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THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: ANNOUNCEMENT OF THE U.S. OUTER LIMITS

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Abstract

In 1945, U.S. President Harry Truman issued a novel claim to ocean space, namely that the United States had jurisdiction over its continental shelf for purposes of resource development. Other states followed with similar declarations, and in the ensuing decades the definition of the continental shelf evolved under both customary international law and treaty law. In December 2023, almost eight decades after Truman's proclamation, the United States announced the outer limits of its continental shelf using the modern definition of the continental shelf found in the 1982 UN Convention on the Law of the Sea. This article examines the U.S. continental shelf announcement and its basis under international law.

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On December 19, 2023, the U.S. Department of State announced the geographic coordinates defining the outer limits of the U.S. continental shelf in areas beyond 200 nautical miles from the coast.[1] For convenience, the United States—and also this article—refers to the portion of a country's continental shelf that is beyond 200 nautical miles from the coast as the

[1] Announcement of U.S. Extended Continental Shelf Outer Limits, Media Note, U.S. Dep't of State (Dec. 19, 2023).

"extended continental shelf," or ECS.[2] The announcement states that the United States has ECS in seven different regions which collectively amounts to approximately a million square kilometers (about 380,000 square miles).

The continental shelf is an important maritime zone in which a coastal state exercises sovereign rights and jurisdiction with respect to natural resources, marine scientific research, and other matters such as the protection of the marine environment, as provided for in the 1982 UN Convention on the Law of the Sea (Convention).[3] The modern definition of the continental shelf is set forth in Article 76 of the Convention. The continental shelf extends 200 nautical miles from the coastal baselines, *or further* (i.e., ECS) if the seabed and subsoil meet the requirements set forth in Article 76.[4]

The continental shelf comprises the seabed and subsoil but does not include the superjacent water column.[5] The waters above the continental shelf *within* 200 nautical miles of the coast typically are subject to the regime of the exclusive economic zone (EEZ), whereas the waters above the ECS are generally high seas areas.[6] Continental shelf within 200 nautical miles

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[2] "Extended continental shelf" is a term of convenience. The term does not appear in the UN Convention on the Law of the Sea. As courts and tribunals have repeatedly reaffirmed, "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf." Arbitration Between Barbados and Trinidad and Tobago, RIAA, Vol. XXVII, at 147, 208–09 (Apr. 11, 2006).

[3] United Nations Convention on the Law of the Sea, Part VI and Arts. 210, 216, 246, *opened* for signature Dec. 10, 1982, 1833 UNTS 397 [hereinafter Convention].

[4] *Id*., Art. 76(1–7).

[5] *Id*., Art. 76(1).

[6] *Id*., Parts V and VII.

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makes up about 35 percent of the world's seafloor, whereas ECS accounts for roughly an additional 9 percent of the world's seafloor.[7] The seabed and subsoil beyond the limits of any country's continental shelf is the "Area" beyond the limits of national jurisdiction which, along with its resources, is the common heritage of mankind administered by the International Seabed Authority (ISA).[8] Figure 1 is a schematic of these maritime zones defined in the Convention.

With the release of its ECS limits, the United States joins 75 other countries that have asserted such limits.[9] Like other countries, the United States determined its ECS limits using the detailed rules set forth in Article 76 of the Convention. The U.S. announcement of its ECS limits, however, differs from those made by other countries. Specifically, because the United States is not a party to the Convention, it has not submitted its ECS limits to the Commission on the Limits of the Continental Shelf (CLCS), an expert body established under the Convention to give recommendations and advice to coastal States on ECS limits.[10] Accordingly, the U.S. announcement has raised questions about the legal basis of the U.S. ECS limits, and the degree to which the rules and procedures of the Convention are applicable to a non-party.

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[7] U.S. Extended Continental Shelf Project Office, *World Map of Extended Continental Shelf Areas*, December 2023, version 1.0., available on the U.S. ECS Project website.

[8] Convention, *supra* note 3, Art. 1(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," including with respect to the ISA).

[9] Website of the U.N. Division for Ocean Affairs and the Law of the Sea (DOALOS), *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the U.N. Convention on the Law of the Sea* [hereinafter Submissions].

[10] Convention, *supra* note 3, Art. 76(8) and Annex II.

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Part I of this article describes the details of the U.S. ECS announcement from a factual perspective. Part II puts the U.S. announcement in historical context and provides background on the development of the continental shelf regime under international law. A basic understanding of this legal regime, including the interplay between customary international law and treaty law, is helpful for understanding the U.S. ECS announcement. Part III reviews the status of key provisions of Article 76 of the Convention under customary international law. Part IV of this article is in the nature of a point-counterpoint. It poses seven criticisms of the U.S. ECS announcement, some actual and others anticipated, and offers legal and policy perspectives on these criticisms. Part V provides concluding observations.

I. THE U.S. EXTENDED CONTINENTAL SHELF ANNOUNCEMENT

The U.S. ECS announcement includes the public release of several products, including a 100-page Executive Summary, a fact sheet, detailed regional maps, and digital data of the U.S. ECS outer limit points and lines.[11] Nearly half of the Executive Summary is a listing of the 1279 geographic coordinates (i.e., latitude and longitude) of the fixed points that define the ECS limits.[12] Two days after its ECS announcement, the State Department published these fixed points in the Federal Register.[13] The release of the U.S. ECS limits was also accompanied by

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[11] Downloads, U.S. ECS Project website, *at* https://www.state.gov/downloads-us-ecs-project/.

[12] *Executive Summary: The Outer Limits of the Extended Continental Shelf of the United States of America*, at 54–97, U.S. Dep't of State (2023), *available at* https://www.state.gov/the-us-ecs/.

[13] Public Notice 12244, Continental Shelf and Maritime Boundaries; Notice of Limits, Dec. 21, 2023, 88 Fed. Reg. 88470. This notice also clarifies that, where the U.S. continental shelf does not extend beyond 200 nautical miles, the U.S. continental shelf limits are the same as those of the EEZ, as specified in Public Notice 12243, Exclusive Economic Zone and Maritime Boundaries; Notice of Limits, Dec. 21, 2023, 88 Fed. Reg. 88477.

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new explanatory materials on the U.S. ECS Project website, including information about the Project and U.S. data collection efforts.[14] The subsections below discuss key elements of the U.S. ECS announcement.

The U.S. ECS Project

The U.S. ECS announcement is the result of more than two decades of multidisciplinary efforts across more than 14 U.S. government agencies.[15] The U.S. ECS Project's lead agencies are the State Department, the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Geological Survey (USGS). Since 2014, analysis and documentation of the U.S. ECS limits were led by the U.S. ECS Project Office, located in Boulder, Colorado, at the NOAA National Centers for Environmental Information (NCEI). As discussed below, the project's historic data collection effort began more than a decade earlier and constitutes the largest offshore mapping effort ever conducted by the United States.[16]

U.S. ECS Limits

The United States announced its ECS limits in seven different regions: the Arctic, Atlantic, Bering Sea, Pacific, Mariana Islands, and two areas in the Gulf of Mexico.[17] Figure 2 depicts these regions, which collectively amount to an area about twice the size of California. The largest area of U.S. ECS is in the Arctic, which is more than half of the total U.S. ECS area.

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[14] U.S. Extended Continental Shelf Project website, *at* https://www.state.gov/continental-shelf/.

[15] About the U.S. ECS Project, U.S. ECS Project website, *at* https://www.state.gov/about-the-us-ecs-project/.

[16] Executive Summary, *supra* note 12, at 11.

[17] Announcement of U.S. Extended Continental Shelf Outer Limits, Fact Sheet, U.S. Dep't of State (Dec. 19, 2023).

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The U.S. ECS Project collected data in additional areas, such as the Hawaiian Islands, to determine whether the continental shelf extends beyond 200 nautical miles.[18] The United States has not announced any ECS limits in those areas, but the U.S. Executive Summary notes that the study of U.S. continental margins is ongoing and that "the United States may delineate its extended continental shelf limits in additional areas in the future or revise the outer limits described herein."[19]

How the United States Determined its ECS Limits

The United States determined its ECS limits based on law and science. On the legal side, the United States followed the rules set forth in Article 76 of the Convention, which the United States regards as part of customary international law. The Executive Summary states:

> The Convention generally reflects customary international law binding on all countries, including the provisions in Article 76 pertaining to delineating the outer limits of the continental shelf. In this regard, the United States has delineated the outer limits of its extended continental shelf consistent with Article 76.[20]

Specifically, the United States relied on the provisions in paragraphs 1 to 7 of Article 76, which contain complex formulas and constraints for determining the exact location of the ECS limits.[21] The U.S. Executive Summary specifies which provisions were applied in each of its seven ECS regions. The Executive Summary also provides the geologic context for the

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[18] *See* NCEI, "U.S. Extended Continental Shelf Data," website providing information on U.S. data collection efforts in additional "possible ECS areas" such as the Hawaiian Islands.

[19] Executive Summary, *supra* note 12, at 7.

[20] *Id.*, at 4.

[21] About ECS, U.S. ECS Project website, *at* https://www.state.gov/about-ecs/.

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continental margin in each ECS region and is supplemented by detailed maps illustrating the application of the formulas and constraints in Article 76.[22]

On the science side, the collection of marine geophysical data is necessary to apply the provisions in Article 76, most importantly bathymetric and seismic data.[23] Bathymetric data measure seafloor depths and provide a three-dimensional map of the seafloor, whereas seismic data provide information on the thickness of the sediments beneath the seafloor.[24] Since 2003, NOAA and the Center for Coastal and Ocean Mapping/Joint Hydrographic Center[25] have collected more than 3 million square kilometers of bathymetric data using state-of-the-art technology. Since 2007, the USGS has collected nearly 30,000 linear kilometers of seismic data during 10 field missions, six of which were conducted in the Arctic Ocean in cooperation with the government of Canada.[26]

From the above, it is clear that the ECS limits asserted by the United States were not based on national security, economic, or other policy interests. Rather, the continental shelf limits of the United States—and other countries—depend on the physical characteristics of the seabed and subsoil and the application of rules set forth in the Convention.

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[22] Executive Summary, *supra* note 12, at 11, 13–52; region-specific poster-sized maps, *at* https://www.state.gov/the-us-ecs/.

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

[24] Data Collection, U.S. ECS Project website, *at* https://www.state.gov/data-collection-us-ecs-project/.

[25] The Center for Coastal and Ocean Mapping/Joint Hydrographic Center is a cooperative partnership between NOAA and the University of New Hampshire.

[26] Data Collection, *supra* note 24.

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Neighboring States

Maritime boundary (or "delimitation") situations arise where maritime zones of neighboring countries overlap. The U.S. Executive Summary indicates that the United States has existing or unresolved ECS boundaries with six other countries.[27]

The United States has already negotiated ECS boundaries with Cuba (2017), Mexico (2000 and 2017), and the Russian Federation (1990).[28] Where relevant, the U.S. ECS limits conform to these boundaries. ECS boundaries with three other neighboring states—The Bahamas (Atlantic region), Canada (Atlantic and Arctic regions), and Japan (Mariana Islands region)—will need to be established in the future.

The Mode of Announcing the U.S. ECS Limits

The United States released its ECS limits via the State Department's website. This approach differs from the path taken by other countries and is explained by the U.S. status as a non-party to the Convention. Convention *parties* are obligated under Article 76(8) to submit information on their continental shelf limits for review and recommendations by the CLCS. The UN Secretariat makes the executive summaries of those submissions publicly available on its website.[29] Whether a non-party such as the United States is permitted or required to file a submission with the CLCS, or alternatively precluded from doing so, is a topic on which there is not universal agreement, as discussed in Parts III and IV.

The U.S. Executive Summary addresses this issue, as follows:

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[27] Executive Summary, *supra* note 12, at 13.

[28] U.S. Maritime Boundaries, *at* https://www.state.gov/u-s-maritime-boundaries-agreements-and-treaties/.

[29] Rules of Procedure of the Commission on the Limits of the Continental Shelf, rule 50, Doc. No. CLCS/40/Rev.1 (2008); Submissions, DOALOS website, *supra* note 9.

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> The United States has prepared a package of data and documents on its continental shelf limits for submission to the Commission on the Limits of the Continental Shelf. . . . 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.

The preceding statement makes three points clear. First, that the United States has prepared a submission to the CLCS. Second, the United States *will* file a submission with the CLCS in the future upon joining the Convention. Third, the United States *may* decide to file the submission as a non-party. Although the United States is "open" to filing its submission as a non-party, it has not clarified the circumstances under which it would do so. This topic is discussed in Part IV.

Why Announce the U.S. ECS Limits?

The U.S. announcement states that "[t]he United States, like other countries, has an inherent interest in knowing, and declaring to others, the extent of its ECS and thus where it is entitled to exercise sovereign rights" and that "defining our ECS outer limits in geographical terms provides the specificity and certainty necessary to allow the United States to conserve and manage the resources of the ECS."[30]

This statement and scholarly commentary on the U.S. announcement signal two kinds of U.S. interests. The first is direct future benefits to the United States, including, as Evan Bloom has noted, "future economic opportunities" and "to advance study and scientific exploration in

[30] Fact Sheet, *supra* note 17.

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deep sea regions."[31] James Kraska similarly highlighted the strategic minerals and rare earth elements found on the continental shelf, noting the longstanding connection between the U.S. continental shelf and "economic and military power."[32] Although the U.S. ECS announcement was not linked to any specific plans or initiatives related to resource development, there is no question that the continental shelf, including the ECS, contains valuable resources from an economic and scientific perspective.

The second kind of U.S. interest is defensive in nature, in that clarifying the U.S. ECS limits puts other countries on notice and helps prevent encroachment on U.S. exclusive rights. Without publicly announcing the U.S. ECS limits, for instance, areas of U.S. continental shelf could be regarded by the international community as part of the Area (beyond the jurisdiction of any state), where mineral access is administered by the ISA.[33] The U.S. announcement similarly provides awareness to the international scientific community with respect to conducting marine scientific research on the U.S. continental shelf.[34]

Limits versus Claim

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[31] Evan T. Bloom, *Five Takeaways from the US Continental Shelf Announcement*, Wilson Center (Jan. 3, 2024).

[32] James Kraska, *Strategic Implication of the US Extended Continental Shelf*, Wilson Center (Dec. 19, 2023).

[33] *See supra*, note 8.

[34] In this regard, one observer has noted that, prior to the U.S. announcement, "scientists intending to conduct [marine scientific research] in areas potentially falling under U.S. jurisdiction had to seek confirmation from the U.S. Government on whether the seabed belongs to the Area or the U.S. ECS" and that "[t]his dynamic" has now changed. Ekaterina Antsygina, *Extended Continental Shelf of the United States: A Landmark Announcement and Its Implications*, EJIL:TALK!, Blog of the European Journal of International Law (Jan. 18, 2024).

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Media coverage of the U.S. ECS announcement has invariably referred to the United States announcement as a "claim." This term of common parlance makes no appearance in the U.S. Executive Summary or other materials. The language of "claims" misleadingly suggests that, prior to December 19, 2023, the United States had no ECS and that a large chunk of seabed, now asserted to be American, sprang into existence with the U.S. announcement.

Rather than refer to a *claim*, the U.S. announcement focuses on *outer limits*, expressed as coordinates of latitude and longitude that give spatial definition to the U.S. continental shelf. The thrust of the U.S. announcement is a clarification of the geographic reach of a maritime zone that is already subject to the jurisdiction of the United States.[35] As discussed in Part II, this approach is grounded in the doctrinal roots of the continental shelf.

II. THE U.S. ECS IN HISTORIC CONTEXT[36]

There are four landmarks in the history of the continental shelf regime that are useful in understanding the U.S. ECS announcement: (1) the Truman Proclamation of 1945; (2) the 1958 Continental Shelf Convention; (3) the 1969 *North Sea* judgment; and (4) the 1982 Law of the Sea Convention. Each of these is discussed below in connection with the U.S. ECS announcement.

The Truman Proclamation

[35] Cornell Overfield, *Wealth on the Shelf: The U.S. Extended Continental Shelf Clarification*, LAWFARE (Jan. 26, 2024) (emphasizing the "clarification" aspect of the announcement).

[36] For an in-depth treatment of the historical development of the continental shelf regime, see Kevin A. Baumert, *The Outer Limits of the Continental Shelf under Customary International Law*, 111 AJIL 827, 828–61 (2017).

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The 1945 continental shelf proclamation of President Harry Truman shows both that the legal regime of the continental shelf was initiated by the United States and was founded under customary international law. The Truman Proclamation asserted that the "natural resources of the subsoil and sea bed of the continental shelf . . . of the United States [are] subject to its jurisdiction and control."[37] It also provided an enduring logic to the notion of coastal state jurisdiction to this area: "the continental shelf may be regarded as an *extension of the land-mass of the coastal nation* and thus naturally appurtenant to it."[38] The Truman Proclamation and the ensuing decade of state practice transformed the continental shelf from simply a physical feature of the ocean[39] to a legal concept.

The U.S. ECS announcement refers directly to the Truman Proclamation,[40] but does so only as marking the onset of U.S. jurisdiction over its continental shelf nearly 80 years ago. As discussed below, the Truman Proclamation and the variations in state practice that followed left many matters unresolved, including the nature of a coastal state's authorities within its continental shelf areas and the geographic extent of a coastal state's continental shelf. The latter point bears emphasizing: throughout most of the history of the continental shelf regime, states

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[37] 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).

[38] *Id*. Emphasis added.

[39] From a scientific perspective, the continental shelf is the flat or gently sloping seabed and subsoil adjacent to a landmass; its outer limit is generally located near what is referred to as the shelf break, typically less than 200 meters, where ocean depths increase markedly. *See, e.g.*, HYDROGRAPHIC DICTIONARY, IHO Pub. S-32 (5th ed. 1994).

[40] Executive Summary, *supra* note 12, at 6.

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have exercised their continental shelf rights without knowing how far seaward their shelf extends. This demonstrates an important legal point, namely that continental shelf *rights* do not depend on the establishment of continental shelf *limits*.

The 1958 Convention on the Continental Shelf

The second landmark in the continental shelf regime is the 1958 Continental Shelf Convention.[41] This treaty, to which the United States is a party, provides the first treaty law definition of the continental shelf. Article 1 of this convention refers to the shelf as the seabed and subsoil extending "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."[42] This definition, which is based on seafloor depths and the ever-expanding notion of resource exploitability, would eventually prove inadequate to meet the needs of the international community.[43] In this regard, Article 1 of the 1958 Convention is not mentioned in the U.S. ECS announcement. Instead, as discussed further below, the United States regards the later-in-time customary international law rules reflected in the 1982 Convention as superseding Article 1 of the 1958 Convention.

The 1958 Convention nevertheless contains provisions with enduring doctrinal significance. Its Article 2 describes the coastal state's exclusive, "sovereign rights" with respect to the exploration and exploitation of natural resources of the shelf.[44] Article 2 also provides that, "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective

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

[42] *Id.*, Art. 1.

[43] *See infra*, note 54 and corresponding text.

[44] *Id.*, Art. 2.

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or notional, or on any express proclamation."[45] Thus, a coastal state's rights with respect to its shelf exist inherently, even if not expressly proclaimed. This provision is repeated in Article 77(3) of the 1982 Convention.

The North Sea Case

The third major development in the history of the continental shelf regime is the judgment of the International Court of Justice (ICJ) in the 1969 *North Sea Continental Shelf* case.[46] In *North Sea*, the ICJ observed that Article 2 of the 1958 Convention is "the most fundamental of all the rules of law relating to the continental shelf," and concluded that continental shelf rights:

> . . . exist *ipso facto* and *ab initio*, by virtue of [a coastal state's] sovereignty over the land . . . . In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted.[47]

The U.S. ECS announcement refers directly to the inherency of continental shelf rights that stem from the Truman Proclamation, the 1958 Convention, and the *North Sea* judgment: "[a] country's continental shelf rights are inherent under international law . . . and exist *ipso facto* and *ab initio*."[48]

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[45] Id.

[46] North Sea Continental Shelf (Ger. v. Den.), 1969 ICJ Rep. 3 (Feb. 20) [hereinafter *North Sea*].

[47] *Id.*, para. 63, at 39–40 (italics in original).

[48] Executive Summary, *supra* note 12, at 6 (italics in original).

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North Sea is also meaningful in nudging states toward greater clarity on the outer limit of the continental shelf. The Court described the continental shelf as the "natural prolongation of [a coastal state's] land territory into and under the sea."[49] The concept of natural prolongation has proven durable with respect to continental shelf entitlement. Following *North Sea*, many states equated the concept of "natural prolongation" with the "continental margin," such that they regarded their continental shelf rights as extending to the outer edge of the continental margin.[50] The continental margin—consisting of the (geographic) continental shelf, continental slope, and continental rise[51]—would eventually become central to the definition of the continental shelf in the 1982 Law of the Sea Convention.

The 1982 UN Convention on the Law of the Sea

The fourth landmark in the legal regime of the continental shelf is the 1982 Convention, adopted at the conclusion of the Third UN Conference on the Law of the Sea (UNCLOS III), which stretched from 1973 to 1982. The lofty goal of the Convention was to settle "all issues relating to the law of the sea" through a "new and generally acceptable Convention on the law of the sea."[52] The drafters can be fairly regarded as having succeeded in realizing this objective. With 169 parties, the Convention is widely accepted, and each year the UN General Assembly emphasizes the "universal and unified character of the Convention" and reaffirms that "the

[49] *North Sea*, *supra* note 46, para. 63, at 39–40.

[50] *North Sea*, *supra* note 46, para. 63, at 39–40.

[51] For discussion, see Baumert, *supra* note 36, at 833–35.

[52] Convention, *supra* note 3, preamble, paras. 1, 2.

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Convention sets out the legal framework within which all activities in the oceans and seas must be carried out."[53] This statement of the General Assembly is not limited to Convention parties.

One important aim of UNCLOS III was to agree upon rules that would yield precisely defined continental shelf limits. Prior to UNCLOS III, the UN General Assembly considered that the Article 1 of the 1958 Convention did not define continental shelf limits "with sufficient precision."[54] The 1982 Convention solved this problem. Its rules in Article 76 for precisely defining the continental shelf limits are summarized below.

Paragraph 1

Article 76(1) states the following:

> 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.[55]

This provision codifies the concept of natural prolongation from *North Sea* and provides two criteria for determining the outer limit of the continental shelf: (1) "the outer edge of the continental margin" (continental margin criterion) or (2) "a distance of 200 nautical miles" from the coastal baselines, where the outer edge of the continental margin does not extend beyond 200

[53] *See*, *e.g.*, GA Res. 78/69, preambular para. 5 (Dec. 11, 2023).

[54] GA Res. 2574 (XXIV) (Dec. 15, 1969) (stating that "customary international law on the subject is inconclusive").

[55] Convention, *supra* note 3, Art. 76(1).

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nautical miles (200 nautical mile criterion). Whereas the 200 nautical mile criterion is straightforward, the meaning of the continental margin criterion is found in paragraphs 2 to 7.

Paragraphs 2 to 7

Article 76(2-7) supply the detailed rules for determining the continental shelf limits using the continental margin criterion in Article 76(1).[56] For present purposes, it is not necessary to explore the intricacies of these provisions. It suffices to say that they are complex, technical, and require marine geophysical data, such as bathymetric and seismic measurements, in order to be applied. For example, the rules refer to physical properties of the seabed and subsoil including the location of the "foot of the continental slope," the thickness of the sedimentary rock, and the 2,500 meter isobath.

The rules in paragraphs 2 to 7 not only implement paragraph 1, they also modify it, in the sense that the rules can result in a continental shelf that does not reach the full extent of the continental margin. As Ireland observed during the UNCLOS III, the "criteria and methods" in Article 76 "in fact involve cutting off from national jurisdiction parts of the margin."[57] The "outer edge of the *continental margin*" (in paragraph 1) is not necessarily the same as the "outer limits of the *continental shelf*" (under paragraphs 2 to 7). State practice and judicial judgments have made clear that a coastal state may not rely solely on paragraph 1's reference to "outer edge

[56] For a more detailed explanation of those provisions, see Baumert, *supra* note 36, 845–48.

[57] 186th Plenary Meeting, XVII OFFICIAL RECORDS 24, UN Doc. A/CONF.62/SR.186 (1982).

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of the continental margin" to determine its ECS limits.[58] Rather, coastal states must follow the rules in paragraphs 2 to 7.

Paragraph 8

Article 76(8) introduces the Commission on the Limits of the Continental Shelf (CLCS) and the procedural aspect of continental shelf delineation. The CLCS is a body of 21 scientific experts charged with reviewing data and other materials submitted by a coastal state concerning its ECS outer limits.[59] Having an independent body of scientific experts review coastal state implementation of paragraphs 2 to 7 enhances legal certainty and international acceptance of continental shelf limits. The CLCS process can reduce the need for states to make their own independent judgments as to whether the rules in Article 76 have been followed.

Paragraph 8 states the following:

> Information on the limits of the continental shelf beyond 200 nautical miles from the [territorial sea baselines] 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

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[58] Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal, Judgment, para. 437 (ITLOS Mar. 14, 2012) (stating that article 76(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, and that paragraphs 1 and 4, "refer to the same area" (i.e., the continental margin).

[59] Convention, *supra* note 3, Annex II (spells out the composition, mandate, and basic procedures of the Commission). The Commission has also established its own rules of procedure, *supra* note 29, and scientific and technical guidelines, *supra* note 23.

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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.[60]

The preceding three sentences outline a sequential process. First, the coastal state submits information on its ECS limits—including the actual limits, supporting data, and analysis—to the CLCS. The term "shall" indicates that filing such a submission with the CLCS is a legal obligation for coastal states wishing to establish ECS limits. Second, the CLCS reviews the information and provides "recommendations" to the coastal state. Third, the coastal state establishes its ECS limits. If it does so "on the basis of" the CLCS's recommendations, then paragraph 8 provides that the limits are "final and binding." There is no requirement to follow the CLCS's recommendations. However, if a coastal state disagrees with the recommendations it receives, the Convention requires it to "make a revised or new submission" to the CLCS.[61]

At the time of writing, 75 coastal States—all of which are Convention Parties—have made 93 submissions to the CLCS, and the CLCS had made 33 recommendations to coastal States.[62] As suggested by the numerical disparity between submissions and recommendations, the CLCS faces a long backlog of submissions. The CLCS "queues" the submissions and then reviews them in the order received.[63] The submissions currently under review with the CLCS

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[60] Convention, *supra* note 3, Art. 76(8).

[61] The phrase "final and binding" has been subject to much commentary. For a thoughtful discussion, see 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, 314–17 (2002).

[62] Submissions, DOALOS website, *supra* note 9. These figures do not include revised or amended submissions.

[63] Rules of Procedure, *supra* note 29, rule 51(4 ter). *See also* Submissions, DOALOS website, *supra* note 9.

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were filed by coastal States in 2009 or earlier.[64] Any submission made today is unlikely to be reviewed for several decades.

As discussed in Part I, the United States has used paragraphs 1 to 7 of Article 76 to determine its ECS limits, but has not implemented paragraph 8 by filing a submission with the CLCS. As a non-party to the Convention, the approach taken by the United States is guided by customary international law, discussed below.

III. Article 76 and Customary International Law

When considering the U.S. ECS announcement from a legal perspective, a central question is whether certain provisions of the 1982 Convention discussed above reflect customary international law. It should be emphasized at the outset that customary international law is not just a matter of interest for non-parties to the Convention (e.g., the United States, Colombia, Israel, Venezuela, among others).[65] Customary international law governs the legal relations between Convention parties and non-parties. Thus, Convention parties must rely on customary international law if they wish their own ECS limits to be opposable to *all states*, rather than just other parties. Likewise, it is the collective ECS limits of *all states*, not just parties, that give geographic definition to the Area, administered by the ISA.

The formation of customary international law requires "evidence of a general practice accepted as law."[66] This formulation from the ICJ Statute reflects the two elements required for

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[64] *Id*. Although the Commission is reviewing more recently filed "revised submissions" of Brazil, Cook Islands, and Iceland, those countries' original submissions were filed in 2009 or earlier.

[65] *See* Bernard H. Oxman, *The Fortieth Anniversary of the United Nations Convention on the Law of the Sea*, 99 INT'L L. STUD. 865, 873 (2022) (conveniently listing coastal and landlocked states that are non-parties).

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

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the formation of customary international law: (1) state practice and (2) *opinio juris* (acceptance as law).[67] The relevant state practice must be general and consistent, or "settled practice."[68] In *North Sea*, the Court explained that, to satisfy the *opinio juris* element, such practice must have "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[69]

Demonstrating the requisite *opinio juris* can be tricky when, as here, a putative customary international law rule is contained in a treaty that is widely followed. As stated by the International Law Commission, "[i]t is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law."[70] Thus, when considering the available evidence with respect to Article 76, it is necessary to focus on the practice of states in situations not governed by the Convention. This includes the practice of non-parties, the practice of parties in relation to non-parties, and the practice of current parties prior to the entry into force of the Convention for those states.[71]

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[67] *See generally*, International Law Commission, *Draft Conclusions on Identification of Customary International Law with Commentaries*, UN Doc. No. A/73/10 (2018) [hereinafter ILC Draft Conclusions].

[68] *North Sea*, *supra* note 46, para. 77, at 44; ILC Draft Conclusions, *supra* note 67, Part Three (conclusions 4–8), at 130–38.

[69] *North Sea*, *supra* note 46, paras. 74, 77, at 43–44; ILC Draft Conclusions, *supra* note 67, Part Four (conclusions 9–10), at 138–140.

[70] ILC Draft Conclusions, *supra* note 67, at 144.

[71] Baumert, *supra* note 36, at 838.

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The customary international law status of Article 76 has already been the topic of a detailed examination in the pages of this journal and will therefore be briefly recapped rather than repeated.[72] In doing so, it is helpful to group the relevant provisions into two baskets: (1) paragraphs 1 to 7 (the rules) and (2) paragraph 8 and Annex II (the procedures).

With respect to Article 76(1-7), it is difficult to doubt that these provisions are part of customary international law. More than 40 years after the adoption of the Convention and nearly 30 years after its entry into force, substantial evidence has been amassed demonstrating the "transmigration into customary law" [73] of these provisions.[74] Such evidence takes a variety of forms, including (1) domestic enactments incorporating these provisions into national law prior to entry into force of the Convention; (2) official statements, such as those made before international courts and tribunals, conveying a state's view that these provisions are part of customary international law; (3) certain boundary treaties involving non-parties to the Convention that delimit ECS areas established under Article 76; and (4) assertions by Convention parties of their ECS limits against non-parties, among others.[75]

In its 2023 judgment in *Nicaragua v. Colombia*, the ICJ reaffirmed its view that paragraph 1 reflects customary international law.[76] The Court did not address the status of

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[72] *Id*.

[73] 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).

[74] Baumert, *supra* note 36, at 828–57.

[75] *Id*.

[76] Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment, para. 52 (Int'l Ct. Justice, July 13, 2023).

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paragraphs 2 to 7, although Judge Tomka remarked that there is "no doubt" that "the other key provisions defining the outer limits of the continental shelf beyond 200 nautical miles are also reflective of customary international law."[77] One reason why it is highly probable that states maintain this conviction is that, the contrary view—namely that *only* paragraph 1 is part of customary international law—would have "deleterious consequences," including the prospect of a non-party having a more expansive continental shelf than a party.[78] The reasons lie in the complexities of paragraphs 2 to 7. As discussed in Part II, these provisions contain important constraints on continental shelf limits.[79]

With respect to Article 76(8), this provision does not appear to be part of customary international law.[80] The submissions to the CLCS made by approximately 75 coastal States could constitute evidence of a general practice of states, but such practice appears to lack the requisite *opinio juris*. Paragraph 8 and Annex II of the Convention are procedural and institutional, and it appears that the practice of filing a submission with the CLCS is simply the implementation of a

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[77] *Id*., Dissenting opinion of Judge Tomka, at 6.

[78] Baumert, *supra* note 36, at 854. *See also*, 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) and Elmahmoud, *infra* note 117.

[79] *See infra*, note 57 and corresponding text.

[80] As a general matter, institutional provisions such as these contained in a treaty are binding on a state only through its express consent. *See*, *e.g.*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, paras. 178, 188, 200, 1986 ICJ REP. 14 (June 27) (distinguishing between rules of customary international law and treaty provisions of an institutional kind, in particular the reporting requirement in Article 51 of the UN Charter).

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Convention obligation by its parties.[81] To date, no non-party has made a submission to the CLCS.

In summary, the *rules* in Article 76 are part of customary international law, but its institutional *procedures* are not. This aligns with the U.S. approach to determining and promulgating its ECS limits. The U.S. ECS Project website states that "[l]ike other countries, the United States has used paragraphs 1 through 7 of Article 76 to determine its continental shelf limits and considers these provisions to reflect customary international law."[82] Materials related to the U.S. ECS announcement make no specific mention of the U.S. view on the customary international law status of paragraph 8 pertaining to the CLCS. However, releasing the U.S. ECS limits on the State Department website rather than filing a submission with the CLCS indicates that the United States does not view paragraph 8 as part of customary international law; if it did, then presumably the United States would have filed a submission with the CLCS.

At the same time, the U.S. statement that it is "open" to making a submission to the CLCS evidences a view that doing so is a legally available option for a non-party. This appears defensible. Although there is no legal obligation for the United States to make a submission to the CLCS, neither is there any rule in the Convention or customary international law that

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[81] Several judges expressed views that align with this conclusion in Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 ICJ REP. 624 (Nov. 19). *See*, *e.g.*, Declaration of Judge ad hoc Mensah, para. 8 (describing paragraph 8 as a "treaty obligation" that "cannot be considered as imposing mandatory obligations on all States under customary international law").

[82] Frequently Asked Questions, U.S. ECS Project website, *at* https://www.state.gov/faq-us-ecs-project/.

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precludes the United States from simply sending in its information voluntarily to this treaty body.[83]

If a non-party were to file a submission with the CLCS, it is not known whether the CLCS would review it and make recommendations. The CLCS and the Meeting of States Parties to the Law of the Sea Convention have discussed but not resolved the matter.[84] As noted in Part II of this article, the plain language of the Convention spells out the CLCS's mandate as pertaining to "coastal States" and not "states parties,[85] which is atypical of expert or specialized bodies established by treaty.[86] Some have regarded this language as indicating that, as a matter of treaty law, the CLCS's mandate is to review "[i]nformation on the limits of the continental shelf" submitted to it by any "coastal state," and not necessarily just Convention parties.[87] The question of how the CLCS would handle a non-party submission remains untested.

IV. U.S. ECS Announcement: Criticisms and Reactions

The full scope of reactions by governments and observers to the U.S. ECS announcement will not be known for some time. Nevertheless, some initial criticisms and reactions have been

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[83] For discussion, see Baumert, *supra* note 36, at 865 ("Non-party Submission").

[84] Report of the Eighth Meeting of States Parties, UN Doc. No. SPLOS/31, paras. 51–52 (1998).

[85] *See infra*, note 87. By contrast, Part XI of the Convention pertaining membership in the ISA and Part XV concerning dispute settlement (e.g., ITLOS, arbitral tribunals) are textually limited to "States Parties."

[86] The mandates of human rights treaty bodies, for instance, pertain to the *states parties* of the relevant treaties. *See* "Treaty Bodies" website of the Office of the High Commissioner for Human Rights.

[87] For a discussion of the views of judges and experts on this matter, see Kevin A. Baumert, *Article 76 of the UN Convention on the Law of the Sea: Parties and Non-Parties*, 99 INT'L L. STUD. 963, 985–88 (2022).

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made, and some others are foreseeable. Legal and policy perspectives are offered below in response to seven such criticisms or reactions.

"The United States has no ECS"

This criticism goes as follows: *because the United States is not a party to the Convention, it cannot rely on this treaty and, therefore, is not entitled to any ECS*. Said differently, *the U.S. continental shelf stops at 200 nautical miles because only Convention Parties have ECS*. Although this view is not widely held, it is the most extreme criticism and therefore merits attention.

As its ECS announcement states, the United States is not purporting to rely on the Convention directly. Rather, the United States considers that Article 76(1), having been incorporated into customary international law, is applicable to all states, whether party to the Convention or not. For this criticism to have traction, the U.S. position would need to be incorrect. As discussed in Part III above, it is difficult to defend the view that Article 76(1) is *not* part of customary international law. Indeed, there does not appear to be a single state or any international court or tribunal that has taken this view.[88]

Moreover, there is also no alternative rule of international law that supports the proposition that the continental shelf terminates at 200 nautical miles from the coast. As discussed in Part III above, continental shelf limits have never been strictly defined by a distance from the coast.[89] As a physical feature of the ocean, the concepts historically invoked to determine continental shelf limits were, appropriately, related to the physical character of the

[88] Baumert, *supra* note 36, at 845.

[89] *Id.*, at 831–45.

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seabed and subsoil: depth, exploitability, natural prolongation of the land territory, and the continental margin. During the UNCLOS III negotiations, some states favored a strict 200 nautical mile limit to the continental shelf, such that the continental shelf limit would align with the maximum breadth of the EEZ. This view was not accepted, and no such ever emerged either at UNCLOS III or outside of those negotiations. Simply put, there has never been a rule of international law, whether in treaty or custom, that supports the view that continental shelf are limited to 200 nautical miles.

"Only the CLCS decides ECS"

This is a variant of the first criticism: the United States has no ECS *because it has not gone through the CLCS process*. This view is rooted in confusion over the role of the CLCS, which is an unusual and poorly understood treaty body. Specifically, there is a widespread misperception that the CLCS is a legal organ of the "UN"[90] that adjudicates continental shelf "claims."[91] Such views give rise to a sense that ECS entitlement is subject to CLCS approval.

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[90] David Malakoff, *Continental shelf maps could add Egypt-size area to U.S. territory*, SCIENCE (Jan. 9, 2024) (referring to the "U.N. commission that evaluates ECS claims"). Although the UN secretary-general serves as its secretariat, the CLCS is a treaty body established under the Convention and not part of the UN system. Convention, *supra* note 3, Annex II, Art. 2(5).

[91] *See*, *e.g.*, Abbie Tingstad, *The US Is Taking an Important, but Imperfect Step in Initiating Extended Continental Shelf Claims – What Are the Implications for the Arctic?*, Wilson Center (Dec. 19, 2024) (referring to the Convention's "process for arbitrating ECS claims" and its "mechanism for coastal states to claim additional rights" beyond 200 nautical miles.).

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The CLCS's function, however, is to provide recommendations on a coastal State's ECS *outer limits*.[92] As the International Tribunal for the Law of the Sea has articulated, "[a] coastal State's *entitlement* to the continental shelf . . . does not require the establishment of *outer limits*."[93] Similarly, the Convention's requirements related to the CLCS do "not imply that entitlement to the continental shelf depends on any procedural requirements."[94] This echoes the characterization in *North Sea* that, in order to exercise "inherent" continental shelf rights, "no special legal process has to be gone through, nor have any special legal acts to be performed."[95] As discussed in Part II of this article, throughout most the history of the continental shelf regime, coastal states have exercised continental shelf rights without having established outer limits.

Thus, any coastal state—whether a party to the Convention or not—with a continental margin that extends beyond 200 M has a legal entitlement to ECS and the accompanying rights, even without commencing or completing the CLCS process under the Convention. Notably, the submissions of coastal states to the CLCS frequently affirm the inherency of continental shelf

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

[93] *Bay of Bengal*, *supra* note 58, para. 409 (emphases added). Note that this judgment applied the Convention as a matter of treaty law. Thus, even for Convention parties, continental shelf entitlement does not depend on the CLCS process.

[94] *Id*., para. 408 (citing Convention article 77, which repeats article 2 of the 1958 Continental Shelf Convention).

[95] *North Sea*, *supra* note 46, para. 63, at 39–40.

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rights, for example by conveying that their continental shelf rights exist ipso facto and ab initio or by referring to Article 77 of the Convention.[96]

A view of the CLCS as the "decider" of ECS entitlement or limits is also harmful for many Convention parties. The CLCS does not review all submissions that it receives. For example, its rules of procedure preclude it from reviewing submissions that are subject to a "land or maritime" dispute, of which there are many.[97] For example, the United Kingdom and Argentina each claim sovereignty over the Falklands Islands (Islas Malvinas), and both countries have made submissions to the CLCS pertaining to these islands.[98] Owing to the sovereignty dispute, each country objects to the other's submission to the CLCS. Unless the underlying sovereignty dispute is resolved, it is unlikely that the CLCS will ever review these submissions and make recommendations to either country. This does not mean that there is no ECS

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[96] *See, e.g.*, *Executive Summary of the Partial Submission of Canada (Atlantic Region)*, at 3 (2013) ("[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."); *Continental Shelf Submission of Australia: Executive Summary*, at 49 (2004) (accompanying diplomatic note referring to article 77 of the Convention and stating that continental shelf rights "do not depend on any express proclamation"). So too, coastal States do not necessarily refrain from exercising their continental shelf beyond 200 nautical miles prior to establishing ECS limits based on CLCS recommendations. *See*, *e.g.*, Baumert, *supra* note 36, at 863 (noting examples).

[97] Rules of Procedure, *supra* note 29, Annex I (in particular, para. 5) (reflecting the policy to not review and recommend upon submissions relating to a "land or maritime dispute" unless the "prior consent [is] given by all States that are parties to such a dispute"). The CLCS also does not review submissions pertaining to continental shelf appurtenant to Antarctica. *See, e.g.*, *Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in Regard to the Submission Made by Australia on 15 November 2004*, CLCS (2008), paras. 4–5.

[98] Submissions, DOALOS website, *supra* note 9.

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appurtenant to the Falkland Islands. To take a contrary view would mean that any country could prevent another from having ECS merely by lodging a formal objection with the CLCS.

"The United States should file a submission with the CLCS"

Even if the United States has no legal obligation to file a submission with the CLCS, this argument posits that it should do so anyway and avoid what might be characterized as a U.S. unilateral assertion of its ECS limits. Along these lines, commentary published by the Arctic Institute observes the following: "[t]he response from other nations [to the U.S. ECS announcement] should be straightforward: submit your data to the CLCS, adhere to the established process, and await evaluation like everyone else.[99]"

Even before the U.S. announcement, the desirability of non-parties using the CLCS process had been noted by numerous observers.[100] The United States has indicated its openness to filing a submission with the CLCS, and elaborated that doing so:

> . . . 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.

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[99] Jan Jakub Solski, *The US Arctic Gambit: Testing the Limits of UNCLOS*, Arctic Institute (Jan. 16, 2024).

[100] *See*, *e.g.*, Helmut Tuerk, *Questions Relating to the Continental Shelf Beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing*, 97 INT'L L. STUD. 232, 249 (2021) (stating that ""if a non-party wishes to engage in such a course of action [i.e., "file a submission with the CLCS"], it would not make sense from the point of view of the interests of the international community to prevent that State from doing so"). *See also*, Baumert, *supra* note 36, at 864-65 (including contrary views).

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In light of the above, why didn't the U.S. file a submission? As Susanne Lalonde observed, "there has been some resistance [internationally] to the idea that the United States should participate in the CLCS process."[101] More pointedly, Evan Bloom has noted that "inevitably some countries would have issued protests claiming that a non-party does not have such a right."[102] This point is significant because, as already noted, the CLCS's rules of procedure preclude it from reviewing disputed submissions. Underscoring the cautiousness of the CLCS, Ekaterina Antsygina has further noted that, "even if objections to a U.S. submission are not considered a 'land or maritime dispute' [under the its rules of procedure], the CLCS might still decline to review the submission in light of objections by State Parties . . . ."[103]

The approach taken by the United States keeps options open and, as Antsygina further observed, the U.S. Executive Summary may serve as a vehicle to gauge "potential reactions from other states."[104] States Parties are now in a position to either support a U.S. submission to the CLCS or, alternatively, to resist such a development and restrict the CLCS to reviewing only the ECS limits of Convention parties.

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[101] Suzanne Lalonde, *Complexity Does Not Signify Failure*, Wilson Center, Polar Perspectives, No. 15 (2024).

[102] Bloom, *supra* note 31.

[103] Antsygina, *supra* note 34. For instance, the Commission did not issue recommendations pertaining to Japan's Kyushu-Palau Ridge region owing to objections from China and the Republic of Korea stating that Japan's Oki-no-Tori Shima Island is a "rock" under article 121(3) of the Convention. These objections did not purport to fall within the Commission's rules relating to a land or maritime dispute. *See* *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission Made by Japan*, paras. 15–20, CLCS (2012), available from DOALOS, *supra* note 9.

[104] Antsygina, *supra* note 34.

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"The U.S. ECS limits are non-binding"

This three-part argument goes as follows: for ECS limits to be "final and binding," they must be established on the basis of CLCS recommendations, per Article 76(8). The United States has not established its ECS limits on the basis of CLCS recommendations. Therefore, the U.S. ECS limits are *not binding* on any other state.

It should be reiterated here that Article 76(8) is not part of customary international law, and thus is not the most appropriate lens through which to view the U.S. announcement. Even if the U.S. ECS limits were (1) submitted to the CLCS, (2) recommended upon favorably, and (3) then established by the United States on the basis of the CLCS's recommendations, they would not be "final and binding" under the Convention. Whatever the meaning of "final and binding,"[105] it does not apply to a non-party and equally has no force for a Convention party in its relations with a non-party.[106]

The ECS limits announced by the United States are like any other maritime limits announced by a coastal state, be they coastal baselines or the seaward limits of the EEZ or other maritime zones measured from such baselines. If maritime limits promulgated by a coastal state are consistent with the rules of international law reflected in the Convention, then there is no legal basis for challenging them. If they are not, such limits may they be challenged on legal grounds, and then only to the extent of the inconsistency.

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[105] *See supra* note 61.

[106] Vienna Convention on the Law of Treaties, Art. 34, May 23, 1969, 1155 UNTS 331 ("A treaty does not create either obligations or rights for a third State [i.e., non-party] without its consent").

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The foregoing is not to diminish the importance of the CLCS. The CLCS plays a role as "legitimator" of continental shelf limits, giving some confidence that paragraphs 1 to 7 have been appropriately followed.[107] ECS limits based on CLCS recommendations give confidence to the entire international community, including a non-party like the United States, that a coastal state has followed the rules in Article 76. That said, limits asserted by a coastal state in the absence of such recommendations also merit respect, unless it is shown that they are not established consistent with the rules provided for in Article 76.

"How do we know if the U.S. has followed the rules in Article 76?"

In its ECS announcement, the United States says it "delineated the outer limits of its extended continental shelf consistent with Article 76."[108] But how is one to know? The rules in Article 76 are complex, and non-compliance is not as easily discernable as, say, a country asserting a 200 nautical mile territorial sea limit. Commentary published by the Arctic Institute critiqued the United States on this point:

> [W]ithout a CLCS submission, other states are left to evaluate the credibility of the US announcement. Unlike situations where maritime zones' outer limits depend on distance, assessing the credibility of limits based on scientific criteria poses challenges for other states lacking the necessary resources.[109]

Three observations can be made with respect to this otherwise fair point. First, for perspective, the "how do we know" question is not particular to the United States. As discussed

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[107] McDorman, *supra* note 61, at 319.

[108] Executive Summary, *supra* note 12, at 4.

[109] *Supra*, note 99.

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above, many submissions of Convention parties will not be reviewed by the CLCS owing to disputes. For those submissions, other states will need to make their own determinations as to the credibility of the ECS limits asserted. Many other submissions will be reviewed at some point, but not for many years. Canada made its ECS submission for its Atlantic region in 2013, and there are still approximately 20 submissions ahead of it in the CLCS's queue. In the intervening decades between the filing of a submission and the completion of the process, states will again need to make their own judgments regarding the ECS limits asserted by a state.

Second, despite having considerable company when it comes to the status of its ECS limits (i.e., *not* reviewed by the CLCS), the United States has taken some steps to enable other governments and observers to gauge the credibility of its limits. The United States makes its scientific data publicly available, for instance.[110] Those data, combined with the detailed maps and information presented in the Executive Summary, provide the inputs needed for someone wishing to assess or reconstruct the U.S. ECS limits. In this regard, the amount of detail in the U.S. Executive Summary and accompanying maps exceeds what most Convention parties have made public in the executive summaries of their submissions to the CLCS.

The U.S. Executive Summary also indicates that United States sought the advice and review of its ECS limits by 17 outside experts, 14 of whom are current or former members of the CLCS.[111] This is unusual, as most coastal States receive assistance from one or two experts. Although it cannot be assumed that these experts concurred with the United States on every

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[110] NCEI, "U.S. Extended Continental Shelf Data," website (providing access to data).

[111] Executive Summary, *supra* note 12, at 13. The mandate of the Commission "to provide scientific and technical advice, if requested by the coastal State" has, in practice, often been discharged by Commission members furnishing such advice in their individual expert capacity. Convention, *supra* note 3, Annex II, Art. 3(1)(b).

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aspect of its ECS limits, their involvement reflects a U.S. effort to consider the views of CLCS members and other outside voices in making decisions on its ECS limits.

Third, a close look at the U.S. ECS limits indicates reasonableness and restraint. Some examples illustrate this point. Restraint is apparent in the Atlantic, for instance, where the United States and Canada have overlapping ECS areas. Both countries are delineating their ECS limits off the same continental margin yet, in the area of overlap, Canada's ECS limit extends more than 30 nautical miles seaward of the U.S. ECS limit.

Restraint is even more evident in the Arctic. The United States restricted its ECS delineation to the seafloor elevation directly appurtenant to Alaska, known as the Chukchi Borderland.[112] despite the interconnectedness of this feature with other seafloor elevations that stretch across the entirety of the Arctic.[113] In its review of Russia's Arctic submissions, the CLCS has already accepted the view that the Chukchi Borderland is continuous with another seafloor elevation, Alpha Ridge, that extends all the way to the northmost reaches of Canada.[114]

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[112] Executive Summary, *supra* note 12, at 15 and 16 (map).

[113] Denmark's has described this interconnectedness, referring to an "an amalgamation of seafloor highs and other features, that includes the Lomonosov Ridge, the Gakkel Ridge, the Alpha-Mendeleev ridge complex and the Chukchi Borderland, that are all morphologically continuous with the land mass of Greenland, and thereby constitute integral parts of the Northern Continental Margin of Greenland." *Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf: The Northern Continental Shelf of Greenland, Executive Summary*, at 12 (2014), available from DOALOS, *supra* note 9.

[114] *Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Partial Revised Submission Made by the Russian Federation in respect of the Arctic Ocean*, at para. 79 and figure 13, CLCS (2023)

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Yet the United States refrained from delineating beyond the northern reaches of the Chukchi Borderland. In the view of one expert that assisted the United States, the U.S. ECS limits are "fairly conservative from a technical and legal perspective" and not likely to "draw fierce objections."[115]

In several other areas, such as the Bering Sea and Gulf of Mexico (Figure 2), the U.S. ECS entitlement is too obvious to be doubted. These are ocean basins underlain by extremely thick sediments. The availability of the sediment thickness formula in Article 76(4) unequivocally demonstrates the existence of ECS, such that the United States and its neighbors in these regions have already divided those ECS areas among themselves by concluding maritime boundary treaties.[116]

Notwithstanding the above observations, if a foreign government presses the United States for additional information regarding how it determined its ECS limits, it would be appropriate for the United States to be fully transparent and forthcoming with respect to its data, methods, legal interpretations, analysis, and any related information sought. Interested parties could also press the United States to publicly release the entire "submission" it has prepared for, but not filed with, the CLCS.

"The United States is 'picking and choosing'"

(showing the outer edge of the continental margin delineated continuously from the Chukchi Borderland to the Alpha Ridge, which is referred to as "Mendeleev-Alpha Rise"), available from DOALOS, supra note 9.

[115] David Malakoff, *Continental shelf maps could add Egypt-size area to U.S. territory*, SCIENCE (Jan. 9, 2024) (quoting David Mosher, a member of the Commission); Executive Summary, *supra* note 12, at 13 (David Mosher).

[116] *See supra*, note 28.

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The following argument has been made in response to the U.S. ECS announcement: "allowing non-parties to *pick and choose* which provisions of UNCLOS they consider beneficial to their position and therefore applicable as rules of CIL would undermine the authority of UNCLOS."[117]

This criticism is part of a broader one for which the U.S. ECS announcement serves only as an example of discontent over the continued U.S. status as a non-party to the Convention. The United States played a central role in the UNCLOS III negotiations, which produced a carefully crafted "package deal,"[118] from which no reservations are permitted.[119] By staying outside of the Convention, this argument posits that the United States may pick and choose provisions that are beneficial, and ignore those that are burdensome or costly.

With respect to its ECS limits, the United States faces a dilemma when it comes to this criticism. The surest way to avoid "picking and choosing" is to abide by *all* provisions of the Convention related to the continental shelf, including Article 76(8) and Annex II pertaining to the CLCS. Yet, doing so would subject the United States to criticism for arrogating to itself access to the CLCS's procedures.[120]

In examining the U.S. announcement, it appears that the United States is "picking and choosing" the provisions of the Convention to follow based on their legal status rather than what is beneficial to the United States. The United States has followed paragraphs 1 to 7 of Article 76,

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[117] Khaled Elmahmoud, *American Pick and Choose or Customary International Law?*, EJIL:TALK!, Blog of the European Journal of International Law (Jan. 17, 2024) (italics in original). UNCLOS refers to the Convention.

[118] *See, e.g.*, Tullio Treves, *United Nations Convention on the Law of the Sea: Introductory Note*, at 2, UN (2008).

[119] Convention, *supra* note 3, Art. 309.

[120] See observations of Lalonde and Bloom, text corresponding to notes 101 and 102, *supra*.

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including those provisions that are not necessarily "beneficial," such as the constraints in paragraph 5 that often reduce the extent of a coastal state's ECS limits.[121] Accordingly, some observers have lauded the United States for having conformed to the Convention,[122] rather than having disturbed its integrity.

On the other hand, the United States has *not* followed Article 76(8), owing to its status only as a part of treaty law and not custom. The *picking and choosing* criticism fails to explain how being outside the CLCS procedure is "beneficial" to the United States, or to the international community. If governments or observers feel that the U.S. decision to not file its submission with the CLCS undermines the authority of the Convention, they may wish to make those views known to the United States, particularly in light of the U.S. openness to filing its submission with the CLCS.

The United States may face a challenge in the future with respect to "picking and choosing." The U.S. ECS announcement makes no mention of the royalty provisions in Article 82 of the Convention. That article provides that, after five years of mineral exploitation on its ECS, a coastal state must share with other states, via the ISA, a portion of the resulting revenues.[123] To date, there has been no resource exploitation in U.S. ECS areas, and it does not

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[121] It is also notable that the U.S. position on the customary international law status of article 76(1-7) is not a recent position adopted out of expediency. The United States has been maintained this position continuously and without objection by other states since 1987. 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.

[122] *See* Antsygina, *supra* note 34; Overfield, *supra* note 35.

[123] Convention, *supra* note 3, Art. 82.

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appear as though any such exploitation is anticipated in the near term.[124] Nevertheless, the day may come when such resource development does take place over a sustained period and, if the United States remains a non-party, it will need to decide whether and how to implement Article 82, despite having no apparent legal obligation to do so.[125]

"The United States should join the Law of the Sea Convention"

The common thread running through the criticisms and reactions discussed above is the U.S. status as a non-party to the Convention. Some negativity over the U.S. ECS is not surprising, as the announcement is a reminder to many within the United States and internationally that the United States remains on the outside of this important treaty. No matter how strong the U.S. arguments are with respect to properly adhering to customary international law, it is difficult to doubt that U.S. interests are best served by joining the Convention. In this regard, the U.S. ECS website states:

> The announcement of the U.S. ECS limits in no way changes the Administration's view that the United States should join the Convention. Joining the Convention would enable the United States to fully protect its navigational rights and freedoms, economic rights, access to critical minerals, and other ocean-related interests. U.S. accession is also a matter of geostrategic importance.[126]

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[124] *See*, *e.g.*, website of the Interior Department's Bureau of Ocean Energy Management pertaining to Offshore Critical Mineral Resources (describing this "underexplored and untapped resource").

[125] It would be difficult to conclude that article 82 is part of customary international law given the dearth of state practice as well its procedural and institutional nature (pertaining to the ISA).

[126] *See supra*, note 82.

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Global leadership could be added to the reasons listed above for joining the Convention. If the United States wishes to set an example of adhering to the rule of law and promoting the universality of the Convention, it should not remain on the outside of this widely-accepted treaty, which has been awaiting action by the U.S. Senate since 1994.[127]

Opponents of U.S. accession to the Convention may seize on the U.S. ECS announcement as evidence that the United States can enjoy the benefits of the Convention without formally joining. This would be a mistake. Joining the Convention would remove any doubt as to whether the United States has access to the CLCS and would put U.S. continental shelf rights on the firmest possible legal footing.

V. Conclusion

The public release of the U.S. ECS limits is a major development in ocean policy both domestically and internationally. It is notable in at least three respects. First is the sheer level of effort. The delineation of the U.S. ECS limits was a two-decade, multidisciplinary endeavor involving more than 300 people and 50 organizations within and outside of the U.S. government.[128] Determining the U.S. ECS limits necessitated the largest offshore mapping effort ever conducted by the United States. The announcement is the fruit of a sustained and large-scale scientific, legal, and policy effort.

Second is the actual ECS limits and the seabed areas they encompass. At nearly 1 million square kilometers, it is not the world's largest ECS, but it is a significant expanse of seabed over

[127] 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).

[128] Executive Summary, *supra* note 12, at 98–99.

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which the United States exercises jurisdiction. Identifying the limits of the ECS serves important national interests, including enabling the United States to steward the resources in this large area and exercise its rights related to marine scientific research on the continental shelf. It also informs the rest of the world where the United States exercises continental shelf jurisdiction, and helps provide geographic definition to the Area.

Third is the legal dimension, and main focus of this article. To determine its ECS limits, the United States relied upon the same well-established rules that other governments have used, doing so on the basis of customary international law, "as reflected in the Convention." However, the U.S. Senate's continued inaction on the Convention led the United States to chart a different, and more unilateral, course than the 75 other countries that have asserted their own ECS limits.

The United States had two options for publicly releasing its U.S. ECS limits. The first option was to follow the procedure in the Convention: submit its limits and associated documentation to the CLCS and have the UN Secretariat release the executive summary publicly on its website. The second option was to forgo the CLCS route and release the U.S. limits and explanatory materials on an official government website. Both options were without precedent for a non-party.

While the United States chose the latter option, it left the door open to pursue the former. There are two possible future paths to a U.S. submission to the CLCS. The first is to submit as a non-party. Whether this happens will likely depend on many factors, including the views of Convention parties and willingness of the CLCS to consider a U.S. submission. The other path is for the United States to join the Convention, in which case the United States would file the submission it has already prepared with the CLCS. Aside from the other benefits of joining the Convention, this path would maximize legal certainty of the U.S. ECS limits. It is also the path

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that would put an end to criticisms faced by the United States, whether merited or not, like those discussed in this article.

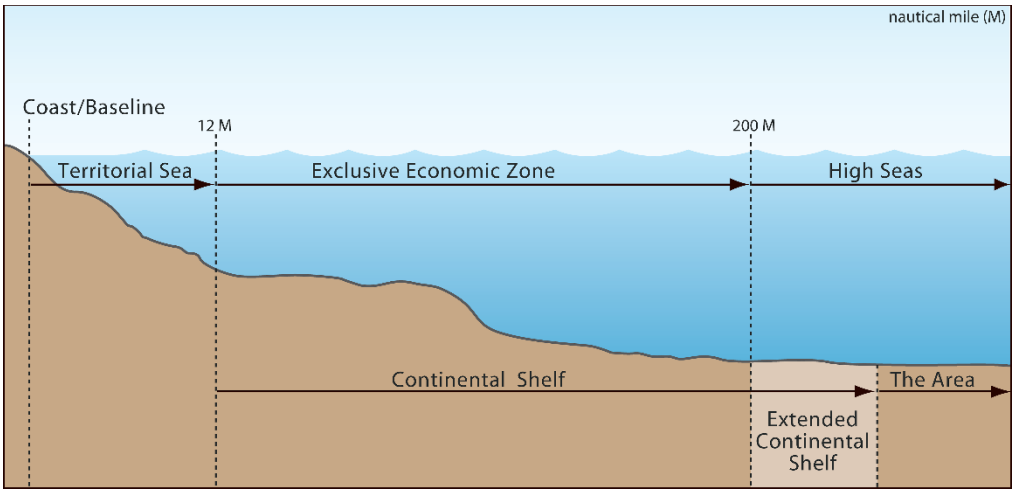

Figure 1

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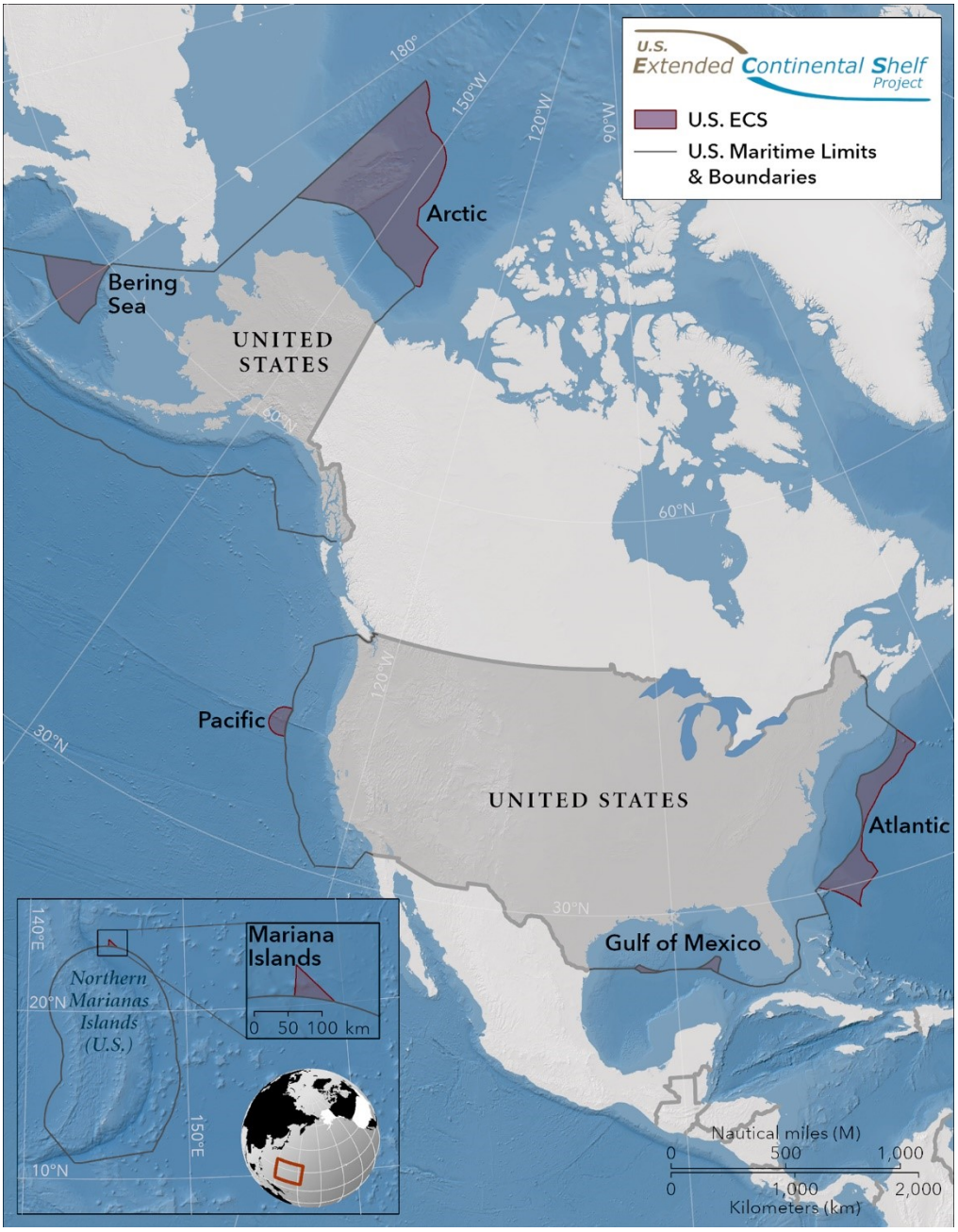

Figure 2

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