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The Extension of the Continental Shelf Beyond 200 Nautical Miles by UNCLOS Non-Party States

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Abstract

Many uncertainties can be found in the delineation of the external limit of the continental shelf under Art. 76 of the United Nations Convention on the Law of the Sea (UNCLOS), insofar as it refers to the geological notion of the continental margin (so-called extended continental shelf). In any case, today this definition is reflected in customary international law and is confirmed by, *inter alia*, decisions of the International Court of Justice. It thus also applies to UNCLOS non-party States. However, what has become customary international law is a global regime of ocean spaces that has a coherent logic and includes both the seabed within national jurisdiction, subject to the sovereign rights of the coastal State, and the seabed beyond national jurisdiction (so-called Area), subject to the different regime of common heritage of mankind. Also, UNCLOS non-party States that are willing to avail themselves of the right to benefit from an extended continental shelf are bound to have its outer limit determined according to a procedure involving the Commission on the Limits of the Continental Shelf (CLCS) and to make payments and contributions through the International Seabed Authority. By announcing in 2023 the outer limits of its extended continental shelf and by declaring itself prepared to present a submission to the CLCS, the United States – a non-party to the UNCLOS – implicitly agreed on the comprehensive regime for the seabed established by the UNCLOS.

Keywords: UNCLOS, Commission on the Limits of the Continental Shelf (CLCS), continental shelf, International Seabed Authority; UNCLOS non-party States

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1. Geoscientific and Legal Intricacies

One of the main innovations of the United Nations Convention on the Law of the Sea (Montego Bay, 1982)¹ is the external limit of the continental shelf. In this regard, departing from the previous regime established by the Convention on the Continental Shelf (Geneva, 1958), UNCLOS Article 76, para 1², provides for the alternative between the distance of 200 nautical miles from the baselines of the territorial sea (geometrical criterion) or the outer limit of the continental margin (geological criterion), if the margin goes beyond the 200-mile limit (so-called extended continental shelf)³.

In choosing such a geological criterion, the UNCLOS drafters entered into the field of scientific uncertainty. It is sufficient to read paragraphs 3 to 7 of Art. 76 to realize how complex the notion of continental margin can be. It includes the shelf, the slope and the rise, but excludes oceanic ridges. It requires the determination of the foot of the continental slope, that is, the point of maximum change in the gradient at its base, or the determination of 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. However, exceptions and even exceptions to these exceptions exist, complicating the process. One can only wonder how much bathymetric and seismic investigation is needed and how much money is spent in calculating the thickness of sedimentary rocks and in other technical intricacies before a final delineation of the outer limit of the continental margin can be made.

Almost 250 years ago, the Neapolitan scholar Ferdinando Galiani (1728-1787) recommended measuring the external limit of the territorial sea by means of a given distance from the coast (three nautical miles) rather than under the criterion of the cannon

1 Hereinafter: UNCLOS.

2 See Lindsay Parson, 'Article 76' in Proelss (eds) *United Nations Convention on the Law of the Sea – A Commentary* (München, 2017) 587. For the discussion during the negotiations for the UNCLOS see Piers R. R. Gardiner, 'Reasons and Methods for Fixing the Outer Limit of the Legal Continental Shelf beyond 200 Nautical Miles' (1978) *Revue Iranienne des Relations Internationales*, nos. 11-12, 145.

3 It has been assessed that the extended continental shelf corresponds to roughly 9% of the world seafloor.



shot. Drawing lines on maps was much easier than to ascertain whether and where artilleries were in place along the coast and engage in calculations about their varying ranges⁴. Gradually, geometry played the role of simplifying international law of the sea. Even today most of the external limits of coastal zones (territorial sea, contiguous zone, exclusive economic zone) are measured by means of a distance from the coast.

However, in the case of the outer limit of the continental shelf, Art. 76 disregards Galiani's inclination for "easy law". This UNCLOS choice seems questionable, to say the least. While legal norms are typically drafted in general and abstract terms, geosciences are inevitably attracted by the numerous variations that can be found in the seabed and its subsoil⁵. Can the two approaches be usefully combined in a legal text?

In any case, lawyers should appreciate that the geoscientific intricacies concerning the new notion of continental shelf have today come up against a typically legal conundrum, namely, whether non-party States to the UNCLOS are entitled to an "extended" delineation of their continental shelves. An attempt to answer this difficult question will be made below.

2. Treaty Law and Customary Law

The notion of the extended continental shelf and coastal State's rights over it are governed by UNCLOS Art. 76, which, being a treaty provision, does not create rights for a third State without its consent (Art. 34 of the 1969 Vienna Convention on Law of Treaties⁶). However, the extended continental shelf is today reflected in customary international law, as confirmed by the domestic legislation of many States, their official statements and a number of maritime boundary treaties. Furthermore, on 19 November 2012 the International Court of Justice, in deciding the Territorial and maritime dispute between Nicaragua and Colombia (the latter being a State non-party to the UNCLOS), remarked that

"(...) the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law"⁷.

4 Ferdinando Galiani, *De' doveri dei principi neutrali verso i principi guerreggianti, e di questi verso i neutrali, libri due* (first published 1782) book I, chap X, para 2.

5 See Luigi Santosuoso, 'The Last Frontier: Trends and Challenges Related to the Delineation of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles', in Maurizio Arcari, Irini Papanicolopulu and Laura Pineschi (eds.) *Trends and Challenges in International Law* (Springer International Publishing 2022) 309.

6 Hereinafter: Vienna Convention.

7 Para 118. The Court repeated a similar statement in the judgment of 13 July 2023 on the Question of the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast (*Nicaragua v. Colombia*) para 52.



The extended continental shelf represents a typical case where

“a rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (...)

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law”⁸.

Accordingly, all coastal States, including those that are not a party to the UNCLOS, are entitled to exercise rights over an extended continental shelf.

However, the question is not so simple. There is a need to clarify what has become customary international law. Under the UNCLOS, the extended continental shelf is a part of a global regime of ocean spaces that includes both the seabed within national jurisdiction, subject to the sovereign rights of the coastal State, and the seabed beyond national jurisdiction (so-called Area), subject to the different regime of common heritage of mankind. The latter is the most evolutionary (the most revolutionary, one could also say) aspect of present international law of the sea, being based on the principle that activities in the Area are to be carried out for the benefit of mankind as a whole, and taking into particular consideration the interests and needs of developing States (Art 140, para 1). A specific international organization, the International Seabed Authority (ISA), is mandated to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through appropriate mechanisms (Art 140, para 2).

The UNCLOS includes two mechanisms to ensure the coordination between the two above-mentioned and radically different regimes (exclusive benefits versus shared benefits).

The first coordination mechanism is represented by the Commission on the Limits of the Continental Shelf (CLCS), a technical body composed of 21 experts in the field of geology, geophysics or hydrography. As excessive claims could encroach upon areas falling under the common heritage of mankind, coastal States cannot unilaterally delineate the outer limits of their extended continental shelf. They must undergo a procedure that implies the submission of proposed limits to the CLCS, along with supporting scientific and technical data. If the CLCS recommends the submission, such limits are final and binding (Art 76, para 8). If the CLCS does not, the coastal State is bound, within a reasonable time, to make a revised or new submission to it (Annex II,

⁸ Conclusion 11, para 1, of the draft conclusions on identification of customary international law, adopted in 2018 by the International Law Commission.



Art 8). While neither the coastal State, nor the CLCS are called to say a decisive word on the matter, it is evident that the final limits are intended as the outcome of an international procedure⁹.

The second coordination mechanism is given by Art. 82, which binds the coastal State to equitably share with UNCLOS States parties the profits of the exploitation of its extended continental shelf:

“1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (...)

4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them”.

Art. 82 implies that, first, the coastal State successfully concludes the procedure for delineating the outer limit of its extended continental shelf and, subsequently, can engage in activities for the relevant commercial exploitation.

Evidently, in the UNCLOS spirit, the extended continental shelf and the common heritage of mankind are both components of a comprehensive regime of seabed spaces that has its own coherent logic. One of the two components cannot be isolated from the other and both are balanced against each other.

In the case of the extended continental shelf, UNCLOS Articles 82, 76, para 8, and Annex II refer to “the coastal State” (and not to the State Party), thus attributing the relevant rights to any such State, irrespective of its participation in the UNCLOS. Article 36, para 2, of the Vienna Convention stipulates that a third State exercising a right accorded by a treaty is also bound to comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. In other words, States that are willing to avail themselves of the right to benefit from an extended continental shelf are bound to have its outer limit determined according to the CLCS procedure and to make payments and contributions through the ISA.

⁹ 95 submissions, some of them relating to parts of the extended continental shelf of a given State, and 11 revised submissions have been presented to the CLCS that has adopted, respectively, 34 and 6 recommendations, so far. The backlog confirms the complexity of the delineation of the outer limit of the continental shelf (cf para 1).



The question remains unchanged even if it is noted that the concept of the extended continental shelf has been incorporated into customary international law. What today appears as customary is a comprehensive regime for the seabed as a whole, which is composed of both the extended continental shelf and the common heritage of mankind, together with the coordination mechanisms between them. This regime – and not only the notion of the extended continental shelf – has entered from the UNCLOS into customary international law.

Under both the UNCLOS and customary international law, the rights of the coastal State over the continental shelf are inherent insofar as they are vested in the coastal State and do not depend on occupation, effective or notional, or on any express proclamation (UNCLOS Article 77, para 3). The previous 1958 Convention on the Continental Shelf included an identical provision (Article 2, para 3). However, the outer limits of the continental shelf were different from those of the UNCLOS, being represented in the 1958 Convention by the alternative between the depth of 200 metres or the possibility to exploit the natural resources of the seabed and its subsoil. The change can be understood in the sense that inherence is legally referred only to the entitlement to a continental shelf and not to the delineation of its outer limit. The latter can vary in time and today it depends on the completion of a submission by a coastal State and the recommendation by the CLCS.

It was precisely to avoid the dangers of the exploitability criterion – “the strong would get stronger, the rich richer”, as in 1967 the representative of Malta, Mr. Arvid Pardo, said in a memorable speech before the United Nations General Assembly¹⁰ – that the regime of common heritage of mankind was conceived. This marked a radical evolution in international law, which is presently embodied in the UNCLOS and reflected in customary international law.

3. A Notable Instance

On 19 December 2023, the United States Department of State announced the outer limits of its extended continental shelf in accordance with customary international law, as reflected in the relevant provisions of the UNCLOS and the Scientific and Technical Guidelines of the CLCS¹¹. The limits are expressed in coordinates of latitude and longitude, relating to seven regions, namely the Arctic, the Atlantic, the Bering Sea,

10 Arvid Pardo, *The Common Heritage – Selected Papers on Oceans and World Order* (first Published 1975, Malta University Press, Valletta) 31.

11 United States Department of State, *The Outer Limits of the Extended Continental Shelf of the United States of America - Executive Summary* (2023, Washington). The attached maps provide an overview of the seven areas of extended continental shelf. See also Kevin A. Baumert, ‘The Continental Shelf beyond 200 Nautical Miles: Announcement of the U. S. Outer Limits’ (2024) *American Journal of International Law*, 275; Ekaterina Antsygina, ‘Extended Continental Shelf of the United States: A Landmark Announcement and Its Implications’ (2024) *EJIL:Talk!* <www.ejiltalk.org/extended-continental-shelf-of-the-unit-ed-states-a-landmark-announcement-and-its-implications/> accessed 20 November 2024.



the Eastern Gulf of Mexico, the Western Gulf of Mexico, the Mariana Islands and the Pacific¹². The extended continental shelf area covers approximately 1,000,000 square km. The limits are supported by a package of data and documents¹³, resulting from “two decades of extensive collection of marine geophysical data, including high-resolution multibeam data and multichannel seismic data”¹⁴.

Notably, the United States is prepared to present the submission to the CLCS, irrespective of whether it will become a party to the UNCLOS or will remain in the present situation of a non-party:

“The United States will file its submission package with the Commission upon accession to the Convention. The United States is also open to filing its submission package with the Commission as a non-Party to the Convention. This would be consistent with the Commission’s mandate to provide recommendations and advice to coastal States concerning the outer limits of the continental shelf and would support the rules-based system under the Convention for delineating the continental shelf and the seabed area beyond national jurisdiction”¹⁵.

By this statement the United States acknowledges that the announced outer limits are not yet final and binding as they still need to be endorsed by a recommendation of the CLCS. The statement also presupposes that the United States implicitly agrees on the comprehensive regime for the seabed established by the UNCLOS, as revised under the 1994 Agreement relating to the Implementation of Part XI (New, York, 1994).

In order to fully clarify the present situation, it would be helpful if the United States explicitly declared its willingness to undertake the burdens provided for in UNCLOS Art. 82. Such a declaration would remove the criticism addressed by the Russian Federation¹⁶. If this were the case, the UNCLOS parties could concur on the right for a

12 United States Department of State, *The Outer Limits* (n 11) 7: “The United States may delineate its extended continental shelf limits in additional areas in the future or revise the outer limits described herein. The present short paper will not address the question of the delimitation of the extended continental shelf between the United States and its neighbouring States.

13 The package is not yet publicly available.

14 United States Department of State, *The Outer Limits* (n 11) 7.

15 *ibid* 6.

16 “Actions in which some States select from the Convention those provisions that are convenient for them to implement and reject others that impose obligations on them are unacceptable and harm the delicate balance achieved in the ‘constitution for the oceans’” (statement made on 18 March 2024 by the representative of the Russian Federation, Mr. Sergey Petrovich, before the Council of the ISA, available on the website of the ISA). On the reactions to the United States announcement see, in general, Baumert (n 11) 290.



non-party to submit a proposal to the CLCS¹⁷. Not only it would be justified under legal considerations, but it should be welcomed as a further sign by the United States government¹⁸ to acknowledge the present comprehensive regime for the ocean seabed, including, as already remarked¹⁹, both the extended continental shelf and the common heritage of mankind, together with the coordination mechanisms between them.



U.S. Extended Continental Shelf Regions (Source: <https://www.state.gov/the-us-ecs/>)

17 Two States having a maritime border with the United States, namely the Bahamas and Canada, would not object to the consideration of a United States submission by the CLCS. See United States Department of State, The Outer Limits (n 11) 19 and 25.

18 Already in 1994, the President of the United States transmitted to the Senate the text of the UNCLOS with a message recommending consent for accession (103d Congress, 2d Session, Treaty Doc. 103-39). No action has been taken by the Senate so far.

19 See para 2.