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The U.S. continental shelf beyond 200 nautical miles

Legal questions arising from non-accession to the UN Convention on the Law of the Sea

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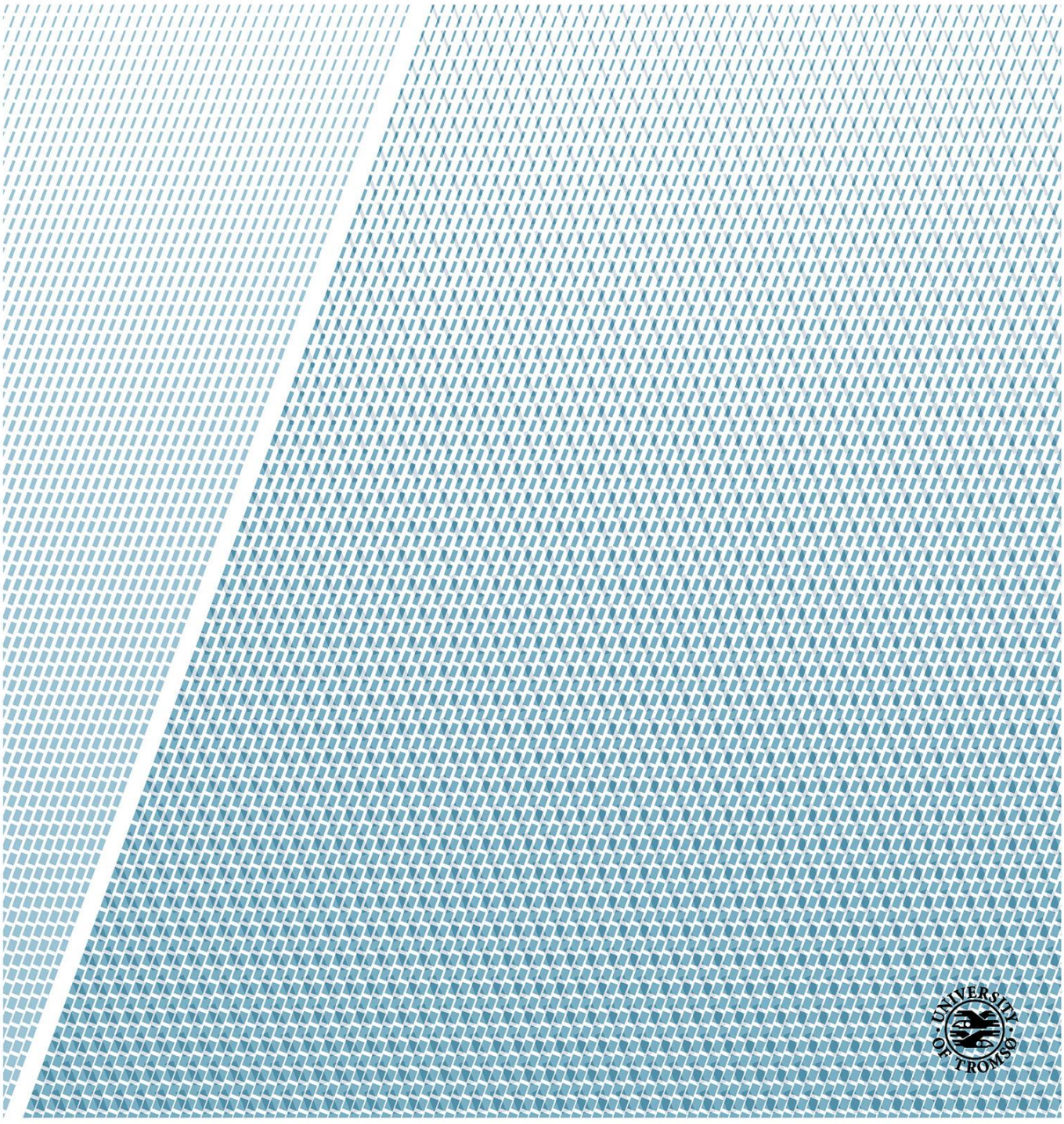

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Abbreviations

CLCS	Commission on the Limits of the Continental Shelf. Also referred to as the Commission.
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ILA	International Law Association
ISA	International Seabed Authority
ISNT	Informal Single Negotiating Text
ITLOS	International Tribunal for the Law of the Sea
LOSC	United Nations Convention on the Law of the Sea. Also referred to as the Convention.
nm	Nautical miles
UNGA	United Nations General Assembly
UNCLOS III	Third United Nations Conference on the Law of the Sea
US	United States
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Context: US non-ratification of the LOSC

The United States remains the most conspicuous non-party to the United Nations Convention on the Law of the Sea (hereinafter the LOSC or the Convention), despite every presidential administration supporting ratification of the treaty since its entry into force in 1994. US objections to the Convention originally materialized under the Reagan Administration – after nearly a decade of productive international negotiations – and were directed at the regime for the deep seabed under Part XI. These concerns were subsequently addressed in the 1994 Agreement relating to the Implementation of Part XI, and accession to the treaty has since enjoyed broad, bipartisan support in the US. Nevertheless, opposition persists among a minority of conservative Senators who see the Convention as undermining American sovereignty. The US Senate Committee on Foreign Relations has recommended accession to the treaty on several occasions, but a small group of Senators has repeatedly succeeded in obstructing a full vote which is needed for the Senate to give its advice and consent for ratification.[1] Their cause has been aided, it seems, by the perception among some lawmakers that accession is not an urgent priority – for decades now the US has been acting consistently with the Convention on the basis of customary international law.[2]

In contrast to this view, advocates of accession assert that ratifying the LOSC is imperative for the US to safeguard its maritime rights and interests by putting them on a more secure legal footing. In particular, rights to the continental shelf are often singled out as an area where the US would gain legal certainty by ratifying the Convention.[3] The LOSC recognizes the continental shelf rights of a coastal state extending throughout the natural prolongation of its land territory to the outer edge of the continental margin, which consists of the geophysical continental shelf, the continental slope, and the continental rise (see *Figure 1*).

[1] Mattler (2005), "The Law of the Sea Convention: A View from the US Senate", pp. 33-34.
[2] Caron and Scheiber (2007), "The United States and the 1982 Law of the Sea Treaty". Retrieved from <http://www.asil.org/insights>.
[3] E.g. Negroponte (2012), Statement Before the US Senate Foreign Relations Committee; US National Security Directive and Homeland Security Presidential Directive (NSPD-66 / HSPD-25) of 9 January 2009, section III.D.1.

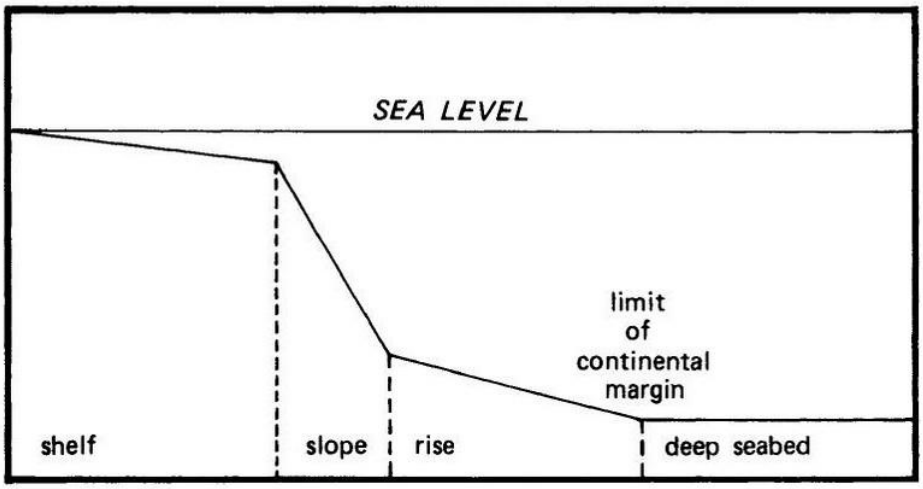

Figure 1 – A basic illustration of the components of the continental margin
Source: Buzan and Middlemiss (1977), "Canadian Foreign Policy and the Exploitation of the Seabed", p. 2.

In some areas, the continental margin extends far beyond the 200 nautical mile (nm) exclusive economic zone (EEZ) which is claimed by the US on the basis of customary law. The rules for delineating this entitlement are complex, and entail a procedural obligation for states parties to submit scientific data on continental shelf limits beyond 200 nm to the Commission on the Limits of the Continental Shelf (hereinafter CLCS or the Commission) – an independent body of technical specialists established under the Convention. It is frequently held that the US, as a non-party to the Convention, does not have access to the CLCS procedure as a means of substantiating the extent of its continental shelf entitlement.[4] The CLCS submissions of other states occasionally make headlines (see the recent submission by Russia concerning the Arctic), stoking fears that the US is "losing out" – presumably on rights in continental shelf areas to which it otherwise would be entitled as a party to the Convention.[5] While this narrative has the worthy political objective of encouraging US accession, it is easily criticized from a legal standpoint. Namely, it misrepresents CLCS submissions as "claims" in a legal sense, and fails to acknowledge that the US enjoys continental shelf rights under customary international law which are inherent – they do not depend on any express proclamation.[6] In the event an

[4] E.g. Oude Elferink (2013), "The Outer Limits of the Continental Shelf in the Polar Regions", p. 63; Negroponte (2012); ILA Committee on Legal Issues of the Outer Continental Shelf (2006), 2nd Report, Conclusion No. 16.
[5] E.g. Bamford, "Frozen Assets" in *Foreign Policy* (May 11 2015): "Even if the Senate were to ratify the treaty, it is likely that, by the time it submits its claim to the commission, much of the icy region will be accounted for"; "Twenty-Five Years and Counting", editorial in *New York Times* (31 October 2007): "Unless the United States ratifies the treaty, it will not have a seat at the table when it comes time to sort out competing claims".
[6] LOSC Article 77(3).

overlapping entitlement is found with an opposite or adjacent coastal state, international law requires delimitation by agreement.[7]

In any case, it is clear that the best way for the US to ensure its continental shelf rights under international law is to ratify the Convention. Many informed commentators in the US, including representatives from government, industry, and the military, support accession to the treaty.[8] US accession would also have the effect of adding an important endorsement to what has already become a near-universal legal regime. Until this happens, however, international maritime affairs will proceed without the US as a party to the Convention. US status as a significant maritime nation does not need emphasis, but what is relevant to the present study is that the US is a coastal state with broad continental margins. Preliminary studies indicate that the US continental margin *beyond 200 nm* totals over one million square kilometers – an area twice the size of California.[9] This represents a massive swath of seabed – potentially containing valuable resources – the entitlement to which is rendered ambiguous by US non-accession to the LOSC. The US has been gathering data on its continental shelf since 2001, with a view to defining its outer limits.[10] It cannot be expected that these legal questions will lie dormant indefinitely. This study proposes an investigation of the international legal regime for the continental shelf, including its status vis-à-vis LOSC non-parties as customary law, in order to achieve a clearer picture of the specific rights and obligations which characterize US entitlement to a continental shelf.

1.2 Objective of thesis

The objective of this thesis is to answer the following question: what are the implications of US non-accession to the LOSC for its entitlement to a continental shelf beyond 200 nm? There is no doubt as to whether the US enjoys certain rights over its continental shelf as a matter of customary international law; the more complicated question is to what degree these customary rights correspond with the legal framework set out in Part VI of the

[7] LOSC Article 83; 1958 Convention on the Continental Shelf Article 6.
[8] See e.g. US Department of State, "Supporters", retrieved from <http://www.state.gov/e/oes/lawofthesea/statements/index.htm/>.
[9] US ECS Project, "About the Extended Continental Shelf Project", retrieved from <http://continentalshelf.gov/about.html>.
[10] See US Department of State, "Defining the Limits of the US Continental Shelf", retrieved from <www.state.gov/e/oes/continentalshelf/>.

Convention. The issue of the seaward extent of such rights is particularly interesting. The Convention's rules on this subject are complex, reflecting a carefully negotiated compromise on outer limits. In this respect, there are aspects of the LOSC legal regime which were never part of the traditional concept of the continental shelf. Today, it is not immediately clear which of these rules are applicable to the US as a non-party.

While treaty rights and obligations are in principle binding only upon states which consent to be bound to them, they may nevertheless come to reflect rules of customary international law. The LOSC continental shelf regime codified certain rules which already reflected international custom at the time of its drafting, as well as introduced new legal rules, some of which have arguably acquired a customary character through subsequent state practice. Part of the task inherent in this research question thus involves disaggregating and analyzing the component parts of the LOSC continental shelf regime in light of state practice, so as to identify those rules of a customary character which are applicable to LOSC parties and non-parties alike. This gives rise to several core research questions, which will be examined in subsequent chapters:

- Is the US entitled to a continental shelf beyond 200 nm under customary international law?
- What is the legal relationship between entitlement to a continental shelf and establishment of its outer limits?
- Can the US submit information on its outer limits to the CLCS?
- What is the legal character of outer limits established outside of the CLCS procedure?

1.3 Legal sources and methodology

This study is concerned primarily with legal research. Various sources of international law, as reflected by Article 38 of the Statute of the International Court of Justice (ICJ), will be considered. As described above, the central research task involves identifying legal rules which can be said to apply to a state which has not ratified the primary source of conventional law on the subject. As such, reference to the 1969 Vienna Convention on the Law of Treaties (hereinafter VCLT) will be indispensable. A fundamental rule of international treaty law, *pacta tertiis,* says that treaties are only binding upon states which consent to be bound by them. This is stated in VCLT Article 34: "A treaty does not create either rights or obligations for third states without their consent". While this is the general rule, the VCLT further provides that

treaties can create rights or obligations for a third state (the term in treaty law for states not party to a treaty) if the parties to the treaty intended for such rights or obligations to apply to third states and the third state assents thereto.[11] None of these rules prevent, however, a rule set forth in a treaty from becoming binding upon a third state as a customary rule of law, recognized as such.[12]

Customary rules can emerge from state practice in the presence of *opinio juris.* Article 38 of the Statute of the ICJ refers to "international custom, as evidence of a general practice accepted as law." This phrasing suggests the presence of two elements: a body of state practice (objective element), and evidence that this practice arises from a feeling of legal obligation (*opinio juris* – subjective element).[13] While *opinio juris* in some cases can be difficult to ascertain, state practice can be understood in relatively simple terms as what states do and say.[14] On the transmigration of a rule from conventional to customary law, the ICJ has stated:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[15]

This appears to set a fairly high threshold for the formation of a customary rule. Nevertheless, it has been suggested that the ICJ has, at times, found customary rules without applying the two criteria identified above, having referred in its jurisprudence to norms for ensuring coexistence and vital cooperation among members of the international community, moral imperatives, logical consequences of certain processes, and the authority of certain conventions as conveying customary character.[16]

It is not possible, within the limited space of this thesis, to analyze state practice in sufficient detail to determine customary international law in every instance. Ascertaining the contents of customary law is part of the work of international courts and tribunals, which are

[11] VCLT (1969), Articles 35 and 36.
[12] VCLT (1969), Article 38.
[13] Treves (2006), "Customary International Law". Retrieved from <opil.ouplaw.com>.
[14] Ibid.
[15] *North Sea Continental Shelf* cases, ICJ (1969), para. 74.
[16] Treves (2006), "Customary International Law".

both qualified and equipped for this task. International judicial decisions, where they are relevant to the questions at hand, will therefore be an important resource in gauging the status of customary international law. The analysis of individual treaty provisions and terms, which is necessary to the object of this thesis, will be done in accordance with the VCLT's rules on the interpretation of treaties. The general rule of treaty interpretation is contained in Article 31 of the VCLT, and states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In certain circumstances, the preparatory work of a treaty and the circumstances of its conclusion may be referenced as supplementary means of interpretation.[17]

1.4 Structure of thesis

This thesis will proceed in five subsequent chapters. The next chapter traces the early development of the continental shelf as a legal concept, beginning with its genesis in the 1945 Truman Proclamation and leading up to its codification in the 1982 LOSC. A brief overview of the legal history associated with the continental shelf is prerequisite to a discussion of customary international law on the subject. Chapter 3 analyzes customary international law as it applies to the continental shelf. As a starting point for this analysis, it discusses the package deal character of the Convention and reviews US policy and practice with respect to the continental shelf. The chapter proceeds by distinguishing three distinct elements of the continental shelf regime which emerged from the LOSC: substantive rights of the coastal state, the basis of continental shelf entitlement, and the delineation of outer limits beyond 200 nm. The potential customary status of these elements is considered in light of the legal history described in chapter 2, as well as relevant state practice and post-1982 judicial decisions. Chapter 4 discusses the LOSC rules for establishing outer limits of the continental shelf beyond 200 nm, including the role of the CLCS. Specifically, the competence of the CLCS is analyzed vis-à-vis the competence of coastal states in the process of establishing outer limits. This chapter further considers the legal status of outer limits (a) established "on the basis" of the Commission's recommendations and (b) potentially established outside of the CLCS procedure. Chapter 5 raises the question of whether a state which is not party to the Convention, such as the US, has the right to make a submission to the CLCS. The question is

[17] VCLT (1969), Article 32.

not simple, and various arguments are possible. This chapter identifies and discusses the principal arguments in connection with this question. Chapter 6, as the concluding chapter, attempts to synthesize the findings of this research with respect to the position of the United States.

2 Development of the legal continental shelf

2.1 1945-1982: Truman Proclamation to UNCLOS III

In order to analyze the current legal regime for the continental shelf, it is first necessary to understand where it came from. The international legal concept of the continental shelf has its origins in the 1945 Truman Proclamation, through which the US Government claimed jurisdiction and control over the natural resources in the seabed and subsoil contiguous to its coasts. This appropriation was justified, inter alia, on the basis that "the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it".[18] This did not go unnoticed by the international community – the Truman Proclamation was followed by similar claims from many other states.[19] As an outcome of the First United Nations Conference on the Law of the Sea in 1958, a definition of the legal continental shelf was codified for the first time in the Convention on the Continental Shelf (hereinafter 1958 Convention). The 1958 Convention recognized coastal states' inherent[20] and exclusive[21] sovereign rights over the continental shelf, defined as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".[22] Although different interpretations of this provision are possible, it was acknowledged already at the 1958 conference that the addition of the exploitability test made the seaward limit of the continental shelf dangerously imprecise.[23]

In 1969, the ICJ made a landmark judgment in the *North Sea Continental Shelf* (hereinafter *North Sea*) cases which had important implications for the future of the continental shelf regime. The Court was requested to identify the principles and rules of international law for the delimitation of the continental shelf, as applicable between the parties to the cases

[18] US Proclamation No. 2667 (1945), Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. Retrieved from <www.gc.noaa.gov/documents/gcil_proc_2667.pdf>.
[19] Churchill and Lowe (1999), *The Law of the* Sea, p. 144.
[20] 1958 Convention on the Continental Shelf, Article 2(3).
[21] Ibid, Article 2(2).
[22] Ibid, Article 1.
[23] Churchill and Lowe (1999), p. 147.

(Germany, Denmark and the Netherlands). Because only two of the three parties had ratified the 1958 Convention, the Court needed to consider the customary status of several of that convention's provisions. In its judgment, the Court confirmed the customary character of the substantive continental shelf regime set out in Articles 1 through 3 in the 1958 Convention, but also elaborated upon the underlying basis of entitlement to the continental shelf. In a well-known dictum, the Court stated:

> the rights of the coastal state in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist, *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.[24]

In other words, it is "the extension of something already possessed" (sovereign territory) which confers title to the continental shelf.[25] Accordingly, the notion of natural prolongation recognized that the legal institution of the continental shelf arose from a "physical fact".[26]

What the *North Sea* judgment did not address, as it was concerned with the delimitation of the continental shelf between neighboring states, was the delineation of outer limits as a unilateral act of the coastal state. The issue of outer limits did not arise in the geographical context of the North Sea. This question was still governed by Article 1 of the 1958 Convention. The "exploitability criterion" contained in this article was widely recognized as inadequate, particularly given the rapid development of technology allowing for the exploitation of seabed resources at greater depths.[27] This sentiment reached its peak in the late 1960's, when it was considered that the mining of mineral resources on the deep seabed could become commercially possible in the near future. Recognizing that the benefits of these activities would accrue primarily to industrial states with the requisite technological capacity, developing states advanced the idea that the deep seabed beyond national jurisdiction should be protected from encroachment and appropriation by states, and that its resources are "the common heritage of mankind".[28] This legal concept was developed further in a 1970 United Nations General Assembly resolution, which called for the formal establishment of a legal

[24] *North Sea Continental Shelf* cases, ICJ (1969), para. 19.
[25] Ibid, para. 43.
[26] Ibid, para. 95.
[27] See UNGA Resolution 2574 A (XXIV) of 15 December 1969.
[28] This was articulated most famously in Maltese diplomat Arvid Pardo's speech to the UN General Assembly in 1967.

regime and institutional machinery for the management of the international seabed area.[29] Thus, a key mandate for the Third United Nations Conference on the Law of the Sea (1974-82, hereinafter UNCLOS III) was the need to clearly delineate the limits of national jurisdiction, expressed as the outer limits of the continental shelf, so as to define the international seabed area and give effect to the common heritage of mankind principle.[30]

2.2 The LOSC and Article 76

A new continental shelf regime would represent a compromise, as it needed to accommodate different views espoused by several blocs of states. A large group representing mostly landlocked or geographically disadvantaged states advocated for the continental shelf regime to be absorbed within the new EEZ regime, and therefore limited to 200 nm from the baselines. This perspective was motivated by a concern that extensive continental shelf entitlements would unreasonably diminish the size of the international seabed area.[31] Meanwhile, a relatively small number of states with broad continental margins argued for a definition of the continental shelf which would extend throughout the natural prolongation of their land territory, to the edge of the continental margin. These states were unwilling to accept a 200 nm limit to their continental shelf rights, as they felt that they had already acquired rights under international law beyond this distance. Their negotiating position drew on Article 1 of the 1958 Convention, the language and reasoning of the ICJ in the *North Sea Continental Shelf* cases, and some state practice in the issuance of oil and gas permits on the continental margin.[32]

A basic definition of the continental shelf was put forth relatively early, in the third of eleven conference sessions, and later repeated verbatim as Article 76(1) of the LOSC:

> The continental shelf of a coastal state comprises the sea-bed 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

[29] UNGA Resolution 2749 (XXV) of 17 December 1970.
[30] See UNGA Resolution 2750 C (XXV) of 17 December 1970. The preparatory body for the conference itself grew out of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (the Seabed Committee).
[31] Nordquist et al. (1993), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. 2 (hereinafter *Virginia Commentary*), pp. 844-45.
[32] See observation of Canada at the 46th plenary meeting, referenced in *Virginia Commentary* (1993), 846.

> 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.[33]

The new definition featured a combination of a distance criterion (a legal continental shelf of 200 nm regardless of the physical characteristics of the seabed), as well as a geomorphological criterion (to the outer edge of the continental margin) to satisfy the broad-margin states. The continental margin is defined in Article 76(3) as consisting of the continental shelf, the slope, and the rise, but not the deep ocean floor or oceanic ridges.[34] Because the new definition was intended above all to close the door on the elastic nature of the 1958 Convention's exploitability criterion, it became essential to precisely define the outer edge of the continental margin and prescribe rules for its delineation beyond 200 nm. The negotiations on this matter produced a compromise entailing three major parts. The first was a complex formula for delineating the outer edge of the continental margin beyond 200 nm, consisting of technical criteria, set out in paragraphs 4 to 6 of Article 76. Secondly, an independent body, the CLCS, was established to assist states in applying the Article 76 formula. The third element of the compromise entails revenue-sharing obligations which are applicable to the exploitation of non-living resources of the continental shelf beyond 200 nm. These obligations are defined in Article 82.

2.2.1 Article 76 formula

The general definition of the continental shelf is immediately qualified by Article 76(2), which indicates that it shall not extend beyond the limits provided in paragraphs 4 to 6 of Article 76. Paragraphs 4 to 6 of Article 76 define the technical criteria for coastal states to delineate the outer limits of the continental shelf beyond 200 nm. These criteria have been discussed at length elsewhere[35] and are summarized only briefly here. Outer limits may be drawn on the basis of two possible formula lines, both of which are based on the location of the foot of the continental slope.[36] The first formula is a function of the thickness of sedimentary rocks (greater thickness enables more seaward limits), while the second formula is a distance

[33] Article 62 of the Informal Single Negotiating Text/Part II, reproduced in *Virginia Commentary* (1993), p. 851.
[34] LOSC Article 76(3).
[35] See e.g. Smith and Taft (2000), "Legal Aspects of the Continental Shelf".
[36] LOSC Article 76(4)(b) states "In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base."

not exceeding 60 nm from the foot of the slope.[37] Final limits are subject to two possible constraints, as they may not exceed either 350 nm from the baselines, or 100 nm from the 2,500 meter isobath which is a line connecting the depth of 2,500 meters.[38] A coastal state is free to apply a combination of the two formula lines and two constraints, so as to maximize the extent of their continental margin. There is an exception for submarine ridges, however, which are limited to the former constraint of 350 nm from the baselines.[39]

It should be noted that the above criteria are not easily applicable in all situations. There are significant ambiguities, for example, associated with the interpretation of Article 76 rules on the location of the foot of the slope, calculations of sediment thickness, the selection of the 2,500 meter isobaths, and classification of ridges.[40] While a legal analysis of these issues is beyond the scope of this thesis, they illustrate in a general sense the complexity associated with implementation of the Article 76 formula. This complexity is the product of extensive negotiations on an issue which carried important resource implications, and moreover was central to the conference mandate of defining the international seabed area. In light of these factors, it is perhaps understandable that the international community considered it desirable to establish an independent body to facilitate the practical application of the Article 76 formula.

2.2.2 Commission on the Limits of the Continental Shelf

During the third session, the US proposed that continental shelf delineations be submitted to a Continental Shelf Boundary Commission, whose acceptance of the data would render the outer limits final and binding.[41] This body was ultimately established under Annex II to the Convention as the CLCS. The CLCS is charged with carrying out two main functions. According to Article 3 of Annex II to the Convention, the functions of the Commission shall be:

a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to

[37] LOSC Article 76(4)(a).
[38] LOSC Article 76(5).
[39] LOSC Article 76(6). Submarine ridges are distinguished from "submarine elevations which are natural components of the continental margin".
[40] Nelson (2002), "The Continental Shelf: Interplay of Law and Science", p. 1242. See also ILA Committee on Legal Issues of the Outer Continental Shelf (2002), Preliminary Report, p. 4.
[41] *Virginia Commentary* (1993), p. 849.

make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

Pursuant to Article 76(8), coastal states have a procedural obligation to submit information on the limits of their continental shelf beyond 200 nm to the CLCS. The significance of CLCS recommendations is reflected in the last sentence of this article, which provides that continental shelf limits "established by the coastal state on the basis of these recommendations shall be final and binding." The US Government has described the CLCS as a "mechanism to prevent or reduce the potential for dispute and uncertainty over the precise limits of the continental shelf where the continental margin extends beyond 200 miles", through a process which is not adversarial, but which provides certain "safeguards against exaggerated claims".[42] The role of the Commission is considered in greater depth in chapter 4.

2.2.3 Article 82 revenue-sharing obligations

At the UNCLOS III negotiations, developing and geographically disadvantaged states resisted the recognition of continental shelf rights extending to the outer edge of the continental margin on the basis that this would unreasonably impinge upon the international seabed area and the common heritage of mankind. During the second session of the conference, US negotiators proposed a revenue-sharing scheme as "a way to reconcile the positions of States which maintained that their rights extended to the edge of the continental margin beyond 200 miles and those that did not wish to see the common heritage of mankind diminished by recognizing coastal State jurisdiction beyond 200 miles".[43] In its final form in Article 82, this obligation applies with respect to the exploitation of non-living resources of the continental shelf beyond 200 nautical miles from the baselines. Sharing of revenues shall take the form of payments or contributions in kind, beginning at 1 percent of the value during the 6th year of production and increasing at 1 percent per year, but not to exceed the rate of 7 percent reached in the 12th year of production.[44] Developing states which are net importers of the exploited

[42] US Senate Commentary (1995), "The 1982 UN Convention on the Law of the Sea and the Agreement on the Implementation of Part XI", pp. 32-33.
[43] Statement by Mr. Stevenson, US representative to the Second Committee, 41st Meeting, (1974), II Off. Rec. 291, para. 20, as cited Lodge (2006), "The International Seabed Authority and Article 82 of the UN Convention on the Law of the Sea", p. 324.
[44] LOSC Article 82(2).

resource may be exempt from these requirements.[45] Payments are made to and distributed through the International Seabed Authority (ISA), which is the body established under the LOSC to act on the behalf of mankind with respect to activities carried out in the international seabed area (hereinafter the Area). It should be noted that Article 82 is a dormant provision, in the sense that it has not been applied in practice to date. Its implementation is currently under consideration by the ISA.[46]

[45] LOSC Article 82(3).

[46] See International Seabed Authority (2009), Technical Study 4: "Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea".

3 The LOSC continental shelf regime as customary international law

True to the Convention's preamble, Part VI of the LOSC resembles both codification and progressive development of the law of the sea as it applies to the continental shelf. Several substantive aspects of the LOSC continental shelf regime, for example, were repeated unchanged from the 1958 Convention. These include the nature of a coastal state's sovereign rights over the continental shelf, which are exclusive, inherent, and do not affect the legal status of superjacent waters and airspace.[47] In these respects, the LOSC merely codified a pre-existing legal framework. Other aspects of the LOSC regime were clearly without precedent, however, especially with regard to outer limits of the continental shelf beyond 200 nm. The Article 76 formula for locating the outer edge of the continental margin, the procedural role of the CLCS in the establishment of outer limits, and the revenue-sharing requirements under Article 82 all emerged as distinctly new aspects of the continental shelf regime. These provisions were the product of extensive negotiations, embodying a compromise that was finally accepted as a package deal.

3.1 Implications of the package deal

The object of this chapter is to discern the principal elements of the LOSC continental shelf regime, with a view to discussing their potential applicability vis-à-vis non-parties to the Convention through the operation of customary international law. This warrants reflection, in the first place, on the package deal character of the Convention. The fashion in which the Convention was negotiated, and eventually adopted, may have implications for its ability to contribute to the formation of customary rules of law. In short, the Convention was agreed to as an indivisible whole – every state made concessions on individual provisions in order to reach a general consensus on the integral text. As such, it is difficult to gauge the consensus which would have existed around any individual provision or rule, taken by itself, as each was ultimately weighed as a constituent part of a delicately-balanced compromise.[48] Moreover, no reservations were permitted. The US delegation expressed the view that "since the Convention is an overall 'package deal' reflecting different priorities of different States, to permit

[47] See further section 3.3.
[48] Harris (2010), *Cases and Materials on International Law,* p. 322.

reservations would inevitably permit one State to eliminate the 'quid' of another State's 'quo'."[49] Similarly, the package deal arguably complicates the transformation of individual LOSC provisions into rules of customary international law.[50]

Nevertheless, the legal effect of the package deal has its limitations. Caminos and Molitor note that "the package deal could not have crystallized all of the provisions of the Convention into an indivisible whole before the treaty was adopted" in 1982.[51] It therefore did not affect the customary status of provisions appearing in the Convention which had already been recognized as rules of customary international law, such as those provisions which were carried over unmodified from the 1958 Convention. The same consideration may apply to the Convention's more innovative provisions, if they came to reflect customary law during the course of UNCLOS III negotiations and prior to the treaty's adoption.[52] In the judgment for the 1982 *Tunisia/Libya* case which was decided several months before the Convention was adopted, the ICJ explained that "it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law".[53]

The other category of provisions – those which had not yet achieved customary status at the time of the Convention's adoption – must be considered as being more closely linked to the entire Convention package.[54] Nevertheless, international case law would suggest that these provisions are not necessarily precluded from transforming into customary rules. The ICJ made an interesting pronouncement in the 1984 *Gulf of Maine* judgment:

> Turning lastly to the proceedings of [UNCLOS III] and the final result of that Conference, the Chamber notes in the first place that the Convention adopted at the end of the Conference has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention concerning the continental shelf and the exclusive economic zone […] were adopted, without

[49] Reports of the US Delegation to the Third United Nations Conference on the Law of the Sea, Nordquist, M. and C. Park (eds.) (1983), as cited in Caminos and Molitor (1985), "Progressive Development of International Law and the Package Deal", p. 875.
[50] See generally Caminos and Molitor (1985).
[51] Ibid, p. 887.
[52] Ibid, p. 888.
[53] *Tunisia/Libya,* ICJ (1982), para. 24.
[54] Caminos and Molitor (1985), pp. 888-89.

> any objections […] these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.[55]

Caminos and Molitor argue that the process of third states acquiring customary rights from the Convention "represents a two-edged sword in that it may make equally applicable to third states the innovative obligations in the Convention".[56] It is recalled that widespread state practice, in the presence of *opinio juris*, is generally required to indicate the emergence of a customary rule. These requirements have not been altered by the package deal. What this suggests, however, is that states wishing to keep the package deal intact may potentially resist the formation of customary rules of law derived from the Convention's provisions. The package deal itself can be characterized as a political understanding, but it may produce legal effects indirectly through its influence on state practice.

3.2 US practice and statements of policy with respect to the continental shelf

The most interesting state practice, for the purposes of this study, is that of the United States. This section reviews the practice and stated policies of the US Government as they relate to the continental shelf. Following the conclusion of the UNCLOS III conference, the first clear statement of US oceans policy came in the form of President Reagan's 1983 proclamation of a 200 nm EEZ. A fact sheet accompanying this proclamation indicated that "the United States is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to traditional uses of the oceans, such as navigation and overflight".[57] While it is sometimes held that the US recognizes all LOSC provisions outside of Part XI as customary international law,[58] this view does not seem to be explicitly supported by an official statement of US policy. It should be noted that continental shelf rights are included within the EEZ regime up to 200 nm,[59] which is applied by the US as a part of customary international law. With respect to sovereign rights to resources of the continental shelf, then, legal ambiguity arising from US non-ratification of the LOSC concerns primarily the continental shelf beyond 200 nautical miles.

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[55] *Gulf of Maine,* ICJ (1984), para. 94.
[56] Caminos and Molitor (1985), p. 888.
[57] "United States Ocean Policy", fact sheet accompanying Presidential Proclamation 5030 of March 10, 1983. Retrieved from <www.gc.noaa.gov/documents/031083-white_house_fs_oceans%20Policy.pdf>.
[58] E.g. Kwiatkowska (1991), "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea", p. 155.
[59] LOSC Article 56(1)(a).

Official US policy for the continental shelf, articulated in a 1987 statement of the Interagency Group on the Law of the Sea and Ocean Policy[60] (see Annex 1), is nuanced in its engagement with the provisions of Article 76. This statement provides that Article 76 reflects the proper definition of the continental shelf under international law, and that the US exercises "jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2) and (3)." At such time in the future that the US decides to establish outer limits of the continental shelf beyond 200 nm, the statement provides that this "shall be carried out in accordance with paragraphs (4), (5), (6) and (7)".

Based on this statement of policy, it can be inferred that the US views the general definition of the continental shelf, as it appears in 76(1), as reflecting customary law. Article 76(3) is integral to this definition, as it affirms that the continental margin consists of the shelf, the slope and the rise. Additionally, Article 76(2) stipulates that the continental shelf of a coastal state shall not extend beyond the limits provided for in paragraphs 4 to 6. Article 76(4) in turn refers to 76(7) on the method of delineation involving fixed points connected by straight lines not exceeding 60M in length. The statement indicates that the US will apply these latter four paragraphs as a matter of procedure, without commenting explicitly on whether they are perceived as customary law. Because the statement refers to 76(2) as reflecting international law, though, adherence to paragraphs 4 to 6 (and by extension paragraph 7) does seem to arise out of a sense of legal obligation. The statement eschews reference to 76(8) and the CLCS procedure, and does not indicate whether the US considers itself bound to Article 82 revenue-sharing obligations.

The most interesting example of US practice in relation to these provisions concerns the continental shelf in the Gulf of Mexico. The US currently exercises jurisdiction in part of the Western Gap area of the Gulf of Mexico, an area slightly smaller than the state of New Jersey, which is located beyond its 200 nm EEZ.[61] This area of the Gulf of Mexico was delimited in a

[60] US Interagency Group on the Law of the Sea and Ocean Policy (1987), "Policy Governing the Continental Shelf of the United States of America", reproduced in Roach and Smith (2012), *Excessive Maritime Claims*, p. 188.
[61] See generally McLaughlin (2008), "Hydrocarbon Development in the Ultra-Deepwater Boundary Region of the Gulf of Mexico: Time to Reexamine a Comprehensive U.S.-Mexico Cooperation Agreement".

bilateral agreement between the US and Mexico, signed in 2000. The Delimitation Treaty[62] was premised on an agreement between both states that the seabed in this area fulfilled the criteria in both the 1958 Convention and Article 76 of the LOSC to be considered as part of the legal continental shelf.[63] Specifically, a desk-top study commissioned by the US Government indicates that the presumption of US entitlement in this area relies on the sedimentary thickness criterion contained in LOSC Article 76(4)(i).[64] This is an ultra-deepwater region which evidently does not pertain to the continental shelf in a geophysical sense. US oil and gas lease stipulations for this area provide for the possibility of implementing Article 82 revenue-sharing obligations, but indicate that this is contingent upon the US becoming party to the Convention.[65]

3.3 Substantive continental shelf rights

With regard to the continental shelf beyond 200 nm, McDorman identifies the substantive rights enjoyed by a coastal state as a distinct component of the international legal framework.[66] The principal substantive rights resemble constant features of the continental shelf regime through its development, as they are derived from the 1958 Convention and repeated in the LOSC. This includes the nature of a coastal state's rights over the continental shelf, described as "sovereign rights for the purpose of exploring it and exploiting its natural resources".[67] These rights are exclusive to the coastal state,[68] and are inherent in the sense that they do not depend on occupation or any express proclamation.[69] This latter point was affirmed by the ICJ in the *North Sea* judgment – the Court noted that coastal state rights over the continental shelf "exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land […] In short, there is here an inherent right. In order to exercise it, no special legal process has to

[62] Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, retrieved from <http://www.state.gov/documents/organization/188466.pdf>.
[63] Letter of submittal from the US Secretary of State Madeline Albright, reproduced in McDorman et al. (2005) *International Ocean Law: Materials and Commentaries*, pp. 139-140.
[64] Mayer, Jakobsson and Armstrong (2002), "The Compilation and Analysis of Data Relevant to a US Claim Under United Nations Law of the Sea Article 76: A Preliminary Report", p. 50.
[65] Western Planning Area, Oil & Gas Lease Sale 207 (20 August 2008) Final Notice of Sale, Stipulation No. 4, reproduced in International Seabed Authority (2009), Technical Study 4, pp. 7-8 (Box 1).
[66] McDorman (2008), "The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean", p. 162.
[67] LOSC Article 77(1); 1958 Convention Article 2(1).
[68] LOSC Article 77(2); 1958 Convention Article 2(2).
[69] LOSC Article 77(3); 1958 Convention 2(3).

be gone through, nor have any special legal acts to be performed".[70] An important consequence of the inherent character of continental shelf rights is that they exist wherever the basis of entitlement is present, and do not depend in any legal sense on the establishment of outer limits.[71] Lastly, the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters (or airspace).[72] These above features of the continental shelf regime are held to be part of customary international law,[73] and there does not appear to be any dispute on the matter.

3.4 Basis and extent of entitlement to the continental shelf

The substantive rights identified above may be exercised by a coastal state where it has legal title over the continental shelf. In the most general sense, entitlement to the continental shelf, as with other coastal state maritime zones, is based on the sovereignty of the coastal state over land territory.[74] The conceptual link between a coastal state's sovereignty to the land territory and sovereign rights over the continental shelf has evolved throughout the legal development of the continental shelf, being expressed at various stages through rather abstract terms such as adjacency, contiguity, and appurtenance. These notions were given a more concrete expression in 1969, when the ICJ in the *North Sea* judgment recognized the natural prolongation of the land territory of a coastal state into and under the sea as the fundamental principle conferring *ipso jure* title to the continental shelf.[75] The Court noted that "the institution of the continental shelf has arisen from a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime".[76] The judgment also considered that, at the time of the 1958 Convention, Articles 1 to 3 of that convention reflected, or crystallized, "received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf".[77] This observation of the Court, read today, begs the question of what the seaward extent of the shelf permitted under the

[70] *North Sea Continental Shelf* cases, ICJ (1969), para. 19.
[71] See ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 1.
[72] LOSC Article 78(1); 1958 Convention Article 3.
[73] McDorman (2008), p. 164.
[74] Oude Elferink (2006), "Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its interpretation from a Legal Perspective", p. 277.
[75] *North Sea Continental Shelf* cases, ICJ (1969), para. 43.
[76] Ibid, para. 95.
[77] Ibid, para. 63.

1958 Convention actually was, and further, how this may have been modified or superseded by the development of customary law on the matter.

The first point to be recognized, with respect to Article 1 of the 1958 Convention, is that the exploitability criterion reflected a failure to agree on permanent outer limits. The question was deferred.[78] This did not necessarily open the door to unrestrained seaward creep by coastal states, as is sometimes suggested. The formulation of Article 1 indicates that the exploitability criterion is only applicable to submarine areas "adjacent to the coast". The phrase "… admits of exploitation" is therefore not the only term in Article 1 which can be read as limiting the seaward extent of rights, as the word "adjacent" carries a legally significant meaning. France, for example, in a declaration attached to its ratification of the 1958 Convention, stated its view that "the expression 'adjacent' areas implies a notion of geophysical, geological and geographical dependence which *ipso facto* rules out an unlimited extension of the continental shelf."[79] According to Oxman, custom and practice at the time of the 1958 Convention's drafting supported, at most, "jurisdiction over the resources of the geological shelf and other coastal 'shallow water' seabed areas".[80] Based on a review of the *travaux préparatoires*, Oxman suggests that these areas would not have included the continental slope (which is seaward of the shelf but landward of the rise).[81]

The Soviet Continental Shelf Decree of 1968 referred to the "continuous mass of the continental shelf", which lends support to an interpretation of the 1958 Convention which understands legal limits arising from geophysical facts.[82] In 1969 the ICJ introduced the concept of natural prolongation, which arguably modified or even replaced adjacency as the basis of continental shelf entitlement. The Court did not address the extent of this entitlement in any direct terms, but the *North Sea* judgment seems to equate the legal continental shelf with the geophysical continental shelf.[83] It is debatable what the extent of continental shelf rights would have been under customary law at the beginning of UNCLOS III, in 1974. At a minimum, it seems there is support for the assertion that customary law at this time recognized

[78] Oxman (1972), "The Preparation of Article 1 of the Convention on the Continental Shelf", p. 713.
[79] Republic of France, declaration upon ratifying the 1958 Convention. As cited in O'Connell (1982), *The International Law of the Sea,* p. 495.
[80] Oxman (1972), p. 720.
[81] Ibid, pp. 719-720.
[82] O'Connell (1982), p. 495, see footnote 148.
[83] Oude Elferink (2006), p. 273.

entitlement over the geophysical continental shelf, including where it existed beyond 200 nm. At the same time, Oude Elferink doubts that the legal continental shelf extended to the outer edge of the continental margin (including the slope and the rise) before negotiations on Article 76 had begun, as was argued by the broad-margin states.[84] This is consistent with the view expressed by Tommy Koh, in the authoritative role as president of the UNCLOS III conference: "[Article 76] contains new law in that it expands the concept of the continental shelf to include the continental slope and the continental rise."[85] Nevertheless, the legal continental shelf did extend well beyond 200 nm in certain parts of the world[86] – places where existing entitlement to the continental shelf would have been severed by the proposed 200 nm limit.

In any case, it is likely that customary law continued to evolve over the course of UNCLOS III negotiations and during the years prior to the Convention's entry into force. Writing in the late 1970s, O'Connell noted a growing number of states which were adopting in their national legislation a definition of the continental shelf as natural prolongation to the outer edge of the continental margin, or to a distance of 200 nm from the baselines, in accordance with UNCLOS III negotiating texts.[87] This new definition of the continental shelf, featured in the Draft Caracas Convention, represented the position in customary international law at this time according to O'Connell.[88] In the 1985 *Libya/Malta* judgment, the ICJ recognized – on the basis of customary international law, as the LOSC had not yet entered into force – the dual nature of continental shelf entitlement featuring a distance criterion within 200 nm and the natural prolongation of a coastal state beyond this limit.[89]

Today, the definition of the continental shelf in Article 76(1) appears to be fully recognized as reflecting customary law. The ICJ explicitly accepted it as such in the 2012 *Nicaragua v. Colombia* judgment.[90] Judge Mensah, serving as an ad-hoc judge in that case, observed in a separate declaration that "It can plausibly be argued that the entitlement of a

[84] Ibid, p. 274.
[85] Koh (1982), "A Constitution for the Oceans", remarks at the final session of the Conference at Montego Bay, retrieved from <http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>.
[86] Oude Elferink (2006), p. 274.
[87] O'Connell (1982), p. 498.
[88] Ibid, p. 497.
[89] *Libya/Malta,* ICJ (1985), paras. 27 and 34.
[90] *Nicaragua v. Colombia,* ICJ (2012), para. 118.

coastal State beyond 200 nautical miles arises *ipso facto* and *ab initio* under customary international law, whether or not the State is party to [the LOSC]".[91] Based on the evidence presented above, it seems that the same perspective could have been plausibly argued in 1969, if not 1958 (depending on the physical characteristics of the seabed). The question of whether customary entitlement extends beyond 200 nm is not at issue. The more incisive question is whether the legal continental shelf under customary law extends to the outer edge of the continental margin, including the slope and the rise. The answer, it would seem, depends on the extent to which "natural prolongation" has been modified or replaced by the concept of the continental margin as the basis of continental shelf entitlement beyond 200 nm. On this issue, the International Tribunal for the Law of the Sea (hereinafter ITLOS) has noted that the notions of natural prolongation and continental margin are closely interrelated in the context of Article 76 – they refer to the same area.[92] The Tribunal proceeded to consider that natural prolongation can no longer be understood as a separate and independent basis of entitlement, and that entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin.[93] By this reasoning, if Article 76(1) is recognized as reflecting customary international law – which seems to be the case – this would squarely indicate recognition of coastal state entitlement to the edge of the continental margin, including the slope and the rise.

While Article 76(1) can therefore be understood as reflecting the current state of customary international law, the question remains at what point in time this recognition occurred. A more detailed analysis of state practice would be required to determine whether coastal states had acquired customary rights to the outer edge of the continental margin prior to 1982, as asserted by O'Connell. It has been noted that at the beginning of UNCLOS III negotiations, the legal continental shelf almost certainly did not consist of the entire continental margin. Nevertheless, the 200 nm/natural prolongation to the outer edge of the continental margin definition of the continental shelf appeared relatively early in conference proceedings, in the 1975 Informal Single Negotiating Text (ISNT), and remained stable through subsequent revisions. By the time the Convention was adopted in 1982, this definition of the continental

[91] *Nicaragua v. Colombia,* ICJ (2012), Declaration of ad-hoc Judge Mensah, para. 7.
[92] *Bangladesh/Myanmar,* ITLOS (2012), para. 434.
[93] *Bangladesh/Myanmar,* ITLOS (2012), paras. 435 and 437.

shelf was reflected in the legislation of at least 18 coastal states.[94] On the other hand, widespread support for this definition at UNCLOS III seemed to rely on the willingness of broad-margin states to share a percentage of revenues derived from the exploitation of mineral resources between the 200 nm limit and the outer edge of the continental margin. The idea of sharing revenues from seabed exploitation within national jurisdiction predated the conference, having been raised in different forms by the US and Canada in the context of the Seabed Committee, which acted as a preparatory body for the conference between the years 1970 and 1973.[95] The concept was revived, in the form of Article 69 of the ISNT, as a compromise designed to appease those states which favored a fixed 200 nm limit.[96] Even if customary recognition of coastal state rights to the outer edge of the continental margin had crystallized before the Convention's adoption in 1982, it seems difficult to assert that this would have occurred independently from the revenue-sharing obligations included as part of the package deal.

3.5 Delineating outer limits beyond 200 nm

The last major component of the LOSC continental shelf regime concerns the delineation of outer limits beyond 200 nm. The real achievement in LOSC Article 76, it can be argued, is that there is a definable limit to the legal continental shelf which may be claimed by a coastal state.[97] Regardless of how Article 1 of the 1958 Convention is to be interpreted, the fact remains that the exploitability criterion was imprecise and, as such, outer limits were potentially elastic. Article 76 of the LOSC was clearly intended to address this issue, as the majority of its provisions are concerned with the delineation of outer limits beyond 200 nm. Article 76(8) on the submission of information to the CLCS will be discussed in the next chapter and is excluded from consideration here; the present section refers primarily to the criteria and methods for locating the outer edge of the continental margin contained in

[94] The United Nations *Law of the Sea Bulletin, No. 2* (1983) provides a tabulation of national legislation concerning maritime zones. As noted in *Law of the Sea Bulletin, No. 3*, the number "200" under the continental shelf heading of this tabulation should be read as "200/PCM". The states identified include Burma, Chile, the Cook Islands, Yemen, the Dominican Republic, Guyana, Iceland, India, Ivory Coast, Mauritania, Mauritius, New Zealand, Pakistan, Peru, Senegal, Seychelles, Sri Lanka, and Vietnam. Vanuatu was excluded from this list because its legislation was revised after the Convention was adopted on April 30th, 1982.

[95] Buzan and Middlemiss (1977), "Canadian Foreign Policy and the Exploitation of the Seabed", pp. 26-27.

[96] Dissenting opinion of Judge Oda in *Tunisia/Libya,* ICJ (1982), para. 100.

[97] McDorman (2002), "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World", p. 307.

paragraphs 4 to 7 of Article 76. The most obvious example of state practice in applying these provisions is probably the large number of submissions which have been made to the CLCS by coastal states since 2001.[98] Because all of these submissions came from states parties to the Convention, however, the customary implications of this practice are limited. Further analysis of state practice in detail is needed to make an informed conclusion on the customary status of these provisions. Such an analysis requires information which is not readily available and is not possible within the limitations of this thesis, but it seems that two general perspectives on the matter are possible.

The first view sees the prospective assimilation of these rules into the body of customary international law as problematic due to their highly detailed and technical character. It can be argued that, as criteria and methods, these provisions are not capable of having a norm-creating character.[99] Additionally, the implementation of the Article 76 formula is linked by its negotiating history to the establishment of the CLCS pursuant to Article 76(8) and Annex II to the Convention, as well as revenue-sharing obligations under Article 82. These latter provisions were integral to the compromise reached at UCNLOS III, conditioned the acceptance of Article 76 in its present form, and arguably can only be implemented on the basis of conventional law.[100] Tommy Koh remarked in 1982 that the provisions of the newly signed Convention "form an integral package […] it is not possible for a state to pick what it likes and disregard what it doesn't like."[101] Koh specifically asserted that, in his view, a state not party to the Convention could not invoke the benefits of Article 76 as customary law, as the article contained new law and was part of a compromise involving Article 82.[102]

On the other hand, it can be argued that these criteria and methods represent the practical application of a more general rule: natural prolongation of land territory to the edge of the continental margin. While the definition of the continental shelf in Article 76(1) may have resembled new law in 1982, it is has since been recognized as forming part of customary law. Consequently, paragraphs 4 to 7 of Article 76 arguably have legal significance via their

[98] The website of the Commission, as of 3 August 2015, lists 77 submissions (including partial and joint submissions). This does not include the recent submission of the Russian Federation. Available at <http://www.un.org/depts/los/clcs_new/commission_submissions.htm>.
[99] See Kwiatkowska (1991), p. 157.
[100] Ibid, p. 158.
[101] Koh (1982).
[102] Ibid.

contextual relationship to the outer edge of the continental margin, referred to in 76(1). According to the VCLT, terms used in treaties are to be interpreted in good faith, in accordance with the ordinary meaning of the term in its context, and in light of the treaty's object and purpose.[103] The purpose of Article 76 is to define the continental shelf with reference to precise outer limits, which are located at the outer edge of the continental margin where it exists beyond 200 nm. The outer edge of the continental margin, as a legal term, has no precise meaning in Article 76(1) in isolation from the context provided by subsequent paragraphs. Specifically, the outer edge of the continental margin is to be located according to the rules in paragraphs 4 to 6, and delineated by the method contained in 76(7). Article 76(2), by providing that the continental shelf shall not extend beyond the limits provided in paragraphs 4 to 6, strengthens the link between these paragraphs and 76(1). This link is introduced before the spatial scope of the continental margin is defined in a general sense, in Article 76(3). A good faith interpretation of Article 76(1), as a customary rule of international law, should therefore refer to paragraphs 4 to 7 for a correct understanding of the outer edge of the continental margin.

In any case, it does not appear that there is any barrier to a LOSC non-party coastal state applying the Article 76 formula voluntarily. If outer limits are delineated in accordance with paragraphs 4 to 7 of Article 76, it seems reasonable to assume they will also be in accordance with Article 76(1) and therefore with customary international law. Customary law recognizes coastal state rights to a continental shelf beyond 200 nm as long as the basis of entitlement is present. The appropriate rules for delineating such an entitlement are contained in the substantive provisions of Article 76, including paragraphs 4 to 6. Referring to these same provisions, Oude Elferink notes that they "are widely accepted by the international community at large, no state seems to have persistently objected to them and there does not seem to be another rule that might reflect customary international law on this matter."[104]

[103] VCLT Article 31(1).
[104] Oude Elferink (2013), "The Outer Limits of the Continental Shelf in the Polar Regions", p. 63.

4 The process of establishing outer limits beyond 200 nm

A key feature of the LOSC continental shelf regime is not only that outer limits are precisely defined, but that, once established, they become permanent. McDorman suggests that the exact location of the outer limits, pursuant to the Article 76 criteria, is arguably less important than the political feature of the limits being "final and binding".[105] This alludes to an important procedural role for the CLCS in the process of establishing outer limits of the continental shelf by a coastal state. States parties to the Convention are obligated to submit information on their continental shelf limits beyond 200 nm to the CLCS, and outer limits established on the basis of CLCS recommendations are recognized as "final and binding".[106]

While there is evidence to suggest that several of the provisions of Article 76 have come to reflect customary rules for determining the outer limits of the continental shelf, it is more difficult to extend customary international law status to the institutional role of the CLCS in the process of establishing outer limits.[107] Nevertheless, an analysis of the Commission's competence vis-à-vis that of coastal states in the process of establishing outer limits of the continental shelf yields important insights for the position of states which are not party to the Convention. The sections below discuss the procedure by which a coastal state establishes outer limits of the continental shelf under the Convention, the nature of the Commission's engagement in this process, and the legal character of established outer limits.

4.1 Role and competence of the CLCS

While a detailed analysis of the role and competence of the CLCS is beyond the scope of this thesis,[108] a few basic observations can be made which are relevant to the present discussion. As noted previously, the mandate of the Commission is to fulfill two main functions. The first is to consider data submitted by a coastal state and make recommendations on the location of outer limits, and the second is to aid coastal states in the preparation of a

[105] McDorman (2002), p. 308.
[106] LOSC Article 76(8).
[107] McDorman (2002), p. 303.
[108] For a more in depth discussion of this topic see e.g. ILA Committee on Legal Issues of the OCS (2004), Berlin Report, section 3; ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 9.

submission if this assistance is requested.[109] The Commission is composed of 21 experts in the fields of geology, geophysics or hydrography,[110] which indicates that its work is primarily concerned with the assessment of scientific and technical data.[111] On the other hand, it has been observed that "one of the cardinal functions of the Commission must necessarily be to interpret or apply the relevant provisions of the Convention – an essentially legal task".[112] The ILA Committee on Legal Issues of the Outer Continental Shelf notes that the CLCS must be presumed to be competent to interpret or apply certain LOSC provisions to the extent this is necessary to carry out the functions which have been explicitly assigned to it.[113] For some authors this is concerning, considering the lack of legal expertise among members of the Commission.[114]

Commission members must be nationals of states parties to the Convention, with their expenses defrayed by the nominating state, but they are to serve in their personal capacities.[115] The CLCS might thus be described as an autonomous body, comprised of individual technical specialists.[116] As such, it does not speak for or represent the interests of individual states, states parties to the Convention, or the international community.[117] Nor does it have any relationship with the ISA, whose scope of regulatory control is directly affected by outer limits of the continental shelf. While the CLCS is clearly intended to be an independent body, it has been noted that "the financial relationship between the nominating state and the Commission member creates perceptual problems that undermine the impartiality of the Commission".[118]

The CLCS is occasionally portrayed as having a watchdog, or safeguard, role to prevent coastal states from making exaggerated continental shelf claims.[119] This should not be read as overstating the Commission's mandate, however, which is limited to providing recommendations which it has no competence to enforce. Only the coastal state has the

[109] Annex II to the LOSC, Article 3.
[110] Annex II to the LOSC, Article 2(1).
[111] ILA Committee on Legal Issues of the OCS (2004), section 3.2.
[112] Nelson (2002), p. 1238.
[113] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 9.
[114] Eg. Nelson (2002), p. 1238, including references in footnote 9.
[115] Annex II to the LOSC, Article 2.
[116] See McDorman (2002), p. 311.
[117] Ibid.
[118] Ibid, p. 312.
[119] See e.g. Franckx (2010), "The International Seabed Authority and the Common Heritage of Mankind: The Need For States to Establish the Outer Limits of their Continental Shelf", p. 559, including references in footnote 96.

competence to determine the outer limits of its continental shelf beyond 200 nm; the CLCS does not have the legal authority to impose certain limits on the coastal state.[120] McDorman characterizes the role of the CLCS firstly as "procedural", in that it receives data which states parties are obligated to submit with respect to continental shelf limits beyond 200 nm, and secondly as "informational", referring to its task to consider the data and make recommendations in accordance with Article 76.[121] While the competence of the Commission itself is fairly limited, its recommendations are likely to influence the perceived legitimacy of outer limits established by a coastal state. In this sense, the role of the Commission might be better described as that of a "legitimator".[122]

4.2 Outer limits established on the basis of CLCS recommendations

The last sentence of Article 76(8) encapsulates the significance of CLCS recommendations in the process of establishing the outer limits of the continental shelf by a coastal state. This sentence reads: "The limits of the shelf established by a coastal state on the basis of [CLCS] recommendations shall be final and binding." The most straightforward reading of this provision resembles an if/then clause: *if* outer limits are established "on the basis" of the Commission recommendations, *then* the outer limits are "final and binding".[123] An interpretation of this provision must therefore be informed by an analysis of the terms "on the basis of" and "final and binding".

4.2.1 Meaning of "on the basis of"

The drafting history of the Convention reveals that the phrase "on the basis of" replaced the words "taking into account", indicating that the newer formulation was intended to place a more concrete limitation on the freedom of action of a coastal state.[124] Furthermore, Article 8 of Annex II to the Convention provides that "In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission." This opens the door to a back-and-

[120] McDorman (2010), p. 508.
[121] McDorman (2002), p. 319-320.
[122] Ibid, p. 319.
[123] Ibid, p. 313.
[124] Oude Elferink (2006), p. 280.

forth process of submission, recommendations, resubmission, recommendations, etc. which in theory could continue indefinitely.[125]

Nevertheless, it bears repeating that it is the coastal state, not the CLCS, which determines the outer limit of its continental shelf beyond 200 nm. The requirements of Article 76(8) can be understood as a "procedural guarantee" to assure that the coastal state establishes its outer limits in accordance with Article 76.[126] This follows from the fact that CLCS recommendations are also required to be in accordance with Article 76.[127] The Commission's recommendations therefore resemble the middle element in a transitive relationship; if a coastal state establishes its outer limits on the basis of CLCS recommendations, then these outer limits will necessarily be in accordance with the substantive requirements of Article 76 (as long as the CLCS has acted within its competence). After fulfilling its mandate to "consider the data" and "make recommendations", the CLCS has no further role entrusted to it by the Convention if the coastal state does not make a new or revised submission.[128] Importantly, this means that the CLCS itself is not competent to assess whether a coastal state has established the outer limits of the continental shelf on the basis of its recommendations.[129]

4.2.2 Meaning of "final and binding"

If outer limits of the continental shelf have been established on the basis of CLCS recommendations, Article 76(8) stipulates that such limits shall be final and binding. "Final and binding" is sometimes interpreted as meaning that such limits cannot be contested.[130] This would suggest that with the imprimatur of the Commission's recommendations, a coastal state's outer limits suddenly become ironclad and immune to protest – at least with respect to other states parties. Closer examination indicates that this view is not correct, as it both overstates the competence of the Commission and ignores the independence of action retained by individual states. Article 76 also provides the important caveat that its provisions are

[125] Smith and Taft (2000), p. 20.
[126] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 10.
[127] Annex II to the LOSC, Article 3(1)(a).
[128] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 10.
[129] Ibid.
[130] See e.g. sources referenced in McDorman (2002), p. 314, footnotes 56 and 57.

without prejudice to the question of delimitation of maritime boundaries between states with opposite or adjacent coasts.[131]

The unique procedural role of the CLCS notwithstanding, the establishment of outer limits of the continental shelf beyond 200 nm does not appear to be fundamentally different from other forms of maritime boundary-making. It is essentially a political act, which can result in either protest or acquiescence on the part of other states.[132] The CLCS does not embody any explicitly delegated authority which deprives states of their independence of action and reaction.[133] Moreover, the implicit competence of the CLCS to apply and interpret Article 76 in making its recommendations does not replace the competence of states parties to interpret the Convention.[134] It is also important to recall the observation made above: the CLCS is not competent to assess whether or not outer limits have been established on the basis of its recommendations. It merely fulfills an informational role, in the sense that it makes its recommendations available to the submitting state, to the Secretary-General of the United Nations,[135] and to other states.[136] Other states can use this information to assess whether the outer limits were established on the basis of the Commission's recommendations (and therefore in conformity with Article 76), and they may react or protest accordingly. Outer limits of the continental shelf beyond 200 nm may be successfully challenged if the coastal state has not acted on the basis of the recommendations of the Commission, or if the Commission, in making its recommendations, has not acted within its competence.[137]

At the moment of their establishment, therefore, outer limits are final and binding on the coastal state itself which cannot then revisit these limits (except in the event they are successfully challenged).[138] Only once the threat of legal challenge has passed, signifying acquiescence on the part of other states parties, do the outer limits truly become final and binding on these other states.[139] In the *Bangladesh/Myanmar* judgment, ITLOS recognized that

[131] LOSC Article 76(10).
[132] McDorman (2002), p. 309-310.
[133] McDorman (2002), p. 313.
[134] ILA Committee on Legal Issues of the OCS (2006) Conclusion No. 9.
[135] Annex II to the LOSC, Article 6(3).
[136] McDorman (2002), p. 320. The practice of the CLCS is to publically disclose a summary of its recommendations.
[137] ILA Committee on Legal Issues of the OCS (2004), section 6.7, footnote 116.
[138] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 11.
[139] McDorman (2010), p. 510.

while the establishment of the limits of the continental shelf beyond 200 nm "is a unilateral act, the opposability with regard to other States […] depends upon satisfaction of the requirements specified in article 76, in particular compliance by the coastal state with the obligation to submit to the Commission information on the limits".[140] This observation of the Tribunal is consistent with the position taken previously by the ILA Committee on Legal Issues of the Outer Continental Shelf: "if the outer limits of the continental shelf have been established in accordance with the substantive and procedural requirements of article 76 they will be final and binding on the coastal State concerned and other States Parties to the Convention."[141] This interpretation does not directly mention the issues of accordance with CLCS recommendations or the acquiescence of other states parties (these are discussed in the report), but it affirms the underlying importance of conformity with the substantive and procedural rules of Article 76 as the decisive factor for assuring both of these outcomes. If the substantive rules are complied with, the CLCS would have no basis for making incongruous recommendations; if the procedural rules are followed, this information, including a summary of the Commission's recommendations, will be made available to other states with the effect of precluding any successful protest.

4.3 Outer limits established outside of the CLCS procedure

The final step in the establishment of outer limits of the continental shelf is described in Article 76(9), and involves the deposit by the coastal state of charts and relevant information with the Secretary-General of the United Nations, "permanently describing the outer limits of its continental shelf." Interestingly, this paragraph does not require that the outer limits deposited to the Secretary-General have been established on the basis of CLCS recommendations, or even considered by the Commission pursuant to Article 76(8).[142] Acceptance by the Secretary-General does not entail any review or evaluation of the information received, and there are no legal consequences attached to such acceptance.[143] In consideration of the above, the ILA Committee on Legal Issues of the Outer Continental Shelf found that the term "permanently" does not necessarily mean that the outer limits of the continental shelf submitted pursuant to Article 76(9) become fixed by the mere fact that the

[140] *Bangladesh/Myanmar*, ITLOS (2012), para. 407.
[141] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 11.
[142] ILA Committee on Legal Issues of the OCS (2004), section 6.8; see also McDorman (2002), pp. 316-317.
[143] McDorman (2002), p. 316.

coastal state has deposited the information.[144] It does imply that the coastal state cannot subsequently change these outer limit lines, unless they are successfully challenged.[145] After due publicity is given to these limits, and no protest or objection is registered following a reasonable time, it is suggested that they will eventually become fixed and not open to contest.[146]

This appears to present the possibility that a coastal state might bypass the CLCS and still manage to establish outer limits of the continental shelf which are binding on other states. It should be recalled that coastal states parties to the Convention have, in any case, a procedural obligation to submit information on the outer limits of their continental shelf beyond 200 nm to the CLCS. This obligation is set out in Article 76(8) and confirmed in Articles 4 and 7 of Annex II to the Convention. Nevertheless, there is no explicit obligation in the Convention for coastal states to follow the recommendations of the Commission in establishing their outer limits. Article 76(8) merely provides that outer limits established on the basis of CLCS recommendations shall be final and binding. As discussed above, the acquiescence or protest of other states is ultimately what determines the eventual legal status of established outer limit lines. The reaction of other states can be presumed to depend on their perception of the outer limits' conformity with Article 76 rules, and this perception is aided by the informational role of the CLCS and its recommendations.

With this in mind, four scenarios are proposed for discussion. It is possible to imagine a coastal state party to the Convention which attempts to permanently establish the outer limits of its continental shelf pursuant to 76(9), if the outer limits (1) have not been submitted to the CLCS for consideration; (2) have been submitted to the CLCS but in an incomplete or partial manner; (3) have been submitted in full to the CLCS but are in violation of the substantive requirements of Article 76; (4) have been submitted in full to the CLCS and are in conformity with the substantive requirements of Article 76. In the first scenario, the coastal state would be in clear violation of its procedural obligation to submit information and this would likely be protested by other states. As regards the second scenario, it appears that Article 7 of Annex II to the Convention would prevent a coastal state from establishing outer limits on the basis of

[144] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 13.
[145] Ibid.
[146] McDorman (2002), p. 317.

information which has not been considered by the CLCS.[147] The third scenario would very likely result in successful challenge from other states, especially with the role of the CLCS engaged. The fourth scenario does not present any problems, except perhaps in the case of a coastal state which wishes to permanently establish its outer limits beyond 200 nm prior to receiving the Commission's recommendations. In this case the coastal state may decide to establish provisional limits, which, in the absence of protests, may become binding on other states.[148] To date, only four states have deposited permanent outer limits pursuant to 76(9), signifying completion of the delineation of their continental shelf beyond 200 nm.[149] All of these deposits were made by states parties to the Convention, followed the receipt of CLCS recommendations, and do not appear to have prompted any protests from other states.

[147] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 10.
[148] Oude Elferink (2004), "Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes", p. 275.
[149] Notifications on the deposit of charts are made available by UN Division for Ocean Affairs and Law of the Sea: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm. Reference is made to M.Z.N. numbers 72, 73, 88, and 92 which were deposited by Mexico, Ireland, the Philippines, and Australia, respectively.

5 Can a LOSC non-party make a submission to the CLCS?

In light of the preceding chapter, the question can be asked how a LOSC non-party is to proceed in the establishment of its continental shelf limits beyond 200 nm. It has been noted that the institutional and procedural character of the rules regulating the role of the CLCS likely prevent them from acquiring the status of customary international law.[150] Accordingly, it is generally recognized that LOSC non-parties are not under any obligation to submit information to the Commission.[151] At the same time, it is not clear whether these states have the right to make such a submission voluntarily. The answer to the question is not simple, and the arguments are largely theoretical since no such submission from a non-party has occurred in practice. The Commission actually sought clarification on the issue of whether it should accept a submission from a state which was not a party to the Convention at the Eighth Meeting of the States Parties in 1998. At that time, the opinion prevailed that the Meeting of the States Parties did not have the competence to give a legal opinion, and that the Commission should request the Legal Counsel of the United Nations for an opinion only when the problem actually arises.[152] The question therefore remains open to debate. The first section of this chapter discusses some of the normative arguments for whether or not the CLCS should accept and consider submissions from all coastal states or only from states parties to the Convention. The second section considers the question from a legal perspective, with regard to the VCLT rules on treaties providing rights or obligations for third states. Finally, the implications of a hypothetical US submission to the CLCS are considered.

5.1 Normative arguments

5.1.1 Package deal character of the Convention

The arguments for whether or not a LOSC non-party can make a submission to the CLCS are animated by two opposing normative viewpoints. The first perspective tends to note that the LOSC was negotiated as a package deal. States may not choose the provisions they

[150] Treves (2006), "Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report", p. 363.
[151] But see McDorman (1995), "The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime", pp. 179-183.
[152] Report of the Eighth Meeting of States Parties, SPLOS/31 of 4 June 1998, 12, paras. 51-52.

like and disregard what they do not like.[153] Specifically, the provisions of Article 76 were negotiated as part of a compromise which also includes revenue-sharing obligations under Article 82, giving recognition to the concern for protecting the common heritage of mankind principle. These articles together constitute the compromise reached at UNCLOS III between the broad-margin states and those states wishing to limit the continental shelf to 200 nm.[154] While there may be sufficient evidence today that coastal states can exercise jurisdiction over the continental margin beyond 200 nm on the basis of customary international law, it does not follow that non-parties have the obligation or the right to access the Convention's procedural rules for establishing outer limits. On the contrary, Article 76(8) and Article 82 arguably can only be implemented on the basis of conventional law.[155] Because of the perceived legal advantages of establishing outer limits on the basis of CLCS recommendations, the right to make a submission to the CLCS is held as an important incentive for acceding to the Convention.

5.1.2 International imperative to define the Area

On the other hand, there are commentators who assert that the CLCS can and should consider submissions from coastal states not party to the Convention.[156] This perspective recalls that one of the key mandates of the UNCLOS III conference was to arrive at defined limits for the Area, so as to develop the common heritage of mankind principle. The Area is defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".[157] This is a negative definition – in order to define the Area, it is first necessary that coastal states define the limits of their national jurisdiction.[158] In parts of the world where coastal states have continental margins extending beyond 200 nm, this means that the exact extent of the Area will not be known until the coastal state establishes the outer limits of its continental shelf beyond 200 nm. Zinchenko suggests that the engagement of non-parties in the CLCS procedure should be welcomed, as it contributes to the stability of global boundaries

[153] See remarks by Koh (1982).
[154] See *Virginia Commentary* (1993), p. 932 et seq.
[155] Kwiatkowska (1991), p. 158.
[156] E.g. Clingan, Jr. (1987), "The Law of the Sea in Prospective: Problems of States not Parties to the Law of the Sea Treaty", p. 112; McDorman (1995), pp. 179-183; Gau (2011), "The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area", p. 9.
[157] LOSC Article 1(1).
[158] Franckx (2010), p. 552.

and gives effect to the general duty to cooperate with regard to shared resources.[159] Thinking along the same lines, Treves finds that a submission to the CLCS from a non-party state would be in the interests of the international community, probably even more so than of the coastal state itself.[160] While the submitting non-party would stand to gain more legal certainty over its outer limits, it would also be in the position of making a submission to a body whose members it cannot elect.[161]

5.2 Legal arguments

5.2.1 VCLT on rights and obligations arising for third states

As an exception to the general rule of *pacta tertiis*, the VCLT provides for conditions whereby rights and obligations under a treaty may become binding upon third states. VCLT Article 35 provides that "an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation." According to Article 36, "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto." A third state's assent to the right is assumed unless the contrary is indicated, but it must expressly accept an obligation in writing.[162]

There is not a clear indication from the LOSC states parties, in the text of the Convention or otherwise, whether or not they intended the CLCS procedure to apply as either a right or an obligation for third states. It seems that the consideration of this issue at the Meeting of the States Parties in 1998 would have been an opportunity to make such an indication. The prevailing view at this meeting was that the Meeting of the States Parties lacked the competence to consider the question, but perhaps this is because it was framed as an issue relating to the competence of the CLCS. In light of VCLT articles 35 and 36, however, the issue certainly can be understood as a question of a treaty right or obligation arising for third states, which is decided first and foremost by the intent of the parties to the treaty. In this

[159] Zinchenko (2004), "Emerging Issues in the Work of the Commission", p. 235.
[160] Treves (2006), "Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report", p. 364.
[161] Ibid.
[162] VCLT Articles 35 and 36.

regard, it can be argued that the Meeting of the States Parties is precisely the appropriate forum for resolving this type of legal question.[163]

5.2.2 Interpretation of "coastal State" in its context

As there is no explicit indication of whether LOSC parties intended for non-parties to have the right (or obligation) to make a submission to the CLCS, the intent of the parties must be inferred indirectly by analyzing the treaty provisions in their context. Article 76(8), which describes CLCS engagement in the process of establishing outer limits of the continental shelf, uses the term "coastal State". The use of this term, instead of the more restrictive "State Party", at least permits consideration of the idea that non-parties are not excluded from submitting information to the CLCS. This yields the possibility that this term was intended to accord a right to a "group of States" (those with a coastline) in the meaning of VCLT Article 36. At closer inspection, it is apparent that the term "coastal State" is used quite liberally not only in Article 76, but throughout the Convention. In contrast, "State Party" is used relatively sparingly and confined mostly to Part XI governing the Area. Clingan seizes on this distinction to assert that, in contrast to "other institutional provisions of the treaty" (referring to Part XI), the "change in terminology [in provisions relating to the CLCS] was deliberate".[164]

Clingan's argument is undercut quite seriously in the context of Article 4 of Annex II to the Convention, which prescribes a time limit for coastal states to submit information to the CLCS on the outer limits of their continental shelf beyond 200 nm. This article provides:

> Where a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State.

While clearly referring to the same "coastal State" as Article 76(8), this provision indicates that the time frame for making a submission is linked to the entry into force of the Convention for the submitting state.[165] This suggests that Article 76(8) was not intended to create a right or obligation for states not party to the Convention. This interpretation is also supported by the relationship between Articles 76 and 82. Because Article 82 has not created an obligation for

[163] Magnusson (2015), *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement,* p. 83.
[164] Clingan, Jr. (1987), p. 112.
[165] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 16.

third states, it is unlikely that Article 76(8) intended to accord a right without also imposing the concomitant revenue-sharing obligations.[166]

5.3 Envisioning a US submission to the CLCS

A review of the VCLT rules indicates that Article 76(8) and the CLCS procedure cannot impose an *obligation* on a third state unless the states parties intended it to do so, and the obligation is expressly accepted by the third state in writing. Such an acceptance has not been forthcoming from the US or any other state not party to the Convention. The CLCS procedure could potentially apply to third states as a *right.* This possibility cannot be dismissed outright, as there is no provision in the Convention expressly prohibiting it and the intent of the states parties has not been definitively expressed. Nevertheless, a contextual interpretation of the term "coastal state" as it appears in Article 76(8) indicates that it is unlikely the CLCS procedure was intended to apply either as a right or an obligation for third states. This is not the end of the matter, though, as the question has not been resolved in practice. A LOSC non-party such as the US could decide to force the issue by making a submission to the CLCS, which in turn might refer the matter to the Legal Counsel of the United Nations. It is also possible that the question would be reconsidered in the context of a future Meeting of the States Parties.

In reality, this issue has practical implications for the outer limits of only a small handful of states, as nearly all coastal states with broad continental margins have already ratified the Convention.[167] In terms of the actual continental margin areas affected, the vast majority would pertain to the US continental shelf. A 2002 study prepared by the Center for Coastal and Ocean Mapping/Joint Hydrographic Center at the University of New Hampshire found that the US may have continental margins extending beyond 200 nm in numerous regions, including in the Atlantic Ocean along most of the US east coast, the Gulf of Mexico, the Bering Sea, the Arctic Ocean, and the areas around Guam and Palmyra Atoll in the Pacific Ocean.[168] Put differently, the delineation of US continental shelf limits will contribute to

[166] Ibid.
[167] In addition to the US, the group of broad-margin states which have not yet acceded to the LOSC may also include Venezuela, Colombia, and Peru.
[168] Mayer, Jakobsson and Armstrong (2002), p. 64.

defining the Area in several regions of the world. Seen in this context, it is not so far-fetched to envision a US submission to the CLCS being received favorably.

If it were to be determined that a LOSC non-party *does* have the right to make a CLCS submission – at a future Meeting of the States Parties, for example – this could very well be linked to an acceptance of revenue-sharing obligations under Article 82.[169] VCLT Article 36(2) establishes that a treaty right accorded to third states shall by exercised by them in compliance with "conditions for its exercise provided for in the treaty or established in conformity with the treaty." This can be read as suggesting a duty to comply with concomitant obligations. In any case, acceptance of Article 82 obligations would seem to be demanded by the general principle of good faith. Although there is not an explicit link between Articles 76 and 82 provided in the text of the Convention, authoritative accounts of the UNCLOS III negotiating history confirm the close relationship between these provisions.[170] In short, broad-margin states – including the US – agreed to the conditions of Article 82 as a *quid pro quo* for the recognition of continental shelf rights to the edge of the continental margin. The role of the CLCS in the establishment of outer limits beyond 200 nm was an integral part of this compromise. US acceptance of revenue-sharing obligations could be formalized by the signing of an Article 82 agreement, a model version of which is currently under consideration by the ISA.[171] It is interesting to note that, despite being a non-party to the Convention, the US was probably the first state to alert its offshore industry about the possibility of royalty payments arising in connection with Article 82.[172] The US Government has described Article 82 revenue-sharing obligations as "modest", and as part of a package which "on balance, […] clearly serves United States interests".[173]

[169] See ILA Committee on Legal Issues of the OCS (2004), p. 31.
[170] E.g., *Virginia Commentary* (1993), p. 932.
[171] See generally ISA (2009).
[172] See US Oil and Gas Lease Stipulations (Gulf of Mexico, 2008) reproduced in ISA (2009), pp. 7-8 (Box 1).
[173] US Senate Commentary (1995), p. 33.

6 Conclusions: Implications for the U.S. continental shelf

6.1 Review of applicable customary law

This thesis set out to examine the legal implications of US non-accession to the LOSC for its entitlement to a continental shelf beyond 200 nm. As a non-party to the Convention, the US is only bound to those provisions which now reflect customary rules of international law or have otherwise created rights and obligations for third states. The analysis in chapter 3 indicates that many aspects of the LOSC continental shelf regime are indeed applicable to the US through the operation of customary international law. This includes the principal substantive rights of a coastal state, which were first codified in the 1958 Convention and carried over directly to the LOSC.[174] It also includes the definition of the legal continental shelf in Article 76(1), which recognizes continental shelf entitlement extending throughout the natural prolongation of a coastal state's land territory to the outer edge of the continental margin, or to a distance of 200 nm if the continental margin does not reach this distance.[175] It has not been possible to conclude with any certainty whether paragraphs 4 to 7 of Article 76, which prescribe criteria and methods for locating the outer edge of the continental margin, can be said to reflect customary rules. For its part, the US has indicated that it will delineate its continental shelf beyond 200 nm in accordance with these provisions, and moreover that this follows from a legal obligation as it views Article 76(2) as reflecting international law. If outer limits are delineated in accordance with paragraphs 4 to 7 of Article 76, it seems reasonable to assume they will also be in accordance with Article 76(1) and therefore with customary international law.

6.2 Exercise of rights beyond 200 nm in the absence of outer limits

Considering these findings, it is apparent that a coastal state's substantive continental shelf rights and underlying entitlement are more clearly defined in customary international law than the outer limits which circumscribe them. The question might therefore be asked if the US can exercise sovereign rights over its continental shelf beyond 200 nm before it has established outer limits in these areas. This invites reexamination of two of the research questions

[174] See analysis in section 3.3.
[175] See analysis in section 3.4.

identified at the outset of this thesis: 1) is the US entitled to a continental shelf beyond 200 nm under customary international law; and 2) what is the legal relationship between entitlement to a continental shelf and establishment of its outer limits?

The first question was already addressed above, and it has been concluded that the US is indeed entitled to a continental shelf beyond 200 nm under customary international law where its continental margin extends beyond this distance.[176] Moreover, it is well documented in legal scholarship that the rights of a coastal state over its continental shelf, including in areas beyond 200 nm, exist wherever the basis of entitlement is present and do not depend on the establishment of outer limits.[177] This point was also recognized by the Meeting of the States Parties in connection with decisions to defer the CLCS submission deadline contained in Article 4 of Annex II to the Convention.[178] This follows from the inherent character of continental shelf rights, in that they do not depend on any express proclamation[179] or the performance of any special legal process or act.[180] The distinction between entitlement to the continental shelf and the establishment of outer limits was recognized implicitly by the ICJ in *Tunisia/Libya* (1982), [181] and explicitly confirmed by ITLOS in *Bangladesh/Myanmar* (2012).[182] Because the US is entitled to sovereign rights over its continental shelf beyond 200 nm on the basis of customary international law, the exercise of these rights is not legally dependent on the establishment of outer limits, via the CLCS procedure or otherwise.

At the same time, it is true that the establishment of outer limits is necessary to determine the exact extent of a coastal state's entitlement over its continental shelf. Part of the continental margin may extend beyond the outer limits resulting from an application of LOSC Articles 76(4) to 76(7), and the incorporation of such areas into the legal continental shelf is prohibited by the separate rule contained in 76(2)[183] which the US accepts as international law. It has been suggested that a coastal state's inherent right to a continental shelf in the absence of

[176] See also analysis in section 3.4.
[177] E.g., ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 1.
[178] See Doc. SPLOS/183, Decision regarding the workload of the Commission and the ability of States to fulfil the requirements of Article 4 of Annex II (20 June 2008); Doc SPLOS/64, Issues with respect to article 4 of Annex II to the United Nations Convention on the Law of the Sea (1 May 2001).
[179] LOSC Article 77(3).
[180] *North Sea,* ICJ (1969), para. 19.
[181] *Tunisia/Libya*, ICJ (1982) para. 47.
[182] *Bangladesh/Myanmar*, ITLOS (2012) paras. 408-409.
[183] Oude Elferink (2006), p. 278.

established outer limits "does not remove from the coastal State the burden of demonstrating its entitlement" to a continental shelf area beyond 200 nm.[184] The absence of outer limit lines beyond 200 nm presents uncertainty over the exact extent of legal entitlement, which can result in attendant difficulties for a coastal state seeking to exercise continental shelf rights in areas near to potential outer limits.[185]

6.3 Options for establishing outer limits beyond 200 nm

As discussed at length in the previous chapter, it is uncertain whether the US as a non-party to the Convention has the right to make a submission to the CLCS. If the US is unable or unwilling to submit information to the Commission, it might alternatively seek to unilaterally establish outer limits of its continental shelf beyond 200 nm by depositing charts and relevant information with the Secretary-General of the United Nations to be given due publicity. In this scenario, the acquiescence of other states would likely depend, in part, on the public disclosure of all scientific data needed to substantiate the outer limits being established. The US Government is apparently not averse to sharing this type of information, as all of the research data gathered in connection with the US Extended Continental Shelf Project are already publically available.[186] At the same time, other states might still register their protest to outer limits established in this manner if they feel that the LOSC package deal has been violated. If such limits do gain the acquiescence of other states, they may eventually become permanent.[187]

There are compelling arguments for why a third state should be able to make a submission to the CLCS, not least of which is that this would contribute to defining the limits of the Area. This in turn is needed to give effect to the common heritage of mankind principle, thereby serving to advance the original and overriding mandate of UCNLOS III. The US may be hesitant to force the issue by simply attempting a submission, as there is a concrete possibility it would be rejected. It might be desirable from the US perspective to broach the question with more diplomatic finesse, perhaps involving an acceptance of the revenue-sharing obligations under Article 82 of the Convention. Meanwhile, there are indications that Venezuela – another non-party to the Convention – may be preparing to make its own

[184] Eiriksson (2004), "The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf", p. 258.
[185] ILA Committee on Legal Issues of the OCS (2006), Conclusion No. 1.
[186] See U.S. ECS Project Data Management, available at < https://www.ngdc.noaa.gov/mgg/ecs/ecs.html>.
[187] See discussion in section 4.3.

submission to the CLCS.[188] How the question of third states' participation in the CLCS procedure will be resolved remains to be seen, but it seems possible that this will occur sooner rather than later.

6.4 Final remarks: revisiting the package deal

This thesis has found that, on the basis of customary international law, the US enjoys the same substantive rights and entitlement to its continental shelf as other broad-margin states which have acceded to the LOSC. The rules the US must follow in establishing the outer limits of its continental shelf beyond 200 nm are far less certain, however. Both the substantive rules (Article 76 formula) and procedural rules (CLCS submission process) for the establishment of outer limits beyond 200 nm are ambiguous in their legal implications for third states. These were among the innovative continental shelf provisions negotiated at UNCLOS III, and indeed represent two major components of the compromise achieved on outer limits. The third part of this compromise entails Article 82 revenue-sharing obligations. These three components of the LOSC continental shelf regime were adopted together as a package deal.

In addition, it is clear that the definition of the continental shelf as reflected in Article 76(1) was negotiated as part of the same package deal. Unlike the substantive rights which had been previously codified in the 1958 Convention, coastal state entitlement over the entire continental margin did not have a solid basis in customary international law prior to UNCLOS III. This is not to say that there was no customary basis for continental shelf entitlement extending beyond 200 nm.[189] Rather, the recognition of broad-margin states' rights to the outer edge of the continental margin, including the slope and the rise, was negotiated as part of the compromise adopted in 1982. Specifically, this was conditioned on acceptance of concomitant revenue-sharing obligations set out in Article 82. As such, the definition of the continental shelf contained in Article 76(1) – which is now part of customary international law – is arguably linked to these revenue-sharing obligations as a consequence of the package deal character of the Convention. The nature of this link has not been fully explored in this thesis, and the extent of its legal implications remains uncertain. This represents an interesting area

[188] Jaffé (2011), "The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The Venezuelan Perspective", p. 477.
[189] See analysis in section 3.4.

for further research, and would necessarily involve a closer analysis of the limited state practice which exists in relation to Article 82.

State party or not, the US has made clear that it intends to demonstrate the extent of its continental shelf entitlement in accordance with the Convention's provisions. This being the case, the relationship between the provisions of Article 76 and Article 82 cannot be ignored. The general principle of good faith would seem to demand respect for the LOSC package deal – rights which are derived from this compromise should not be separated from their corresponding obligations.[190] Among the three principal elements of the LOSC continental shelf regime analyzed in this thesis – substantive rights of a coastal state, entitlement over the continental margin, and the delineation of outer limits – it appears that the substantive rights are the only element which can be interpreted under customary international law as truly independent from the package deal sealed in 1982. For the US to achieve legal certainty over the full extent of its continental shelf rights under international law, the most reliable course of action would be to ratify the Convention. If the advice and consent of the US Senate remains unattainable, some legal uncertainty is bound to persist in relation to the extent of US entitlement over the continental margin and the rules by which the outer limits of this entitlement are to be delineated and established – particularly if the US does not accept and implement revenue-sharing obligations reflected in Article 82.

[190] The principle of good faith is also referred to in LOSC Article 300 and is linked to non-abuse of rights.

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Annex 1

Source: Roach, J. Ashley and Robert W. Smith, *Excessive Maritime Claims*, 3rd ed., (Leiden, Martinus Nijhoff, 2012), p. 125.

United States Policy Governing
The Continental Shelf of the United States of America

After reviewing the question of how to define and delimit the continental shelf of the United States and its island territories and overseas possessions, the Interagency Group on Ocean Policy and Law of the Sea has determined that the proper definition and means of delimitation in international law are reflected in Article 76 of the 1982 United Nations Convention on the Law of the Sea. The United States has exercised and shall continue to exercise jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2) and (3). At such time in the future that it is determined desirable to delimit the outer limit of the continental shelf of the United States beyond two hundred nautical miles from the baseline from which the territorial sea is measured, such delimitation shall be carried out in accordance with paragraphs (4), (5), (6) and (7).

No agency shall seek to delimit [the outer limit of the continental shelf] on behalf of the United States without first obtaining the concurrence of the Interagency Group for Ocean Policy and Law of the Sea. After delimitation is completed, the results of any such delimitation shall be reviewed by the Senior Interagency Group on Oceans Policy and Law of the Sea and transmitted to the President for review. If approved, the Department of State shall transmit charts depicting the delimitation and other relevant information to the Secretary-General of the United Nations and any other organizations as the Interagency Group shall determine to be desirable.

Because of the need to ensure that United States' practice is consistent with international law, before the continental shelf is delimited, an agency planning any leasing or licensing activity on the continental shelf beyond 200 nautical miles from the baseline from which the territorial sea is measured, shall provide notice to the Department of State for transmittal to the Interagency Group with a brief description of the location and type of activity. An opportunity for consultation and comment among all interested agencies shall be provided through the Interagency Group. The Interagency Group shall have 45 days to comment on the proposed action.

The United States shall continue to exercise its rights and duties pertaining to its continental shelf in accordance with international law.

Delimitation of the continental shelf between the United States and a neighboring State with an opposite or adjacent coast shall be determined by the United States and the other State concerned in accordance with equitable principles.