paragraphs 2 to 7, although evidence to this effect does not appear to be publicly available.

[197] Treaty Between the United States of America and the Republic of Cuba on the Delimitation of the Continental Shelf in the Eastern Gulf of Mexico Beyond 200 Nautical Miles, Jan. 18, 2017 (not in force) (preamble, "Affirming that the provisions of international law pertaining to the seaward extent of the continental shelf are reflected in Article 76 of the 1982 United Nations Convention on the Law of the Sea").

[198] Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources, 27 ILM 859, 865–66 (1988) (stating Article 5(3) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, which refers to "the geographic extent of the continental shelf as the term continental shelf is defined in accordance with international law," would be "determined by reference to all the criteria and rules embodied in paragraphs 1 to 7 of Article 76 of the [LOS Convention]."). Consultative Parties include Argentina, Australia, Belgium, Brazil, Chile, China, France, German Democratic Republic, Federal Republic of Germany, India, Italy, Japan, New Zealand, Norway, Poland, South Africa, USSR, United Kingdom, United States, and Uruguay. The Final Act also expresses the agreement of thirteen Contracting Parties to the

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countries, including those such as China and Japan, for which other evidence has not been identified.

Assessment

The direct supportive evidence chronicled above of customary international law formation comes from about forty different coastal states (some appearing multiple times across different categories), with one coastal state, Colombia, taking a contrary view. It is apparent that the relevant state practice for paragraphs 2 to 7 is less widespread than for paragraph 1. Unlike paragraph 1, the evidence for paragraphs 2 to 7 also contains a state with a dissenting view and practice. Nevertheless, when considering the strength of the evidence that does exist, the peculiarities of Colombia's contrary position, and several practical considerations that are somewhat unique to the law of the sea, it may still be concluded that "extensive and virtually uniform" state practice exists that is accompanied by the requisite *opinio juris* for paragraphs 2 to 7 to form customary international law.

First, in assessing the *extensiveness* of the evidence, it is important to again bear in mind the legal and geographic considerations discussed above for paragraph 1 of Article 76.[199] It cannot be expected that every, or indeed even most, countries would exhibit state practice pertaining to the delineation of the outer limits of the continental shelf beyond 200 M from the coast. Moreover, these considerations are more acute for paragraphs 2 to 7 than for paragraph 1. Whereas paragraph 1 assertions of continental shelf are typically made in a generalized fashion (e.g., by referring to the "outer edge of the continental margin"), the proper application of paragraphs 2 to 7 requires continental shelf limits to be "defined by coordinates of latitude and longitude."[200] This kind of precision requires the collection, processing, and analysis of large amounts of marine geophysical data, which has only been possible with the passage of time. As a result, the actual implementation of paragraphs 2 to 7 by coastal states has been rare during the period when evidence of customary international law on continental shelf limits is easiest to identify, namely from the 1970s until the Convention's entry into force in 1994. Widespread implementation of paragraphs 2 to 7 did not take place until after 2000, at which point it is harder to disentangle evidence of customary international law formation from treaty implementation by parties.

In this regard, forty coastal states may be regarded as a significant number from which direct supportive evidence can be found. These coastal states are also broadly representative with respect to interests and geography, including many with broad-margins such as Brazil, Canada, France, Iceland, India, South Africa, the United States, and the United Kingdom, and also geographically disadvantaged states that would have little to gain from Article 76. The supportive evidence comes from large and small states, continental and island states, and developed and developing states.

Second, with respect to *uniformity* of state practice and *opinio juris*, the clear international standard for continental shelf delineation beyond 200 M is found in paragraphs 2 to 7 of Article 76. No coastal state has relied solely on the continental margin criterion in paragraph 1

Antarctic Treaty, namely Bulgaria, Canada, Czechoslovakia, Denmark, Ecuador, Finland, Greece, Republic of Korea, Netherlands, Papua New Guinea, Peru, Romania, and Sweden.

[199] *See supra*, paragraph corresponding to notes 146 to 148.

[200] LOS Convention, *supra* note 5, Art. 76(7).

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of Article 76 or on the exploitability criterion in the 1958 Continental Shelf Convention to delineate its continental shelf limits. With the possible exception of Colombia discussed below, no coastal state has even suggested the possibility of using provisions other than paragraphs 2 to 7 of Article 76 to delineate continental shelf limits.

In the practice of states since UNCLOS III, evidence of non-acceptance of paragraphs 2 to 7 as customary international law appears to come only from Colombia. This non-acceptance, however, is plagued by contradictions and inaccurate factual assertions. For instance, Colombia's initial pleading before the ICJ acknowledged that "the relevant provisions of the Convention dealing with [inter alia] a coastal State's . . . entitlement to maritime areas . . . reflect well-established principles of customary international law."[201] Paragraphs 2 to 7 are obviously such "relevant provisions," yet Colombia later took the position that "there is no evidence of State practice indicating that the provisions of paragraphs 4 to 9 of Article 76 . . . are considered to be rules of customary international law."[202] This revised position seems to reflect a litigation posture more than an actual assessment of the matter in question, as it overlooks a large body of conspicuous evidence. Even Colombia's own neighbor, Ecuador, asserted continental shelf limits in 1985 that relied on paragraph 5 of Article 76 as customary international law.[203]

Third, several practical considerations should be borne in mind when considering whether the totality of the evidence identified above amounts to "extensive and virtually uniform" state practice accompanied by the requisite *opinio juris* such that paragraphs 2 to 7 reflect customary international law. The first consideration is specific to Article 76, and the second pertains to the law of the sea regime more generally.

With respect to Article 76 specifically, it should be recalled that paragraphs 2 to 7 are intended to implement the continental margin criterion in paragraph 1. As ITLOS has confirmed, paragraph 1 "should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin," namely paragraphs 2 to 7.[204] Paragraphs 1 and 4, for instance, "refer to the same area"[205] (i.e., the continental margin), with paragraph 4 providing the formulas and methods for determining the exact location of the "outer edge of the continental margin." In addition, paragraphs 5 and 6 set forth the constraint lines that, when applicable, result in an outer limit of the continental shelf that does not reach the outer edge of the continental margin. Accordingly, illogical and deleterious consequences would follow from regarding only paragraph 1 of Article 76 as part of customary international law. For instance, a non-party would be able to develop its own method of determining the outer edge of the continental margin, even if this results in a more seaward location than paragraph 4. Likewise, a non-party could lawfully ignore the constraints in paragraphs 5 and 6, resulting in a larger continental shelf entitlement than if it were

[201] *Nicaragua v. Colombia I*, *supra* note 27, Counter Memorial of the Republic of Colombia, at 306, para. 4.

[202] *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 117, quoting from Written Reply of the Republic of Colombia to the Question Put by Judge Bennouna (May 10, 2012).

[203] *See supra* note 182. Ecuador became a Convention party in 2012.

[204] *Bay of Bengal*, *supra* note 44, para. 437.

[205] *Id.*, para. 434. *See also*, CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in Respect of Ascension Island on 9 May 2008*, at 6 (stating that the "outer edge of the continental margin" (referred to in paragraphs 1 and 3 of Article 76) is "established by applying the provisions of article 76, paragraph 4 . . .").

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to accede to the Convention. Oxman calls such an outcome, which is suggested by Colombia's position before the ICJ, an "audacious contention" that confers an "exceptional benefit" on non-parties.[206] Accordingly, if a non-party were to actually ignore any of the provisions in paragraphs 2 to 7 today, in supposed reliance on customary international law, such practice would likely be met by protests from other states.

With respect to the law of the sea more generally, its coherence and effectiveness depends upon all states being bound by common rules.[207] States undertake resource exploitation, scientific research, shipping, military, law enforcement, and other activities in a shared physical space. Accordingly, an assertion of maritime rights by one state necessarily implies obligations (and implicates rights) of all other states. In this context, where states interact in a shared environment, a coherent system of law cannot exist if different countries subscribe to different legal rules.

Providing a common rule set—"a legal order for the seas and oceans"[208]—to govern the maritime domain is the historic accomplishment of the LOS Convention, and also one with major implications for the customary international law of the sea. This review of state practice, for instance, has not identified a single Convention party that claims the Convention's territorial sea, EEZ, or continental shelf rights solely against other parties to the Convention. Instead, the seemingly universal practice of coastal states—whether parties or not—is to assert their maritime claims *erga omnes* ("against all").[209] Because this practice is widespread, and because it generally conforms to the Convention's provisions related to maritime zones, it creates a force for the development of customary international law aligned with those treaty provisions. This appears to be what the international community has actively sought, both in the negotiation of the Convention itself[210] and its subsequent implementation by states, including non-parties. Since well before the Convention entered into force, for instance, the UN General Assembly has repeatedly stated its request for "States"—whether they have consented to be bound by the Convention, or not—to "observe the provisions of the Convention when enacting their national legislation"[211] and "the need for harmonization of national legislation with the provisions of the Convention."[212] For its part, despite not having joined the Convention, the United States has vigorously supported the Convention's provisions since shortly after its adoption in 1982.[213]

[206] Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 411 (Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott & Tim Stephens eds., 2015).

[207] LOS Convention, *supra* note 5, preamble (stating that "the problems of ocean space are closely interrelated and need to be considered as a whole").

[208] *Id.*

[209] *See, e.g.*, China's Exclusive Economic Zone and Continental Shelf Act, Arts. 1, 4, 7, 8 (1998) (describing various rights relating to China's EEZ and continental shelf as "exclusive" or "sovereign").

[210] LOS Convention, *supra* note 5, preamble (referring to "the desire to settle . . . all issues relating to the law of the sea" and the "codification and progressive development of the law of the sea achieved in this Convention").

[211] *See, e.g.*, GA Res. 45/145, para. 6 (Dec. 14, 1990) (emphasis added).

[212] *See, e.g.*, GA Res. 40/63, preambular para. 9 (Dec. 10, 1985).

[213] United States Ocean Policy, Statement by the President, Mar. 10, 1983 (stating that the Convention's "provisions with respect to traditional uses of the ocean . . . generally confirm existing maritime law and practice and fairly balance the interests of all states" and that "the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states"). Part XI of the Convention, concerning the

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The practice described above, by which states assert their maritime claims *erga omnes*, is evident with respect to the continental shelf. Many LOS Convention parties, for instance, are (1) using paragraphs 2 to 7 to define their continental shelf limits (pursuant to treaty obligations, at a minimum) and also (2) asserting their continental shelf rights against *all states*, including against non-parties. The situation of the Philippines is illustrative (and also notable because the Philippines is not among the approximately forty countries for which direct supportive evidence has been identified above). As a party to the Convention, the Philippines has delineated its continental shelf using paragraphs 2 to 7 in the Benham Rise region (east of the Philippine archipelago, beyond 200 M).[214] The Philippines regards its continental shelf as subject to its "exclusive jurisdiction and control for purposes of exploration and exploitation."[215] The expectation of the Philippines appears to be that *all states*, including non-parties to the Convention, must respect its exclusive continental shelf rights out to the limits provided for under paragraphs 2 to 7. If so, this legal relationship between the Philippines and non-parties is governed by customary international law, not the Convention.[216] As stated in the commentary to the ILC's Draft Conclusions on the identification of customary international law, when treaty parties "apply conventional obligations in their relations with non-parties to the treaty, this may evidence the existence of acceptance as [customary] law . . . ," and not just treaty implementation.[217]

In addition to the Philippines, sixty-six other parties to the Convention have asserted continental shelf limits based on paragraphs 2 to 7, with a large majority of these parties also having made statements within their submissions to the CLCS or enacted legislation providing that the rights within their continental shelf limits are "sovereign" or "exclusive" to that state. Given that continental shelf rights by their nature—under both customary and treaty law—are exclusive to the coastal state,[218] it seems implausible that any state party would regard its continental shelf limits determined pursuant to paragraphs 2 to 7 as having legal force only against other state parties.

"Area," was the only part of the Convention rejected by United States following adoption of the Convention in 1982. The U.S. concerns were addressed with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted July 28, 1994. *See* Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea (with Annexes and 1994 Agreement), S. Treaty Doc. 103-39 (1994), at VII–VIII, 60–79 (concerning the 1994 Agreement). With respect to the U.S. adherence to international law as reflected in the Convention, including its practice of protesting the excessive claims of foreign states, see generally, ROACH & SMITH, *supra* note 192.

[214] Executive Summary: A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea, at 3–6 (2009) (referring explicitly to paragraphs 3 to 6); DOALOS, M.Z.N.88.2012.LOS (Maritime Zone Notification), July 12, 2012 (referring to the Philippines' deposit of information "permanently describing the outer limits of its continental shelf beyond 200 nautical miles . . . in respect of the Benham Rise").

[215] Presidential Proclamation No. 370 of 20 March 1968 Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf; Philippine Statement on the Benham Rise, Mar. 15, 2017 (referring to the Philippines' "sovereign rights over the Benham Rise area").

[216] Vienna Convention on the Law of Treaties, Art. 34, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT] ("A treaty does not create either obligations or rights for a third State [i.e., non-party] without its consent."). In the context of the continental shelf, *see* MOSSOP, *supra* note 64, at 83 (noting that coastal states have asserted continental shelf rights "beyond 200 nm against non-parties . . . , which indicates that they consider the rights to be based on more than the LOS [Convention]").

[217] ILC Draft Conclusions, *supra* note 31, at 98. *See also id.* at 106.

[218] LOS Convention, *supra* note 5, Arts. 77(1), 77(2).

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Finally, as the current non-party to the LOS Convention with the largest continental shelf, the state practice and *opinio juris* of the United States, merits particular attention. The United States lodged diplomatic objections to the 1980s-era continental shelf limits asserted by Chile and Ecuador.[219] The protests objected to these states' improper application of paragraphs 5 and 6 and, in doing so, affirmed the views of Chile and Ecuador that these provisions were legally available under customary law. The United States expressly accepted paragraphs 1 to 7 as customary international law in an internal government memorandum in 1987, published by the Department of State in 1993.[220] In the decades since, the United States has publicly taken substantial steps to implement paragraphs 1 to 7 with seemingly no international objection. To implement the formulas and constraints in paragraphs 4 to 6, the United States has openly conducted at-sea data collection since 2002, including more than three dozen bathymetric and seismic surveys of U.S. continental margins.[221] As stated on the U.S. government's Extended Continental Shelf Project website:

> Like other countries, the United States is using Paragraphs 1 through 7 of Article 76 to determine its continental shelf limits, and considers these provisions to reflect customary international law. As a matter of customary international law, the United States also respects the continental shelf limits of other countries that abide by Article 76.[222]

In light of the evidence and considerations above, the conclusion that paragraphs 2 through 7 of Article 76 reflect customary international law is both well-founded and practical. This conclusion has a firm basis in state practice and *opinio juris*, and also avoids what has been referred to as "an undesirable divergence between Article 76 of the Convention and customary international law."[223] Even if it is doubted that paragraphs 2 to 7 (or some provisions among them) have completed the "transmigration into customary law,"[224] there is surely no legal obstacle for a non-party to use paragraphs 2 to 7. As Churchill and Lowe state, "[i]t would be difficult to argue that any continental shelf claim consistent with the article 76 formula was not compatible with customary international law."[225]

IV. Article 76(8): The CLCS

The preceding Parts II and III have answered this article's central inquiry, namely the limits of the continental shelf under customary international law. However, Article 76 consists of more than substantive rules. Paragraph 8 of Article 76 introduces the Commission on the Limits of the Continental Shelf (Commission, or CLCS) and its procedures. In doing so, it likewise introduces a number of legal questions, beginning with whether paragraph 8 is part of customary international law.

[219] Roach & Smith, *supra* note 192 (reprinting U.S. diplomatic protests of enactments of Chile and Ecuador, *supra* notes 181, 182).

[220] Negroponte Memorandum, *supra* note 28.

[221] U.S. Extended Continental Shelf Project, *at* http://www.continentalshelf.gov/missions_data/index.htm.

[222] U.S. Extended Continental Shelf Project, *supra* note 29, *at* http://www.continentalshelf.gov/faq/index.htm.

[223] E.D. Brown, 1 Seabed Energy and Minerals: The International Legal Regime 34 (1992).

[224] Treves, *Remarks on Submissions to the Commission*, *supra note* 65, at 363.

[225] R.R. Churchill & A.V. Lowe, The Law of the Sea 150 (3d ed., 1999).

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The Rules . . . and the Procedures

Paragraph 8 of Article 76 states:

> 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.

Annex II of the Convention provides that the CLCS "shall consist of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals."[226] Annex II also spells out the Commission's functions and basic procedures. Consistent with Annex II, the Commission has developed its own more detailed Rules of Procedure[227] and has promulgated Scientific and Technical Guidelines to assist coastal states in preparing submissions.[228] Although frequently described as a UN body, the CLCS is actually an independent body of experts for which the UN secretary-general serves as the secretariat.[229]

The core function of the Commission is to consider submissions by coastal states and make recommendations regarding the outer limits of the continental shelf.[230] Drawing from Article 76(8), Annex II, and the Commission's Rules of Procedure, the submission process can be summarized as follows:

1) *Submission by Coastal State*. A coastal state intending to establish the outer limits of its continental shelf beyond 200 nautical miles must "submit particulars of such limits to the Commission along with supporting scientific and technical data."[231]

2) *Receipt of the Submission.* The submission is received by the UN secretary-general, which records the submission, notifies all UN member states of its receipt, makes the executive summary of the submission public on its website, and places the submission on the provisional agenda of the Commission's next ordinary session.[232]

3) *Consideration of the Submission by CLCS*. The Commission discharges its mandate to "consider the data and other material submitted by coastal States"[233] through "subcommissions composed of seven members."[234] Submissions are "queued in the order

[226] LOS Convention, *supra* note 5, Annex II, Art. 2.

[227] Rules of Procedure of the Commission on the Limits of the Continental Shelf, Doc. No. CLCS/40/Rev.1 (2008) [hereinafter Rules of Procedure].

[228] Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, Doc. No. CLCS/11 (1999).

[229] LOS Convention, *supra* note 5, Annex II, Art. 2(5). *See* DOALOS, *at* http://www.un.org/Depts/los/index.htm.

[230] LOS Convention, *supra* note 5, Art. 76(8); Annex II, Art. 3(1)(a).

[231] *Id.*, Annex II, Art. 4.

[232] Rules of Procedure, *supra* note 227, Rules 48(1), 50, 51. *See also* list of submissions, *supra* note 151.

[233] LOS Convention, *supra* note 5, Annex II, Art. 3(1)(a).

[234] *Id.*, Annex II, Art. 5.

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they are received" and, due to the substantial backlog of submissions received, it is anticipated that it will take many years before a submission made today is considered.[235]

4) *Recommendation to the Coastal State.* After review, the full Commission makes its recommendations to the coastal state.[236]

5) *Establishment of Outer Limits*. As stated in Article 76(8), "[t]he limits of the shelf established by a coastal State on the basis of these recommendations [by the CLCS] shall be final and binding."[237] Once the coastal state establishes its outer limits, they are to be deposited with the secretary-general, which gives due publicity to these outer limits.[238]

6) *Disagreement with the Commission*. If a coastal state disagrees with the recommendations of the Commission, it "shall, within a reasonable time, make a revised or new submission to the Commission."[239]

Several observations regarding the CLCS procedures merit emphasis. First, paragraph 8 describes a mandatory obligation; information "*shall* be submitted by the coastal State." While non-compliance with this provision cannot deprive a coastal state of its continental shelf, the Convention nevertheless obligates coastal states that intend to establish continental shelf limits beyond 200 M to make a submission and participate in the Commission's procedures. Second, the CLCS itself is a *recommendatory* body; it is the coastal state and not the CLCS that actually establishes the outer limit of its continental shelf. Third, despite its recommendatory character, the Commission's role has a legal dimension because "*if* an outer limit claim is based on the Commission recommendations, *then* the outer limit is final and binding."[240] The meanings of two phrases in Article 76(8)—"on the basis of" and "final and binding"—have been the subject of much commentary.[241] For present purposes, it suffices to say that if a coastal state follows the Commission's recommendations, it benefits from increased legal certainty and international recognition of its outer limits. It is unclear what happens in the event of a protracted disagreement between the coastal state and the Commission. If disagreement persists even after "mak[ing] a new or revised submission to the Commission,"[242] then the coastal state may presumably establish its outer limits *not*

[235] Rules of Procedure, *supra* note 227, Rules 48(1), 51. *See also* list of submissions, *supra* note 151.

[236] LOS Convention, *supra* note 5, Annex II, Arts. 3(1)(a), 6(1), 6(3); Rules of Procedure, *supra* note 227, Rules 51(5), 53.

[237] LOS Convention, *supra* note 5, Art. 76(8).

[238] *Id.* Arts. 76(9), 84.

[239] *Id.*, Annex II, Art. 8.

[240] Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INT'L J. MARINE & COASTAL L. 301, 314 (2002) (considering the "most straightforward reading" of the final sentence of paragraph 8 to be an "if/then clause") (emphasis in original).

[241] *See, e.g.*, *id.* at 313–17; ØYSTEIN JENSEN, THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF: LAW AND LEGITIMACY 92–117 (2014); B.M. MAGNÚSSON, THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: DELINEATION, DELIMITATION, AND DISPUTE SETTLEMENT 87–95 (2015); INTERNATIONAL LAW ASSOCIATION, SECOND REPORT OF THE COMMITTEE ON LEGAL ISSUES OF THE OUTER CONTINENTAL SHELF 14–16 (2006) (hereinafter ILA Second Report); John Noyes, *Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf*, 42 VAND. J. TRANSNAT'L L. 1211 (2009).

[242] LOS Convention, *supra* note 5, Annex II, Art. 8.

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on the basis of the Commission's recommendations, in which case the coastal state's limits would *not* be final and binding, leaving it up to other states to evaluate the credibility of such limits.[243] Finally, it should be noted that Article 76(8), Annex II, and the Commission's Rules generally refer to "coastal States" rather than "States Parties," a relevant distinction in the context of possible applicability of these provisions to non-parties, discussed in Section V.

Formation of the Rules and Procedures

The need for an independent treaty body to oversee the implementation of paragraphs 2 to 7 of Article 76 can be explained by the extraordinary complexity of these provisions, coupled with the compelling need for coastal states to establish precise and widely-accepted continental shelf limits. Excessive claims by coastal states would diminish the size and resource potential of the international seabed Area beyond national jurisdiction. As such, Article 76(8) concerning the CLCS was an integral part of the carefully balanced compromises at UNCLOS III.

Paragraph 8 evolved from proposals of the United States and the Evensen Group at the Third Session of UNCLOS III in 1975, providing that a "Continental Shelf Boundary Commission" would make "decisions" regarding a coastal state's continental shelf limits that were "final and binding."[244] This approach exceeded the comfort level of many negotiating states, as it would have given the Commission a direct and powerful role in establishing this important jurisdictional limit. The Soviet delegation, for instance, conveyed the view in 1976 that the Commission "should not be allowed to determine the boundary of any State."[245] From this point forward, the text of what would become paragraph 8 referred only to "recommendations" of the Commission.

Disagreements persisted, however, with respect to the weight and effect to be given to the Commission's recommendations. Whereas some states wished to see "a closer link between the recommendations of the Commission and the final definition of the outer limit," others considered it "unacceptable for a third party to be authorized to exceed a recommendatory role."[246] A number of states expressed concerns about the meaning and implications of the final sentence of paragraph 8 (referring to the Commission's recommendations).[247] Of particular note, Canada expressed its concerns on this matter in a plenary statement, noting that Canada was "assured on all sides that [it] is not the intention" of the draft text to "giv[e] the commission the function and power to determine the outer limits of the continental shelf of a

[243] See discussion, *infra* Section V.

[244] UVA COMMENTARY, *supra* note 20, at 848–50. For instance, the Evensen Group's proposal provided that "[t]he coastal State, any State with a particular interest in the matter, or the International [Seabed] Authority, may submit any [coastal state's continental shelf] delineation . . . for review." *Id.* at 850. Regarding the Evensen Group, see *supra* note 158.

[245] UVA COMMENTARY, *supra* note 20, at 853.

[246] 126th Plenary meeting, XIII OFFICIAL RECORDS 20, 24, UN Doc. A/CONF.62/SR.126 (1980) (statements of Austria and Venezuela, respectively).

[247] *See, e.g.*, 127th plenary meeting (France), XIII OFFICIAL RECORDS 30, UN Doc. A/CONF.62/SR.127 (1980); 128th Plenary meeting (Uruguay), XIII OFFICIAL RECORDS 35–36, UN Doc. A/CONF.62/SR.128 (1980); 137th Plenary meeting (UK), XIV OFFICIAL RECORDS 49, UN Doc. A/CONF.62/SR.137 (1980). These and other states preferred the phrase "taking into account" instead of "on the basis of," expressing the view that the latter might undermine the recommendatory role of the Commission.

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coastal State."[248] While UNCLOS III did not fully resolve the precise meanings of the phrases "on the basis of" and "final and binding," the sentiments expressed by Canada and others convey the primacy of the coastal state in establishing the jurisdictional limits in question.[249]

Finally, the negotiating history and the state practice that accompanied UNCLOS III demonstrate that Article 76(8) did not codify an existing rule or crystalize an emerging rule of customary international law. The Commission and its procedures are wholly a creation of UNCLOS III and could only come into existence through the entry into force of the Convention and the election of Commission members by states parties.

Status of Article 76(8) Under Customary International Law

As of the end of 2017, coastal states had made seventy-eight submissions to the CLCS.[250] Because each was made by a coastal state that was a party to the Convention at the time of its submission, none provide clear support that paragraph 8 reflects customary international law. There is likewise an absence of enactments and statements by coastal states indicating that paragraph 8 is part of customary law.[251] As discussed above, a number of coastal states have enacted legislation, prior to the entry into force of the Convention, seemingly accepting the entirety of Article 76 as customary law. Still, even from these enactments, it is hard to draw an inference in favor of acceptance of paragraph 8 specifically, considering that the CLCS is an institution that itself could only come into existence if the Convention enters into force. The more defensible view is that Article 76(8) is not part of customary international law. This view is also in accord with the declarations and separate opinions of four judges involved in ICJ proceedings between Nicaragua and Colombia.[252]

V. The CLCS and Non-parties

If paragraph 8 were part of customary international law, the analysis could now satisfactorily conclude. All states would be bound by the same set of rules in Article 76, and also subject to the same procedures. The contrary finding, however, presents a complex legal situation. While the rules for delineating continental shelf limits (reflected in Article 76, paragraphs 1 to 7, as either treaty or customary law) are the same for parties and non-parties to the

[248] Statement by the Delegation of Canada, XIII Official Records 102, UN Doc. A/CONF.62/WS/4 (1980).

[249] *See also* McDorman, *Role of the Commission*, *supra* note 240, at 306 ("*One certainty is that it is the coastal state, not the Commission, which has the legal capacity to set the state's outer limit of the continental margin*.") (emphasis in original).

[250] *See* list of submissions, *supra* note 151.

[251] Some statements expressly note the *non*-customary status of paragraph 8. *See, e.g.*, Canadian Legal Memorandum, *supra* note 186.

[252] These separate opinions addressed the matter because the Court gave rather substantial weight to paragraph 8 in a case that the Court itself stated was decided on the basis of customary law. *Nicaragua v. Colombia I*, *supra* note 27, at 666, para. 118; at 669, paras. 126–27. *Nicaragua v. Colombia I*, *supra* note 27, Separate Opinion of Judge Donoghue, para. 28 (non-parties have "no duty to make submissions to the Commission."); *Nicaragua v. Colombia I*, *supra* note 27, Decl. of Judge *ad hoc* Mensah, para. 8 (regarding paragraph 8 as a "treaty obligation" that "cannot be considered as imposing mandatory obligations on all States under customary international law"); *Nicaragua v. Colombia I*, *supra* note 27, Decl. of Judge *ad hoc* Cot, paras. 19–20 ("[i]t is difficult to regard paragraph 8 as an expression of customary law"); *Nicaragua v. Colombia II*, *supra* note 174, Decl. of Judge Robinson, para. 11 (Article 76(8) and Annex II "are obviously special, contractual and confined to States parties to UNCLOS.").

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Convention, only parties are subject to the obligation in Article 76(8) to make a submission to the CLCS. This suggests two possibilities for a non-party intending to establish the outer limits of its continental shelf: (1) establish outer limits without participating in the CLCS process; or (2) seek to establish outer limits through the CLCS process. Both possibilities are explored in this section.

Outer Limits in the Absence of the CLCS Process

Because paragraphs 1 to 7 of Article 76 are part of customary international law, it naturally follows that non-parties have entitlement to the full geographic extent of their continental shelf, consistent with these provisions of law. Of course, if a non-party establishes the outer limits of its continental shelf outside of the CLCS process (e.g., via unilateral declaration), those outer limits could not be "final and binding" within the meaning of paragraph 8 of Article 76 of the LOS Convention. Rather, for a non-party following this course, the outer limits of its continental shelf would have the same status as the outer limits of any other maritime zone, such as the territorial sea. That is, the reactions—or non-reactions—of other states would be relevant in determining the acceptability of a non-party's continental shelf limits.[253]

It should be noted that the above situation is no different for a state party. Continental shelf entitlement is not dependent upon a state party either making a submission or, if a submission is made, following the Commission's recommendations. The Convention contains no obligation for states parties to establish their continental shelf limits beyond 200 M on the basis of the Commission's recommendations; rather, it merely provides that when this is done, the limits are "final and binding."[254] As ITLOS has affirmed, the Convention's requirements related to the Commission do "not imply that entitlement to the continental shelf depends on any procedural requirements."[255] To conclude otherwise, and predicate entitlement upon a procedure, would overturn long-standing continental shelf doctrine described in Article 2 of the 1958 Convention, Article 77 of the 1982 LOS Convention, and in the ICJ's *North Sea* judgment, which stated that continental shelf rights "exist *ipso facto* and *ab initio*, by virtue of [the coastal state's] sovereignty over the land. . . . In order to exercise [rights to the shelf], *no special legal process has to be gone through*, nor have any special legal acts to be performed."[256]

[253] *See, e.g.*, McDorman, *Role of the Commission*, *supra* note 240, at 308–10 (discussing the "politics of ocean boundary making"). For U.S. practice on protesting excessive maritime claims, see ROACH & SMITH, *supra* note 192.

[254] LOS Convention, *supra* note 5, Art. 76(8). That entitlement to continental shelf is not dependent upon the CLCS is further underscored by the Commission's own Rules of Procedure, which provide that the Commission may not review a submission involving a "land or maritime dispute," unless a disputing state provides its consent. This rule, which is intended to prevent the Commission from prejudicing such disputes, means that some states parties that have made a submission will never receive recommendations. Rules of Procedure, *supra* note 227, Rule 46; Annex I.

[255] *Bay of Bengal*, *supra* note 44, para. 408 (citing Art. 77 of the Convention).

[256] *North Sea*, *supra* note 16, at 23, para. 19 (emphasis added). *See also* CSC, *supra* note 14, Art. 2(3); LOS Convention, *supra* note 5, Art. 77(3) (confirming that continental shelf rights "do not depend on occupation, effective or notional, or on any express proclamation." This provision was found to reflect customary international law in *North Sea*, *supra* note 16, at 39–41, paras. 63, 66). The ICJ, however, has sown confusion on the relationship between continental shelf entitlement and the CLCS process, most notably the Court's 2016 judgment in ongoing proceedings between Nicaragua and Colombia. *Nicaragua v. Colombia II*, *supra* note 174, Preliminary Objections (Mar. 17, 2016), *at* http://www.icj-cij.org/files/case-related/154/154-20160317-JUD-01-00-EN.pdf. Here, a narrow majority appeared to take the view that the reason Nicaragua had failed to establish (in

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These are not outdated sentiments from the 1960s, as they are reiterated in the actual submissions of many coastal states to the CLCS.[257]

State practice confirms that entitlement to continental shelf is not predicated on the establishment of outer limits through the CLCS process. Since the inception of the continental shelf regime in the 1940s, coastal states have exercised their continental shelf rights notwithstanding the lack of established outer limits. Even in continental shelf areas beyond 200 M, both parties and non-parties to the Convention have exercised their continental shelf rights in the absence of CLCS recommendations.[258] There are also at least fourteen boundary treaties involving nineteen different coastal states "in which the outer continental shelf [i.e., beyond 200 M] is delimited before making a submission to the CLCS or receiving any recommendations from the Commission."[259] The parties to such boundary treaties have seemingly satisfied themselves that their respective entitlements overlap, even without involvement of the CLCS. Such practice can be explained by the fact that, in many instances, there is no doubt that the area in question is continental shelf.[260] The central purpose of the CLCS procedures is to establish certainty as to the *outer limits* of the continental shelf; however, as ITLOS has

prior proceedings) a continental margin of sufficient breadth to generate an overlap with Colombia's continental shelf was because, at the time of the proceedings, Nicaragua had not yet filed a submission with the CLCS (para. 82). By subsequently filing its submission to the CLCS, according to the majority's reasoning, Nicaragua seemingly cured this defect and "established that it has a continental margin" of sufficient breadth to justify boundary delimitation by the Court (*id.*). The majority's reasoning is unclear, in part because it is interpreting its prior judgment and not the Convention. To the extent that the Court's majority considers the filing of a submission as establishing entitlement to continental shelf beyond 200 M, the Court is in error. In addition to having no support in the text of the Convention or state practice, this view overlooks the possibility that the Commission, in its review of a submission, may conclude that the coastal state does not have any continental shelf limits beyond 200 M, as was the case for the UK with respect to Ascension Island, *supra* note 205. *See also*, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, paras. 55–58 (noting that "information submitted to the CLCS . . . will not necessarily be regarded as sufficient to establish the existence of an extended continental shelf"); Dissenting Opinion of Judge Donoghue, paras. 47–51 ("the obligation to make a submission to the Commission applies only to the process of delineating the outer limits of the continental shelf. UNCLOS imposes no obligation on a State party to make a submission to the Commission prior to seeking judicial or arbitral delimitation of continental shelf beyond 200 nautical miles of its coast"); Declaration of Judge Gaja, para. 1 ("a coastal State's entitlement to an extended continental shelf does not depend on an assessment by the Commission"); and Declaration of Judge Robinson, paras. 15–18 (referring to the majority's "invention of a procedural condition").

[257] *See, e.g.*, Executive Summary of the Partial Submission of Canada (Atlantic Region), at 3, *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/can70_13/es_can_en.pdf ("[T]he rights of the coastal State over the continental shelf exist *ipso facto* and *ab initio* as reflected in Article 77 of the Convention.") *See also Bay of Bengal*, *supra* note 44, para. 408 (Convention's requirements relating to the CLCS "not imply that entitlement to the continental shelf depends on any procedural requirements.").

[258] For example, Canada (Atlantic) and the United States (Gulf of Mexico) have undertaken hydrocarbon leasing beyond 200 M (although no commercial exploitation has occurred). *See e.g.*, Carolyn Davis, *Statoil Touts Two More Discoveries Offshore Eastern Canada in Flemish Pass Basin*, NATURAL GAS INTELLIGENCE (June 13, 2016); Bureau of Ocean Energy Management, Western Gulf of Mexico "Lease Sale Information," including Lease Sale 180 (2001), *at* https://www.boem.gov/GOMR-Historical-Lease-Sale-Information. *See also*, MOSSOP, *supra* note 64, at 80 (describing the exercise of continental shelf rights beyond 200 M by Portugal under the OSPAR Convention).

[259] B.M. Magnússon, *Is There a Temporal Relationship Between the Delineation and the Delimitation of the Continental Shelf Beyond 200 Nautical Miles?* 28 INT'L J. MARINE & COASTAL L. 465, 471–72 (2013). *See also*, 2017 U.S.-Mexico and U.S.-Cuba treaties, *supra* notes 143 and 197, respectively.

[260] *See, e.g.*, *Bay of Bengal*, *supra* note 44, para. 446 (referring to "uncontested scientific evidence" in the Bay of Bengal). Other examples include so-called "doughnut holes" of continental shelf beyond 200 M that are surrounded on all sides by 200 M limits (e.g., Barents Sea, Bering Sea, Gulf of Mexico, Sea of Okhotsk).

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stated, "[a] coastal State's *entitlement* to the continental shelf . . . does not require the establishment of *outer limits*."[261]

None of the foregoing diminishes the importance of the Commission. Coastal states must develop their continental shelf limits by applying complex formulas and rules typically requiring large amounts of marine geophysical data and analysis. Even if done transparently, many governments are ill-equipped to easily evaluate the credibility of another country's claimed continental shelf limits. Accordingly, a system of unilateral claims and unilateral reactions might sow confusion and uncertainty from the perspective of both the coastal state and the international community. The lack of a stable boundary separating the continental shelf and the international seabed Area would complicate, and perhaps thwart, fixed site-specific investments for developing mineral resources on both sides of the line. This is particularly the case in those areas where continental shelf limits are difficult to identify without a rigorous assessment of scientific data, which may not even be publicly available. It was these concerns that led drafters of the Convention to establish the Commission. Through its procedures and independent scientific expertise, the Commission serves the function of legitimizing (or not) claimed outer limits, to the benefit of the entire international community, including with respect to defining the Area beyond national jurisdiction.

Non-party Participation in the CLCS Process

As discussed above, while legal entitlement to continental shelf beyond 200 M does not depend on participation in the CLCS process, such participation by coastal states may nevertheless be beneficial. But is non-party participation in the Commission's procedures legally permissible?

Scholarly opinion is divided on this question. McDorman and other scholars see "nothing in the mandate of the Commission that would preclude a non-party . . . from utilising the Commission."[262] Oude Elferink and others, however, consider that a non-party is "not entitled to employ the procedure for establishing the outer limits of the continental shelf involving the Commission."[263] Others have viewed non-party participation in the CLCS process from the perspective of what is sensible and beneficial, rather than as a strictly legal question. For instance, Treves has considered this matter "in terms of interest[s]," including the interest of the coastal state in "obtain[ing] more support and certainty for its claim" but also "the

[261] *Bay of Bengal*, *supra* note 44, para. 409 (emphases added).

[262] McDorman, *Role of the Commission*, *supra* note 240, at 303–04. *See also*, Clingan, *supra* note 171, at 112; T.A. Clingan, Jr., *Dispute Settlement Among Non-parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf*, *in* THE LAW OF THE SEA: WHAT LIES AHEAD? 495 (T.A. Clingan, Jr. ed., 1986); P. Pedrozo, *Is It Time for the United States to Join the Law of the Sea Convention?*, 41 J. MAR. L. & COM. 151, 152–53 (2010) (the Convention and the Commission's rules "all speak in terms of submissions by 'coastal states,' not 'State Parties'").

[263] A.G. Oude Elferink, *The Regime for Marine Scientific Research in the Arctic: Implications of the Absence of Outer Limits of the Continental Shelf Beyond 200 Nautical Miles*, at 2 (paper presented at Arctic Science, International Law and Climate Change: Legal Aspects of Marine Science in the Arctic Ocean 2011). *See also*, Rudiger Wolfrum, Statement at the 73rd Biennial Conference of the International Law Association, The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea, at 6 (2008) (considering it "doubtful" that non-parties "may submit their data to the Continental Shelf Commission" or that the Commission "would be entitled . . . to issue recommendations to the coastal State concerned"); *Nicaragua v. Colombia I*, *supra* note 27, Decl. of Judge *ad hoc* Mensah, para. 6 (stating that "it is at least arguable that this procedure is not available (certainly not as of right) to non-parties to UNCLOS").

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interest of everybody else, probably more so than of the coastal state. Everybody has an interest in a precise definition of states' limits, including limits of States that are not parties to the LOS [Convention]."[264] Along similar lines, Zinchenko suggested that a non-party submission "should be welcomed for its contribution to the delineation and stability of global boundaries."[265] Magnússon considers that making a submission helps a non-party "show its commitment to the principles and legal framework of [the LOS Convention] and present its entitlement to the continental shelf in a format that is well established."[266]

As an initial matter, non-party participation in the CLCS process would involve two steps with different main actors: (1) the filing of a submission, which would be an act undertaken by a non-party coastal state; and (2) the review of (and recommendations on) a submission, which would be undertaken by the CLCS. Different legal considerations weigh on these steps.

Non-party Submission

First, with respect to the filing of a submission by a non-party coastal state with the CLCS, neither treaty law (which cannot bind a non-party) nor customary law (which is not applicable to paragraph 8) prohibits such an act. Whether invited or not, whether ultimately welcomed or ignored by the CLCS, a submission merely involves the communication of data and other materials to the Commission in a particular format. This would be a permissible act by a non-party coastal state.

One might be tempted to view a non-party submission as being governed by Article 35 or 36 of the Vienna Convention on the Law of Treaties (VCLT).[267] Those articles describe the conditions under which an obligation or right "arises for a third State [i.e., non-party] from a provision of a treaty." It is submitted here that the matter is not so complex. The problem with applying Articles 35 and 36 of the VCLT to assess the legality of a non-party submission is that such a submission need not be made as a matter of right or obligation *arising under the treaty*.[268] Rather, a non-party submission could be among the many examples of a non-party implementing a treaty provision where there is no requirement to do so. To conclude otherwise, that a submission by a non-party is legally *prohibited*, would seem to disturb a basic principle of treaty law, *pacta tertiis*, reflected in Article 34 of the VCLT, in that the treaty *qua* treaty (i.e., LOS Convention) cannot create a legal bar for non-parties.[269]

[264] Treves, *Remarks on Submissions to the Commission*, *supra* note 65, at 364.

[265] Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf*, *in* LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 235 (Myron H. Nordquist, John Norton Moore & Tomas H. Heidar eds., 2004) (stating that the deadline provision in Article 4 of Annex II "appears to exclude the possibility for States non-Parties") *Id.* at 237.

[266] Magnússon, *Can the United States Establish the Outer Limits of its Extended Continental Shelf*, *supra* note 64, at 7.

[267] VCLT, *supra* note 216, Arts. 35, 36.

[268] Some opinions appear to assume the contrary, namely that a non-party must have a "right" or "obligation" arising *under treaty law* in order to make a submission. *See, e.g.*, ILA Second Report, *supra* note 241, at 20–21. In focusing on Articles 35 and 36, the Second Report does not address the question of whether a non-party is legally permitted to make a submission outside the confines of treaty law.

[269] VCLT, *supra* note 216, Art. 34 ("A treaty does not create either obligations or rights for a third State without its consent.").

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CLCS Review of a Non-party Submission

The second and more difficult question is whether the CLCS may consider a submission from and make recommendations to a non-party coastal state. As McDorman has correctly observed, this question engages the *mandate* of the CLCS under the Convention;[270] it is not an issue of customary international law and its application to states. Put simply, what is this treaty body authorized to do? Article 3 of Annex II describes the functions of the CLCS as follows (with emphases added):

> (a) to consider the data and other material submitted by *coastal States* concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 . . . ;
>
> (b) to provide scientific and technical advice, if requested by the *coastal State* concerned during the preparation of the data referred to in subparagraph (a).

Thus, the mandate of the Commission—with respect to both submissions and the provision of scientific and technical advice—pertains to "coastal States," not "States Parties." The relevant legal question, therefore, is the meaning of "coastal States" as a matter of treaty law, namely whether or not the term "coastal States" includes non-parties.

In 1997, the CLCS posed to the Convention's Meeting of States Parties the very question of whether "the terms 'a coastal State' and 'a State' [in Annex II] include a non-State party to the Convention, or do they only refer to a coastal State or a State which is a State Party to the Convention?"[271] The matter was briefly addressed at the Meeting of States Parties in 1998. No decision was taken, and doubt was expressed as to whether the Meeting of States Parties had the competence to address this legal question.[272] The matter remains unresolved from the perspective of the Commission. It will likely only be officially considered further "when the problem actually arises."[273]

The Meaning of "Coastal State"

The Convention does not define the term "coastal State." Based on rules of treaty interpretation, the ordinary meaning of "coastal State" in the context it is used and in light of the object and purpose of the Convention indicates that this term—and therefore the mandate of the CLCS—includes non-party coastal states.[274] The ordinary meaning of "coastal State" is any state that borders the sea, including continental and island states with a sea coast (i.e., not land-locked). In the *Chagos Marine Protected Area Arbitration*, the Tribunal simply remarked: "[t]his term is not defined in the Convention, although its usage in the text [of the

[270] McDorman, *Role of the Commission*, *supra* note 240, at 303–04.

[271] Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, 2d Sess., para. 12, Doc. No. CLCS/4 (1997).

[272] Report of the Eighth Meeting of States Parties, UN Doc. No. SPLOS/31, paras. 51–52 (1998) ("[O]ne delegate stated that the Meeting of States Parties did not have the competence to give a legal opinion, and that it was preferable not to pursue the matter any further. He added that the Commission should request the Legal Counsel for an opinion only when the problem actually arises. Other delegations supported this point of view.").

[273] *Id.*

[274] VCLT, *supra* note 216, Arts. 31, 32.

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Convention] makes evident that it was intended to denote a State having a sea coast, as distinct from a land-locked State."[275]

A review of the context for the use of the term "coastal States" in the Convention supports this interpretation. In numerous places, the Convention text refers to "all States, *whether coastal or land-locked*."[276] This confirms that the term "coastal States" (like "land-locked states") refers to a subset of "all States" and not a subset of "States Parties." In addition, the LOS Convention expressly defines the term "States Parties" as "States which have consented to be bound by this Convention and for which this Convention is in force."[277] Therefore, both "States Parties" and "coastal States" are a subset of "States," with the term "States Parties" excluding non-party states and the term "coastal States" excluding land-locked states. These two subsets of states contain overlaps and outliers; states parties may be coastal states, or not; likewise, coastal states may be states parties, or not.

Article 76 refers exclusively to "coastal States" and contains no references to "States Parties." Although Annex II to the Convention (pertaining to the CLCS) is replete with references to "coastal States," its Article 2 refers to "States Parties" as having responsibility for the nomination, election, and defraying of expenses of members of the Commission.[278] Care clearly has been taken to ensure textual distinctions between provisions in Annex II referring to "coastal States" and those referring to "States Parties."[279] Had the drafters wished to exclude non-parties from the Commission's mandate, they could have readily done so, as they did for the Convention's other institutions and procedures. Part XI of the Convention pertaining to the ISA and Part XV concerning dispute settlement (e.g., ITLOS, arbitral tribunals) are textually limited to "States Parties." The CLCS, with its mandate to work with "coastal States," is an exception in this regard.

It has been suggested that Article 4 of Annex II presents a "difficulty" with respect to non-party participation in the CLCS process.[280] The relevant provision in Article 4 of Annex II reads as follows:

> a coastal State . . . shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State.

By referring to "the entry into force of the Convention for that State," one could argue that only states parties may make a submission and that, therefore, the CLCS should not consider non-party submissions. This argument, however, fails textually. The provision provides that "a coastal State" shall make its submission "*as soon as possible but in any case* within 10 years of the entry into force of this Convention for that State" (emphasis added). The phrase "within

[275] Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, 85, para. 203 (Perm. Ct. Arb. 2015).

[276] *See, e.g.*, LOS Convention, *supra* note 5, Arts. 17, 58(1), 87(1) (emphasis added).

[277] *Id.* Art. 1(2)(1).

[278] *Id.*, Annex II, Art. 2.

[279] This textual distinction is particularly evident in Article 2(5) of Annex II, under which a nominating "State Party" must defray the expenses of a CLCS member, but the "coastal State" must defray expenses incurred with respect to advice sought pursuant to Article 3(1)(b) of Annex II.

[280] Treves, *Remarks on Submissions to the Commission*, *supra* note 65, at 364; Zinchenko, *supra* note 265, at 237; ILA Second Report, *supra* note 241, at 20–21.

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10 years of entry into force" describes the *latest* permissible date for a submission by a coastal state. The main thrust of the provision is "as soon as possible"; sooner is better. The provision comfortably accommodates a submission by a coastal state that has not yet joined the Convention. Moreover, the purpose of this provision is not to limit the Commission's mandate (which is stated in Article 3 of Annex II), but rather to impose a deadline to ensure that coastal states delineate the outer limits of their continental shelves in an expeditious manner (thus giving concomitant certainty as to the spatial extent of the Area).

The ordinary meaning of the term "coastal States" in Article 76(8) and in Annex II is not "ambiguous or obscure" and does not lead to a "result which is manifestly absurd or unreasonable."[281] To the contrary, the view that non-party coastal states may make submissions and receive recommendations from the CLCS is quite sensible, as it furthers the object and purpose of the Convention, which includes defining the spatial extent of the Area. Accordingly, the rules of treaty interpretation do not call for recourse to the Convention's negotiating history or other supplementary means of interpretation to determine the meaning of "coastal States."[282] Still, a review of the *travaux préparatoires* of UNCLOS III does not reveal whether negotiating states considered this question.[283] It is possible that some negotiating states did not intend for the CLCS mandate to extend to non-parties.[284] Even if this is the case, UNCLOS III was a complex and protracted multilateral negotiation evidencing no conclusive meaning of "coastal States" that differs from the text of the Convention and the conclusion reached above.[285]

While the meaning of the term "coastal States" is clear as a matter of treaty interpretation, it leads to a surprising result that the CLCS may cooperate with non-parties. The mandates of most institutions created by a treaty pertain to that treaty's states parties. For instance, the numerous expert bodies created by human rights treaties, such as the Human Rights Committee and the Committee against Torture, are bodies charged with monitoring the treaty implementation *by states parties*.[286] As noted above, this is also the case with respect to the LOS Convention's other institutions, such as the ISA.

While unusual, it is not unheard of for a treaty to create an independent institution and give that institution a mandate that extends beyond the parties to that treaty. A close look reveals that this is even the case with respect to ITLOS. Although Part XV of the LOS Convention concerning dispute settlement applies solely to "States Parties," the Tribunal's Statute, set forth in Annex VI of the Convention, provides that "entities other than States Parties" may access the Tribunal in certain instances (outside of Part XV).[287] It is even permissible for "state enterprises" and certain "natural or juridical persons" to have access to

[281] VCLT, *supra* note 216, Art. 32.

[282] *Id.*

[283] Official Records of UNCLOS III are available at http://legal.un.org/diplomaticconferences/1973_los.

[284] *See* Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AJIL 541, 547–50 (1983). According to Lee, "it may be argued [that] the reference to "all States" or "every State" reflects the assumption that all states would be parties to the Convention . . . ." *Id.* at 548. *See also*, Koh quote, *supra*, text at note 64.

[285] This includes any possible "special meaning" be accorded to "coastal States." VCLT, *supra* note 216, Art. 31 (4).

[286] *See* website of UN Office of the High Commissioner for Human Rights, describing "treaty-based bodies," *at* http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

[287] LOS Convention, *supra* note 5, Annex VI, Arts. 20 (Access to the Tribunal), 21 (Jurisdiction).

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ITLOS.[288] While Annex VI (ITLOS) is clearer than Annex II (CLCS) on the matter of non-party participation, the point to be made is that a treaty may create an institution with a mandate that extends to states (or other entities) that are not party to that treaty. Doing so does not create rights or obligations for any third state (i.e., non-party) *under that treaty*,[289] but it does enable the third state and the institution to cooperate with one another.

Conclusions and Practical Considerations

To take stock, because the mandate of the CLCS pertains to "coastal States," the CLCS may review any coastal state submission—including that of a non-party—and make recommendations to the submitting state.[290]

In light of this, it would be appropriate for the Commission and UN Secretariat to treat a submission from a non-party coastal state the same as any other. If a non-party made a submission, however, the Commission would not need to decide on its treatment immediately. Rather, the UN Secretariat could receive the non-party submission just as it would any other submission (including by making the executive summary public on the CLCS website), and then the Commission could simply enter the submission into the queue and decide the matter only after the submission has reached the top of the queue. Given the number of submissions in the queue,[291] any submission received today will not be substantively considered for many years.

This approach is legally sound and has some practical advantages. Most notably, it allows for the possibility that the matter could resolve itself in the fullness of time. This would be the case, for instance, if the non-party were to subsequently accede to the Convention by the time the submission reaches the top of the queue. This approach also enables states to voice their views through Notes Verbales that are made public on the CLCS website, a standard practice for all submissions.[292] While some states may argue that the CLCS process should be open only to parties, others may view the matter, for instance, from the perspective reviewing the accuracy of non-party continental shelf limits and giving geographic definition to the Area, which would militate in favor of the CLCS considering all submissions. Indeed, the UN General Assembly affirms annually that "it is in the broader interest of the international community that *coastal States* with a continental shelf beyond 200 nautical miles submit information on the outer limits of the continental shelf" to the Commission.[293]

The Benefit of Joining the Convention

The conclusions reached in this article are generally favorable from the perspective of a non-party: (1) paragraphs 1 to 7 of Article 76 are part of customary international law and

[288] *Id.* Arts. 187(c), 187(e), 190, Annex VI, Art. 20(2).

[289] VCLT, *supra* note 216, Arts. 35, 36.

[290] Although a non-party coastal state may subsequently establish its outer limits "on the basis of" such recommendations, it does not necessarily follow that those limits would be "final and binding" *as a matter of treaty law, under the Convention*. Recalling that treaties can only bind its states parties, the binding nature of a non-party's outer limits would be under customary international law rather than Article 76(8) of the Convention.

[291] *See supra*, note 232 and corresponding text.

[292] *See, e.g.*, Reactions of states to the Joint Submission of Vietnam and Malaysia Concerning the South China Sea, *at* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

[293] *See, e.g.*, GA Res. 70/235, at 5 (Dec. 23, 2015) (emphasis added).

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(2) the CLCS may review submissions by and provide recommendations to non-party coastal states. Outcomes for non-parties, however, cannot be predicted with certainty.

Therefore, the safest path for a coastal state to fully secure its continental shelf rights, including establishing its outer limit with certainty, is to access Article 76 and the Commission's procedures as a party to the LOS Convention. The Executive Branch of the United States government has taken this view, including the Clinton, George W. Bush, and Obama administrations.[294] In November 2015, the U.S. Department of State's special representative for the Arctic expressed this view to Congress:

> Becoming a Party to the Law of the Sea Convention would help the United States *maximize international recognition and legal certainty* regarding the outer limits of the U.S. continental shelf, including off the coast of Alaska.[295]

Joining the Convention would mean relying on treaty law and benefiting from the legal certainty it provides as to the availability of the Convention's rules and procedures. For this reason, the continental shelf has featured among the core arguments—along with national security and economic considerations—made by the Executive Branch to the U.S. Senate in favor of joining the Convention.[296]

VI. Conclusions

This article has assessed the seaward limit of the continental shelf under customary international law and the question of whether a non-party to the LOS Convention may access the procedures of the Commission on the Limits of the Continental Shelf. The article has reached the following conclusions: First, the continental margin criterion in paragraph 1 of Article 76 is a part of customary international law, as held by the ICJ in *Nicaragua v. Colombia I* (Part II of this article). This view is supported by abundant evidence of state practice and *opinio juris*. The outer limit of the continental shelf under customary international law is not, and has never been, strictly limited by distance from shore (i.e., 200 M).

Second, paragraphs 2 to 7 of Article 76 are also part of customary international law (Part III). This view, held by the United States for three decades, is both well-founded and practical. From an oceans policy perspective, one may go further and conclude that it would be irresponsible for non-parties to ignore these provisions and detrimental to the order of the oceans to rely solely on Article 76(1) of the LOS Convention or Article 1 of the 1958 Continental Shelf Convention to determine continental shelf limits. These first two conclusions, taken together, mean that the applicable law for determining the spatial extent of the continental shelf is the same for all coastal states, whether a party to the Convention or not.

[294] At the time of writing, the Trump Administration had not yet stated a view on this matter.

[295] Charting the Arctic: Security, Economic, and Resource Opportunities: Hearing Before the House Commission. On Foreign Affairs, 114th Cong. (2015) (Statement of Admiral Robert J. Papp, Jr.) (emphasis added).

[296] *See, e.g.*, U.S. Dep't of State, Fact Sheet: Why the United States Needs to Join the Law of the Sea Convention Now (2012).

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Third, paragraph 8 of Article 76 concerning the Commission on the Limits of the Continental Shelf is not part of customary international law (Part IV). The absence of relevant state practice and *opinio juris* compels this conclusion.

Fourth, a non-party (or even a party) may establish the outer limits of its continental shelf in the absence of Commission recommendations (Part V). There is no requirement for *any* coastal state to ultimately establish its continental shelf limits on the basis of the Commission's recommendations. However, outer limits established otherwise may be subject to scrutiny and possible non-acceptance by other states. This may be especially the case in areas where continental shelf limits are complex and uncertain, benefitting from the kind of independent scientific review provided by the Commission.

Fifth, non-parties may access the Commission's procedures (Part V). This has been a matter of confusion and debate among scholars and judges, who have sometimes drawn an inference that, because paragraph 8 is not part of customary international law, non-parties therefore have no access to the Commission's procedure. Conclusions six through eight, below, are more detailed corollaries of this conclusion.

Sixth, a non-party may communicate information on its continental shelf limits to the Commission. There is no legal basis for the view that such an act is prohibited under customary international law or treaty law (which cannot bind a non-party). Moreover, a non-party submission should be welcomed by the international community because it provides information on continental shelf limits in a format familiar to states and initiates the possibility of international review. Considering that submissions are based on the provisions contained in paragraphs 1 to 7 of Article 76, a non-party submission also promotes conformity between customary law and treaty law on an important issue of maritime jurisdiction.

Seventh, the CLCS may consider a non-party submission and make recommendations to the submitting non-party coastal state. The legal basis for this conclusion is the mandate of the Commission, which is to provide recommendations to coastal states, irrespective of whether they are parties to the Convention. Moreover, the Commission's cooperation with non-party coastal states should be encouraged because it promotes a worldwide interest in clarifying jurisdictional limits, including with respect to the spatial extent of the Area beyond national jurisdiction. As has been observed, "[e]verybody has an interest in a precise definition of states' limits, including limits of States that are not parties to the LOS [Convention]."[297] One non-party—the United States—has a boundary with the international seabed Area that is among the longest in the world. Interests on both sides of this boundary would benefit from its stability and certainty.

Eighth, the Commission will ultimately need to decide for itself how to handle a submission by a non-party. In this regard, a pragmatic approach is suggested in which the Commission could defer a decision on the admissibility of the non-party submission until that submission reaches the top of what is presently a long queue of coastal state submissions. When the non-party submission reaches the top of the queue, the matter may have resolved itself (e.g., if the non-party has acceded to the Convention), or the views of states may have evolved and crystalized in such a way as to make the decision more straightforward.

[297] Treves, *Remarks on Submissions to the Commission*, *supra* note 65, at 364. *See also* GA Res. 70/235, *supra* note 293 and corresponding text.

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Ninth, and finally, although this article sets forth the reasons why a non-party to the LOS Convention is fully entitled to continental shelf (just as parties are) and may also participate in the CLCS process, accession to the LOS Convention is nevertheless advisable. Doing so would maximize legal certainty and international recognition of a coastal state's continental shelf limits. This is particularly the case for the United States, the foremost maritime power and coastal state that still remains outside the formal treaty governing the world's oceans.

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