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## Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf

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# Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf

John E. Noyes\*

## ABSTRACT

*This Article explores when international third-party dispute settlement forums may hear cases concerning the outer limits of a continental shelf beyond 200 nautical miles from baselines. The 1982 Convention on the Law of the Sea articulated determinate rules for establishing those limits and created an institution—the Commission on the Limits of the Continental Shelf—to make recommendations concerning them. Limits set by coastal states “on the basis of” such recommendations “shall be final and binding.” Yet the Law of the Sea Convention’s third-party dispute settlement system may also apply to outer limits questions concerning the Arctic Ocean and other oceans.*

*International courts and tribunals are likely to play only limited roles in reviewing a coastal state’s compliance with the substantive and procedural requirements of the Law of the Sea Convention related to the outer limits of its continental shelf. Rules about jurisdiction and standing, and the need to accord appropriate deference to the Commission on the Limits of the Continental Shelf, will restrict the cases that may be pursued. Although third-party tribunals might issue occasional advisory opinions or rulings in contentious interstate cases, helping to settle disputes or promote consistent and accurate application of the law, alternative mechanisms will often have to further these goals.*

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## I. INTRODUCTION

The 1982 United Nations Convention on the Law of the Sea (the Convention)<sup>1</sup> helps establish the rule of law for the oceans. The Convention includes a third-party dispute settlement system, authorizing international courts and tribunals to authoritatively interpret Convention norms in many issue areas.<sup>2</sup> This system may also further goals such as the peaceful settlement of disputes.

This Article explores instances in which international third-party dispute settlement forums may hear contentious cases or render advisory opinions concerning the outer limits of the continental shelf beyond 200 nautical miles from baselines.<sup>3</sup> The Law of the Sea Convention includes determinate rules for establishing those limits.<sup>4</sup> The Convention also created an institution specifically to address outer limits.<sup>5</sup> This technical body, the Commission on the Limits of the Continental Shelf (CLCS), makes recommendations concerning outer limits “in accordance with article 76” of the Convention<sup>6</sup>; limits set by coastal states “on the basis of” those recommendations “shall be final and binding.”<sup>7</sup> Yet the Convention’s third-party dispute settlement system may also apply to outer limits questions concerning the Arctic Ocean and other oceans. This Article examines the challenges involved in subjecting outer limits disputes or advisory opinion requests to third-party review.

Part II of this Article introduces the third-party dispute settlement system of the Convention and highlights its various functions, including promotion of the rule of law. Part III then surveys the Convention’s provisions on the outer limits of the continental shelf and the roles of the CLCS. These two Parts provide a framework for Part IV, which considers when international courts and tribunals may review a coastal state’s compliance with or give advice about the substantive and procedural requirements of the Convention with respect to the outer limits of the continental shelf. International courts and tribunals will likely play limited roles with

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]. As of July 15, 2009, there were 159 parties to the Convention, including the European Community and all major developed states except the United States. The Convention is to be interpreted and applied together with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3 [hereinafter 1994 Part XI Implementation Agreement], as a single instrument.

2. LOS Convention, *supra* note 1, arts. 186–91, 279–99, Annexes II, IV–IX.

3. This Article focuses on the regime concerning the outer limits of the continental shelf that is contained in the widely accepted Law of the Sea Convention, and on related third-party dispute settlement options—primarily those available pursuant to the Convention. The Article addresses issues related to the outer limits beyond 200 nautical miles from baselines, not the situations in which states may have only a 200-mile continental shelf limit.

4. LOS Convention, *supra* note 1, art. 76(4).

5. *Id.* art. 76(8).

6. *Id.* Annex II, art. 3(1)(a).

7. *Id.* art. 76(8).

respect to this issue. Political considerations may restrict the submission of cases, and judges face restrictive rules about jurisdiction and standing. Although third-party tribunals may occasionally render advisory opinions or decide contentious interstate cases—thus helping to settle disputes or promote consistent and accurate application of the law related to outer limits—alternative mechanisms will often have to further these goals.

## II. THIRD-PARTY DISPUTE SETTLEMENT AND THE LAW OF THE SEA

Negotiators at the Third United Nations Conference on the Law of the Sea (UNCLOS III) believed that compulsory third-party dispute settlement was an essential part of the Law of the Sea Convention. The Convention contains elaborate provisions for third-party dispute settlement, which are summarized in Part II.A. Part II.B then discusses several functions of courts and tribunals operating under these provisions, emphasizing the notion of rule of law promotion.<sup>8</sup>

### A. *The Third-Party Dispute Settlement System of the Law of the Sea Convention*

The negotiations at UNCLOS III led to the establishment of a complex third-party dispute settlement system, which is contained in Part XI, Part XV, and several Annexes of the Law of the Sea Convention.<sup>9</sup> The provisions applicable to deep seabed mining disputes differ significantly from those applicable to non-seabed-mining disputes.<sup>10</sup> With respect to many non-seabed-mining

8. For overviews of the Law of the Sea Convention's system of third-party dispute settlement and discussion of reasons for this system, see generally A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND COMMENTARY* (1987); MIGUEL GARCÍA GARCÍA-REVILO, *EL TRIBUNAL INTERNACIONAL DEL DERECHO DEL MAR: ORIGEN, ORGANIZACIÓN Y COMPETENCIAS* [THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: ORIGIN, ORGANIZATION AND LEGAL AUTHORITY] 291–420 (2005) (Spain); J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 182–210 (4th ed. 2005); E.D. Brown, *Dispute Settlement and the Law of the Sea: The UN Convention Regime*, 21 *MARINE POL'Y* 17 (1997); Lucius C. Caflich, *The Settlement of Disputes Relating to Activities in the International Seabed Area*, in *THE NEW LAW OF THE SEA* 303 (Christos L. Rozakis & Constantine A. Stephanou eds., 1983); John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 *CONN. J. INT'L L.* 675 (1989); Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 *LAW & CONTEMP. PROBS.* No. 2, at 195 (1983); Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 *VA. J. INT'L L.* 9 (1976). For an extensive bibliography, see INT'L TRIBUNAL FOR THE LAW OF THE SEA, *SELECT BIBLIOGRAPHY ON SETTLEMENT OF DISPUTES CONCERNING THE LAW OF THE SEA* (2009), [http://www.itlos.org/documents\\_publications/documents/ITLOS%20Bibliography%2013%20May2009.pdf](http://www.itlos.org/documents_publications/documents/ITLOS%20Bibliography%2013%20May2009.pdf).

9. LOS Convention, *supra* note 1, arts. 186–91, 279–99, Annexes II, IV–IX.

10. The International Court of Justice has defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views of interests between parties . . . In

disputes, Part XV of the Convention authorizes comprehensive compulsory procedures entailing binding decisions.<sup>11</sup> These procedures apply when informal mechanisms do not lead to the settlement of disputes.<sup>12</sup>

The third-party dispute settlement system articulated in Part XV is flexible. States may choose among: the International Tribunal for the Law of the Sea (ITLOS) (a court created by the Convention); the International Court of Justice (ICJ); Annex VII arbitration; or, for disputes relating to fisheries, the marine environment, marine scientific research, or navigation, Annex VIII special arbitration before technical experts.<sup>13</sup> Each such court and tribunal has jurisdiction “over any dispute concerning the interpretation or application of th[e] [Law of the Sea] Convention which is submitted to it in accordance with this Part” or “over any dispute concerning the interpretation or application of an international agreement related to the purposes of th[e] Convention, which is submitted to it in accordance with the agreement.”<sup>14</sup> Furthermore, states are free to agree on other formal or informal dispute settlement mechanisms.<sup>15</sup> Despite this flexibility in choice of forum, the Convention’s third-party dispute settlement provisions remain compulsory and can lead to binding decisions, with arbitration serving as the default mechanism in non-seabed-mining cases when all parties to a dispute do not agree on an same alternative forum.<sup>16</sup>

Most contentious non-seabed-mining third-party cases brought under Part XV will be interstate cases. The European Community, which has accepted the Convention, may be a party to cases in the International Tribunal for the Law of the Sea, Annex VII arbitral tribunals, or Annex VIII special arbitral tribunals, but not to cases in the International Court of Justice.<sup>17</sup> The Convention restricts the access of other international organizations and individuals to third-party forums,<sup>18</sup> a point developed more fully in Part IV.

The Law of the Sea Convention restricts the scope of compulsory procedures entailing binding decisions by providing for several limitations and exceptions. These limitations relate to certain

order to establish the existence of a dispute, “It must be shown that the claim of one party is positively opposed by the other.” East Timor (Port. v. Austl.), 1995 I.C.J. 90, 99–100 (June 30) (quoting South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 328 (Dec. 21)).

11. LOS Convention, *supra* note 1, arts. 286–96.

12. *Id.* art. 281.

13. *Id.* art. 287.

14. *Id.* art. 288.

15. *Id.* arts. 280–82.

16. *Id.* art. 287(3), (5).

17. See *id.* arts. 2(2), 291(2), 305(1)(f); *id.* Annex VI, art. 20; *id.* Annex VII, art. 13; *id.* Annex VIII, art. 4; *id.* Annex IX, arts. 1, 7; Statute of the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> [hereinafter ICJ Statute].

18. LOS Convention, *supra* note 1, art. 291.

disputes concerning marine scientific research and exclusive economic zone (EEZ) fishing disputes.<sup>19</sup> States Parties to the Convention may also file declarations opting out of the Convention's third-party dispute settlement requirements with respect to a few matters. These optional exceptions apply to maritime boundary delimitations, historic bays, military activities, certain EEZ law enforcement activities, and instances when the United Nations Security Council is exercising its assigned functions.<sup>20</sup> None of these limitations or optional exceptions applies directly to disputes concerning the outer limits of the continental shelf.<sup>21</sup>

With respect to contentious cases relating to seabed mining in "the Area," i.e., the seabed and subsoil beyond the limits of national jurisdiction,<sup>22</sup> the Seabed Disputes Chamber of the ITLOS is the primary third-party dispute settlement forum.<sup>23</sup> The Chamber, composed of eleven of the twenty-one members of the ITLOS, has jurisdiction with respect to "activities in the Area"<sup>24</sup> in cases involving certain disputes between: States Parties to the Law of the Sea Convention; a State Party and the International Seabed Authority; parties to a mining contract, which may include natural or juridical persons; and the Authority and prospective contractors, which may include natural or juridical persons.<sup>25</sup>

19. *Id.* art. 297.

20. *Id.* art. 298. For the text of declarations, see U.N. Div. for Ocean Affairs & the Law of the Sea, *Declarations and Statements* (Mar. 16, 2009), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm). For a good overview of the Part XV limitations and optional exceptions, see generally Tullio Treves, *The Jurisdiction of the International Tribunal for the Law of the Sea*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 111, 118–20 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001). Most parties to the Law of the Sea Convention have not invoked the optional exceptions. Annex VII arbitral tribunals have decided maritime boundary delimitation disputes between States Parties that have not invoked the maritime boundary delimitation exception. *Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barb. v. Trin. & Tobago)*, 27 R. Int'l Arb. Awards 147 (Annex VII Arb. 2006), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXVII/147-251.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXVII/147-251.pdf); *Delimitation of Maritime Boundary (Guy. v. Surin.)* (Annex VII Arb. 2007), <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>.

21. See LOS Convention, *supra* note 1, arts. 297–98 (listing the limitations and optional exceptions to the applicability of Part XV, Section 2: Compulsory Procedures Entailing Binding Decisions).

22. *Id.* art. 1(1).

23. *Id.* arts. 186–91.

24. "Activities in the Area" are defined as "all activities of exploration for, and exploitation of, the resources of the Area." *Id.* art. 1(3). "Resources" are in turn defined, for purposes of Part XI of the Convention (relating to the Area), as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules." *Id.* art. 133(a).

25. *Id.* art. 187. See also GUDMUNDUR EIRIKSSON, *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 129–33 (2000) (outlining the jurisdiction of the Seabed Disputes Chamber of the ITLOS "with respect to activities in the International Seabed Area"); Treves, *supra* note 20, at 124–27 (discussing the Chamber's jurisdiction with respect to disputes concerning "activities in the Area"). For more extensive analyses, see generally SAID MAHMOUDI, *THE LAW OF DEEP SEA-BED MINING* 287–302, 304–05, 340 (1987); NIELS-J. SEEBERG-ELVERFELDT, *THE SETTLEMENT OF DISPUTES IN DEEP SEABED MINING* (1998); Cafilisch, *supra* note 8.

Some of the international courts and tribunals that can hear contentious law of the sea cases may also render advisory opinions. The ICJ may do so, with respect to any legal question, at the request of the U.N. General Assembly or the U.N. Security Council.<sup>26</sup> Parties to an international agreement related to the purposes of the Law of the Sea Convention may authorize the ITLOS to issue an advisory opinion.<sup>27</sup> When the Assembly or Council of the International Seabed Authority requests an advisory opinion to address “legal questions arising within the scope of their activities,” the Seabed Disputes Chamber of the ITLOS “shall give” an advisory opinion,<sup>28</sup> and the Assembly may request the Chamber to provide an advisory opinion “on the conformity with th[e] [Law of the Sea] Convention of a proposal before the Assembly on any matter.”<sup>29</sup> Part IV of this Article examines more closely these mechanisms and how they apply to questions about the legality of outer limits determinations.

### B. *The Functions of Third-Party Dispute Settlement and the Rule of Law*

Courts and tribunals deciding law of the sea matters may serve a variety of functions. They may decide on provisional measures, in order to preserve the status quo or help manage crises, pending a final determination on the merits.<sup>30</sup> The ITLOS also decides “prompt release” applications—making narrow rulings concerning the prompt release, in limited circumstances, of a vessel and its crew on the posting of a reasonable bond<sup>31</sup>—to eliminate a source of friction and uphold individual rights before a decision on the underlying merits of a broader dispute.<sup>32</sup> The Seabed Disputes Chamber of the ITLOS may act as a constitutional court or, upon agreement by the parties, a commercial arbitral body.<sup>33</sup>

26. U.N. Charter art. 96, para. a; ICJ Statute *supra* note 17, art. 65.

27. International Tribunal for the Law of the Sea, Rules of the Tribunal, Doc. ITLOS/8 (2001), art. 138(1), available at [http://www.itlos.org/documents\\_publications/documents/ITlos%208%20E%2017%2003%2009.pdf](http://www.itlos.org/documents_publications/documents/ITlos%208%20E%2017%2003%2009.pdf) [hereinafter ITLOS Rules].

28. LOS Convention, *supra* note 1, art. 191.

29. *Id.* art. 159(10).

30. *Id.* art. 290; ICJ Statute, *supra* note 17, art. 41. See SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW 218–25 (2005).

31. LOS Convention, *supra* note 1, art. 292. Although a variety of courts and tribunals in theory may consider prompt release applications, the ITLOS has residuary compulsory jurisdiction over them and has heard all such applications.

32. For discussion of the economic, humanitarian, safety, and environmental concerns accommodated by the Convention’s prompt release provisions, see Bernard H. Oxman, *Observations on Vessel Release under the United Nations Convention on the Law of the Sea*, 11 INT’L J. MARINE & COASTAL L. 201, 203–04 (1996).

33. See LOS Convention, *supra* note 1, arts. 187–89 (explaining the jurisdiction of the Seabed Disputes Chamber in contentious cases); MAHMOUDI, *supra* note 25, at 296–300; John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 164–72 (1998) (examining the Seabed Disputes Chamber’s role as a “constitutional” court).

Most generally, the Law of the Sea Convention's third-party dispute settlement system was negotiated to help resolve disputes peacefully and to authoritatively interpret and apply the rules agreed on in the Convention.<sup>34</sup> Proactive judicial measures may complement the general undertaking of courts and tribunals to resolve disputes peacefully.<sup>35</sup> Although a decision by a court or tribunal having jurisdiction under Part XV, Section 2, of the Convention "shall have no binding force except between the parties and in respect of that particular dispute,"<sup>36</sup> an impartial third-party decision interpreting a Convention provision may guide other actors and encourage consistent and accurate application of that provision.<sup>37</sup> The Convention's third-party dispute settlement system may, in short, promote the rule of law as well as contribute to the settlement of disputes. Practical international lawyers recognize these goals while cautioning against over-optimism in predicting what third-party dispute settlement may achieve.<sup>38</sup>

The "rule of law" to which the Convention's dispute settlement system may contribute deserves some elaboration. The concept is much debated, and some use the phrase to promote particular

34. See Bernard H. Oxman, *Tribute to Louis Sohn—Is the Dispute Settlement System Under the Law of the Sea Convention Working?*, 29 GEO. WASH. INT'L L. REV. 655, 659–60 (2007).

35. See L.D.M. Nelson, *The Jurisprudence of the International Tribunal for the Law of the Sea: Some Observations*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 967, 981–82 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007) (noting several instances in which the International Tribunal for the Law of the Sea "has taken fully into account the necessity to prescribe practical measures which would assist the parties to find a solution, utilizing its powers under the rules of procedure (article 89, paragraph 5) to prescribe measures other than those requested" (emphasis added)). The fundamental obligation to settle disputes peacefully is articulated in Articles 2(3) and 33 of the U.N. Charter and in Article 279 of the Law of the Sea Convention.

36. LOS Convention, *supra* note 1, art. 296(2). *Accord id.* Annex VI, art. 33(2); ICJ Statute, *supra* note 17, art. 59.

37. International courts and tribunals operating under the Law of the Sea Convention may also effectively act as courts of equity in limited circumstances. *Ex aequo et bono* authority is available in theory, see LOS Convention, *supra* note 1, art. 293(2) (granting the court or tribunal the ability to decide a case *ex aequo et bono* if the parties consent), but has not been invoked in practice. In maritime delimitation cases, the applicable law refers to the need "to achieve an equitable solution." *Id.* arts. 74, 83.

38. The inclusion of a measure of compulsory jurisdiction, despite the latter's admitted problems and limitations, may in certain instances improve the climate for negotiations. In some others, it may either curb the temptation to take unilateral actions or rely overly upon arguments based on national sovereignty, or provide an additional option in the diplomatic management of a dispute, even if the eventual decision does not, in fact, settle it (as is often the case). In circumstances where jurisdiction is confined to the "optional" or "consent-based," experience shows that consent is withheld more often than not, usually at some cost to the rule of law.

concepts of justice or to mask forms of oppression.<sup>39</sup> As an ideal, however, the rule of law captures important values. The modern ideal of the rule of law developed primarily in the context of Western—especially liberal democratic—domestic legal systems that established a vertical relationship between sovereigns and their citizens, rather than in an international legal context.<sup>40</sup> In the domestic context, the rule of law captures the notion that the power of the state must not be exercised arbitrarily (evidencing a concern with prospective, accessible, and transparent rule application) and must apply to all without discrimination (evidencing a concern with general and consistent application). In domestic legal systems, the rule of law proscribes arbitrary sovereign exercises of power; the law should apply to and constrain the state and its agents.<sup>41</sup> Some commentators take the view that independent courts with impartial judges are, in domestic legal systems, an essential component of the rule of law.<sup>42</sup>

It is difficult to apply one vision of the rule of law to the entire international system, in part because the structure of international legal regimes varies dramatically.<sup>43</sup> In some international contexts where rule of law principles have been articulated, international legal norms apply to individuals, the actions of international organizations or states operating within those organizations directly affect individuals, and independent tribunals regularly hear cases involving individuals.<sup>44</sup> These contexts parallel domestic settings in which rule of law principles have been articulated. Yet, in situations where

39. See Randall Peerenboom, *Varieties of Rule of Law*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE, AND THE U.S.* 1, 1 (Randall Peerenboom ed., 2004).

40. See Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331, 333–40 (2008) (tracing the evolution of the concept of the rule of law).

41. In contrast, “rule by law” describes states that use law to govern but do not accept that law binds the state and state actors. Peerenboom, *supra* note 39, at 2.

42. See Robert S. Summers, *The Principles of the Rule of Law*, 74 *NOTRE DAME L. REV.* 1691, 1694 (1999).

43. Variation appears, inter alia, in the extent to which international legal regimes embody roles for institutions, the independence of those institutions, the subjects addressed by various legal regimes, the determinacy of applicable legal norms, and how much freedom of action those norms accord to major powers or hegemony. For efforts to address the meaning of the rule of law in the international law realm, see generally, IAN BROWNLEE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (1998); Chesterman, *supra* note 40; Simon Chesterman, *Rule of Law*, *MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L.* (2007), available at <http://www.mpepil.com>; Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 *IND. J. GLOBAL LEGAL STUD.* 79, 106–13 (1999); Maria Vicien-Milburn, *Promoting the Rule of Law Within the United Nations*, 43 *INT’L LAW.* 51 (2009).

44. See Vicien-Milburn, *supra* note 43 (examining the contribution of the U.N. Administrative Tribunal to “key principles that are essential to promoting Rule of Law within the United Nations”); The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶¶ 5–6, delivered to the Security Council, U.N. Doc. S/2004/616 (Jan. 26, 2004) (highlighting important issues and observing significant lessons learned “from the Organization’s experiences in the promotion of justice and the rule of law in conflict and post-conflict societies”).

international law is horizontal—developed by and applied to states—justifications for the rule of law that depend on protecting individuals against arbitrary or abusive conduct of sovereign or international institutional authorities do not self-evidently apply. In such situations, the rule of law may be justified in functional terms, as furthering such core values as stability, the peaceful resolution of disputes, and predictability. In many areas of horizontal international law, increased acceptance of the jurisdiction of independent courts and tribunals—as has occurred under the Law of the Sea Convention—may be regarded as an advance towards the rule of law ideal.<sup>45</sup>

Precisely which rule of law principles one believes should apply to the Convention may depend on one's view of the extent to which the Convention is a self-contained regime. The predominant view with respect to the regime for the outer limits of the continental shelf is that the Convention, which created rules and procedures relating to outer limits, determines the applicable legal order. Yet every treaty draws, to some extent, on extra-treaty norms (e.g., those contained in the law of treaties). Should broad extra-Convention principles such as effective access to forums be identified as legal norms, they may well be compatible with the Convention.<sup>46</sup> A focus on such "procedural" norms could lead to a review or critique of the operations of international institutions in order to help ensure that such principles are implemented.<sup>47</sup>

In general, international rule of law principles should reflect the core notions of governance of law, supremacy of law, and equal treatment of members of the same class of subjects of international law.<sup>48</sup> The fundamental international law principle of *pacta sunt servanda*—the notion that treaties shall be complied with in good faith<sup>49</sup>—is a rule of law concept. With regard to the legal regime

45. See Chesterman, *supra* note 43, para. 44 ("Rule of law advances would include greater acceptance of the compulsory jurisdiction of the ICJ and other independent tribunals.")

46. See LOS Convention, *supra* note 1, arts. 293(1) (courts and tribunals may apply "other rules of international law not incompatible with" the Law of the Sea Convention), 311. See generally Michael Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 INT'L J. MARINE & COASTAL L. 351 (2007).

47. See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 43–48 (2005) (describing the different normative bases of global administrative law). If a treaty regime mandated procedures that conflicted with extra-treaty norms, standard legal doctrine would regard application of the treaty procedures as proper, at least absent conflict between the treaty provisions and a peremptory or *jus cogens* norm. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (articulating the principle that a *jus cogens* norm of international law will prevail in a conflict with a treaty provision); JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 133–34 (2003) (explaining that when norms conflict with treaty provisions, generally the treaty provision will prevail).

48. See Chesterman, *supra* note 40, at 342.

49. Vienna Convention on the Law of Treaties, *supra* note 47, art. 26.

governing the outer limits of the continental shelf, respect for the rule of law certainly includes the idea that coastal states should consistently follow the Convention's procedural and substantive rules relating to outer limits. Respect for the rule of law also means that international organizations charged with applying the law should follow Convention rules as well as other established rules and procedures governing institutional behavior.

The idea of "following rules" connotes two principles that this Article highlights: reliability and accuracy.<sup>50</sup> Reliability means that previously established standards and processes will be applied and that the same standards and processes will be applied in the same way to all similarly situated states and other international actors. Accuracy requires the use of a standard method of legal interpretation to articulate the meaning of legal norms.<sup>51</sup> Reliability and accuracy are distinct concepts: A rule may be applied regularly and consistently but inaccurately, or a rule may be applied accurately but irregularly or inconsistently. The broad concept of governance of laws implies that legal rules will be applied accurately—within a range of results acceptable to international legal experts—and reliably. Equality of treatment also implies reliability and consistency.<sup>52</sup>

The third-party dispute settlement system of the Law of the Sea Convention relates to rule of law questions in several ways. If the multiple forums available to hear law of the sea disputes were to give fragmented interpretations of the law, the rule of law value of consistency would be undermined. However, the risk of inconsistent legal interpretations should not be overstated, as various courts and tribunals use standard approaches for interpreting treaties and draw

50. This Article focuses on the interpretation and application of established law, rather than on law-making processes. With respect to both law application and law making, rule of law principles other than reliability and accuracy undoubtedly exist and often will complement the notions of reliability and accuracy. Such principles include clarity in written rules, the relative stability of rules, appropriate transparency, and the need for affected parties to have effective access to available procedures. These principles may be associated with what Randall Peerenboom, writing in the context of domestic conceptions of the rule of law, has helpfully described as a "thin" conception of the rule of law, i.e., one that does not incorporate conceptions of human rights, particular forms of governance, or aspects of political morality. See Peerenboom, *supra* note 39, at 2 ("A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws").

51. Although decision makers may disagree about the meaning, or application to facts, of even highly determinate rules, use of a standard method of treaty interpretation will limit the range of disagreement; experts will regard some interpretations as inaccurate.

52. The author is indebted to Thomas Barton for sharing his thoughts about the notions of reliability and accuracy as components of the rule of law and how these concepts may apply internationally. Commentators on the concept of the rule of law in domestic legal systems have noted related themes. See *generally* Peerenboom, *supra* note 39, at 2–3; Summers, *supra* note 42, at 1692–94.

on each other's jurisprudence to promote consistent interpretations of the Convention.<sup>53</sup>

The rule of law also requires that courts and tribunals themselves—acting as appliers and interpreters of legal rules—operate in accordance with specified limits on their authority.<sup>54</sup> Respect for the rule of law encompasses the idea that an international court or tribunal should not exceed limits on its own jurisdiction, as set out in its governing charter—typically a treaty. When an international court or tribunal acts outside the legal limits on its authority, observers will not regard its exercise of power as legitimate.<sup>55</sup> This legitimacy criterion reflects the importance attached to adherence to accepted, generally recognized procedures for exercising legal authority. If a tribunal were to issue a ruling that upheld a consistent and accurate interpretation of a substantive treaty provision but did so without proper jurisdiction, its ruling would properly be criticized for not complying with the rule of law.<sup>56</sup>

For this reason, this Article closely examines jurisdictional and other legal limits on the authority of third-party decision makers. In particular, Part IV analyzes the provisions of the Law of the Sea

53. See Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 41 (1997) (noting that "there has been no overt conflict between the decisions of the International Court on the one hand and of arbitration tribunals on the other" in interpreting continental shelf legal issues); Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 72–73, 77 (1997) (noting that fears of great variations between decisions by various international tribunals are for the most part unfounded); P. Chandrasekhara Rao, *The International Tribunal for the Law of the Sea: An Evaluation*, in 1 LIBER AMICORUM JUDGE SHIGERU ODA 667, 677 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds., 2002) (noting that the International Tribunal for the Law of the Sea "has relied upon or referred to the decisions by other international courts and tribunals" and that, more generally, "[i]t is to be hoped that each international tribunal or court, though autonomous in itself will not ignore the decisions of other bodies, thus ensuring the harmonious development of international law"); Shabtai Rosenne, *Establishing the International Tribunal for the Law of the Sea*, 89 AM. J. INT'L L. 806, 814 (1995) ("There is no evidence to support the view that a multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times).").

54. See generally Chesterman, *supra* note 40, at 342 (noting concerns when some legal actors, such as U.N. officials and nongovernmental organizations, act "outside the legal system in question and, almost literally, above the law").

55. Conceptions of the rule of law related to domestic legal systems reflect similar concerns. See, e.g., Summers, *supra* note 42, at 1704 ("Legitimacy requires that valid law be . . . implemented in law-like ways.")

56. Other rule of law criteria may include the independence and impartiality of third-party decision makers, appropriate transparency in a tribunal's legal proceedings, and the effective access of affected parties to the tribunal. See *supra* note 50. A tribunal's attention to these rule of law principles will also help establish the "legitimacy" of tribunal decisions. See generally JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 521–45 (2005) (discussing the factors necessary to call an international tribunal legitimate); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (identifying the most important characteristics of effective supranational adjudicatory instruments).

Convention that may give international courts and tribunals jurisdiction to hear contentious cases and advisory proceedings involving the outer limits of the continental shelf. Part IV also considers what entities, if any, may properly bring claims alleging that a coastal state has illegally set its outer limits or that the Commission on the Limits of the Continental Shelf has improperly interpreted Convention rules concerning outer limits. First, however, Part III introduces the Convention rules concerning the outer limits of the continental shelf beyond 200 nautical miles from baselines and the important role of the CLCS.

### III. THE OUTER LIMITS OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES FROM BASELINES AND THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

Article 76 of the Law of the Sea Convention provides rules for determining the outer limits of the continental shelf beyond 200 nautical miles from baselines.<sup>57</sup> It also creates an institution—the Commission on the Limits of the Continental Shelf—to evaluate state-submitted technical data related to outer limits and to make recommendations concerning those limits.<sup>58</sup> Part III.A describes the outer limits of the continental shelf. It also distinguishes setting outer limits lines from maritime boundary delimitation between adjacent or opposite states and notes why the location of outer limits is important. Part III.B then examines the functions of the CLCS.

#### A. *The Outer Limits of the Continental Shelf*

The Law of the Sea Convention defines the continental shelf as including

the seabed and subsoil of the submarine areas that extend beyond [a coastal state's] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.<sup>59</sup>

Where the outer edge of a coastal state's "continental margin" (a term encompassing not only the physical shelf but also the physical slope and rise) extends beyond 200 nautical miles, the state's outer limits depend on either: (1) a line drawn by reference to points at which the thickness of sediment is at least one percent of the shortest distance to the foot of the continental slope; or (2) a line drawn by reference to points no more than sixty nautical miles from the foot of the slope.<sup>60</sup>

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57. See *infra* note 61.

58. See LOS Convention, *supra* note 1, art. 76(8), Annex II.

59. *Id.* art. 76(1).

60. *Id.* art. 76(4).

Certain additional cut-offs may apply; for example, on submarine ridges the outer limit may not exceed 350 nautical miles from baselines.<sup>61</sup> Annex II of the Final Act of the Third United Nations

61. *Id.* art. 76(5)-(6). Article 76, the primary source for determining the outer limits of the continental shelf, reads in full:

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

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

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

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

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

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

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

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Conference on the Law of the Sea also sets out specific criteria for establishing the outer limits of the continental shelf.<sup>62</sup>

Knowing where a coastal state's continental shelf outer limits are located allows coastal states and other international actors to determine the geographical area in which various international legal rights and responsibilities apply. Establishing the outer limits of the continental shelf is not a prerequisite for the exercise of coastal state rights and responsibilities on the shelf beyond 200 nautical miles from baselines; entitlement to the continental shelf is a conceptually distinct issue from setting the outer limits of the continental shelf.<sup>63</sup> Nevertheless, specifying the outer limits allows for the precise determination of where various rights and responsibilities may be exercised. The location of outer limits lines affects the rights of not only coastal states but also non-coastal states and their nationals. To pick just one example, non-coastal states or their nationals may want to engage in marine scientific research; they may have to obtain the permission of the coastal state if the research is on the continental shelf.<sup>64</sup>

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

*Id.* art. 76. For a detailed analysis of the provisions of Article 76, see generally Comm. on Legal Issues of the Outer Cont'l Shelf, Int'l Law Ass'n, *Second Report*, in INT'L LAW ASS'N, REPORT OF THE SEVENTY-SECOND CONFERENCE, TORONTO 215 (2006) [hereinafter *Second Report*] (providing extensive analysis and discussion of the provisions of Article 76).

62. Annex II of the Final Act is titled "Statement of Understanding Concerning a Specific Method to Be Used in Establishing the Outer Edge of the Continental Margin." LOS Convention, *supra* note 1, Annex II; see *infra* note 87.

63. A coastal state may have a right to a continental shelf beyond 200 nautical miles from baselines, even before the exact location of the outer limit has been determined. See LOS Convention, *supra* note 1, art. 77(3) ("The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."); Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INT'L J. MARINE & COASTAL L. 301, 305–06 (2002) (noting that coastal states have a right under both customary international law and the Convention to a continental shelf area beyond 200 nautical miles where certain physical features are present); Alex G. Oude Elferink, *Article 76 of the LOSC on the Definition of the Continental Shelf: Questions Concerning its Interpretation from a Legal Perspective*, 21 INT'L J. MARINE & COASTAL L. 269, 277–78 (2006) (explaining the fundamental nature of the entitlement to a continental shelf and grounding this entitlement in "Article 77(3), which provides that the rights of the coastal state over the continental shelf do not depend on occupation or any express proclamation"); *Second Report*, *supra* note 61, at 216–17.

64. LOS Convention, *supra* note 1, art. 246. Fewer restrictions apply to marine scientific research on the continental shelf beyond 200 nautical miles from baselines than inside the 200-mile limit. See *id.* art. 246(6) (noting that coastal states may refuse their consent to marine research projects that will occur beyond the 200 nautical mile limit only in designated areas in which exploitation or exploratory operations are

The location of the outer limits of the continental shelf also raises an international community concern. The Area, which constitutes the “common heritage” of humankind,<sup>65</sup> begins where the continental shelf ends; the deep seabed mining regime detailed in the Law of the Sea Convention and the 1994 Part XI Implementation Agreement applies in the Area.<sup>66</sup> In sum, determining the outer limits affects the expectations of a range of international actors in the areas of navigation, commerce, natural resources, and environmental rights and responsibilities.

Setting the outer limits of the continental shelf must be distinguished from maritime boundary delimitations between opposite or adjacent states.<sup>67</sup> Maritime boundary delimitations result either from international negotiations or from decisions of conciliation commissions or judicial or arbitral bodies.<sup>68</sup> Outer limits determinations are different. Where parts of the Area exist in a specific ocean basin, such as in the Arctic Ocean,<sup>69</sup> a coastal state whose continental shelf borders on the Area may establish its own outer limits after it has submitted supporting data to the CLCS, in accordance with the requirements of the Convention.<sup>70</sup> The legal criteria governing maritime boundary delimitations are notoriously indeterminate, reflecting the fact that a variety of contextual factors are relevant to the location of the boundary. In contrast, the

occurring or will occur). For an overview of the rights and duties of coastal states on the continental shelf, see generally R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 151–57 (3d ed. 1999).

65. LOS Convention, *supra* note 1, art. 136.

66. *Id.* arts. 1(1)–(3), 133–85; 1994 Part XI Implementation Agreement, *supra* note 1, art. 1 & Annex.

67. See *Second Report*, *supra* note 61, at 237 (“Article 76 is concerned with entitlement to and the establishment of the outer limits of the continental shelf and not the delimitation of overlapping entitlements between neighboring States . . .”).

68. See LOS Convention, *supra* note 1, arts. 74, 83, 298(1)(a). See generally 1 *INTERNATIONAL MARITIME BOUNDARIES* (Jonathan I. Charney & Lewis M. Alexander eds., 1993); 2 *INTERNATIONAL MARITIME BOUNDARIES* (Jonathan I. Charney & Lewis M. Alexander eds., 1993); 3 *INTERNATIONAL MARITIME BOUNDARIES* (Jonathan I. Charney & Lewis M. Alexander eds., 1998); 4 *INTERNATIONAL MARITIME BOUNDARIES* (Jonathan I. Charney & Robert W. Smith eds., 2002); 5 *INTERNATIONAL MARITIME BOUNDARIES* (David A. Colson & Robert W. Smith eds., 2005).

69. See Ron Macnab, *The Outer Limit of the Continental Shelf in the Arctic Ocean*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 301, 301–04 (Myron H. Nordquist, John Norton Moore & Tomas H. Heidar eds., 2004) (discussing issues related to state claims to continental shelf areas in the Arctic Ocean).

70. In some situations, the continental shelf beyond 200 nautical miles from the baselines of each of two opposite states is unbroken; no portion of the Area lies beyond the continental shelf of either state. This situation exists, for example, in the Western Gap of the Gulf of Mexico, where a portion of the continental shelf of Mexico and the United States lies beyond 200 miles from the baselines of both states. Where this is the situation, the location of outer limits really becomes a question about the location of the maritime boundary between two opposite states, to be resolved by negotiation, conciliation, or a judicial or arbitral proceeding. This Article is concerned with the situation in which the Area lies beyond the continental shelf.

Convention criteria defining the outer limits of the continental shelf beyond 200 nautical miles from baselines are highly determinate.<sup>71</sup>

Despite the high degree of determinacy in Article 76 of the Convention, international lawyers have debated several points about the outer limits of the continental shelf beyond 200 miles from baselines. Coastal states and the CLCS must address significant *scientific* uncertainty concerning data relevant to determining outer limits.<sup>72</sup> In addition, and more importantly for the purposes of this Article, a degree of *legal* uncertainty accompanies the interpretation of Article 76 and other relevant Convention rules and how legal rules apply to particular circumstances. Article 76 raises several questions of legal interpretation. For example:

– The terms “oceanic ridge,” “submarine ridge,” and “submarine elevation” are not defined in the Law of the Sea Convention, but the terms carry legal significance. An “oceanic ridge” is not part of the continental margin at all,<sup>73</sup> suggesting that a coastal state cannot rely on an oceanic ridge to extend its continental shelf beyond 200 miles from baselines. On a “submarine ridge,” the maximum outer limit of the continental shelf is 350 miles from baselines.<sup>74</sup> How should these terms be interpreted?

– When a coastal state has more than one 2500-meter isobath, important for applying Article 76(5),<sup>75</sup> which should be used in the calculation of fixed points?<sup>76</sup>

71. See LOS Convention, *supra* note 1, art. 76. The Law of the Sea Convention provides much more determinate rules for the outer limits of the continental shelf than did the 1958 Geneva Convention on the Continental Shelf. See Convention on the Continental Shelf art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (setting out exploitability criterion).

72. See CONTINENTAL SHELF LIMITS: THE LEGAL AND SCIENTIFIC INTERFACE (Peter J. Cook & Chris M. Carleton eds., 2000) (especially the chapters in Part II: Methodology); Duncan J. McMillan, *The Extent of the Continental Shelf: Factors Affecting the Accuracy of a Continental Margin*, 9 MARINE POL'Y 148 (1985).

73. LOS Convention, *supra* note 1, art. 76(3).

74. *Id.* art. 76(6). For discussion of the ridges issue, see generally Harald Brekke & Philip A. Symonds, *The Ridge Provisions of Article 76 of the UN Convention on the Law of the Sea*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS, *supra* note 69, at 169; Ron Macnab, *Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76*, 39 OCEAN DEV. & INT'L L. 223 (2008); L.D.M. Nelson, *The Continental Shelf: Interplay of Law and Science*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1235, 1245–47; *Second Report*, *supra* note 61, at 219–22; Robert W. Smith & George Taft, *Legal Aspects of the Continental Shelf*, in CONTINENTAL SHELF LIMITS, *supra* note 72, at 17. The CLCS has indicated that it will examine the issue of ridges, which arise from a variety of geological processes, “on a case-by-case basis,” taking into account such factors as “natural prolongation of land territory and land mass, morphology of ridges and their relation to the continental margin . . . and continuity of ridges.” Comm’n on the Limits of the Cont’l Shelf [CLCS], *Scientific and Technical Guidelines* ¶¶ 7.2.10–7.2.11, Doc. CLCS/11 (May 13, 1999), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CLCS/11&Lang=E> [hereinafter *Scientific and Technical Guidelines*]. See also *infra* note 189 and accompanying text (suggesting that such terms should be interpreted in light of changing scientific knowledge).

75. LOS Convention, *supra* note 1, art. 76(5) (describing the relevance of isobaths in the calculation of fixed points).

- How does one connect a “fixed point,” important for applying Article 76(4)-(7),<sup>77</sup> to the 200-mile limit in situations where part of a coastal state’s continental shelf extends only to 200 nautical miles and part of it extends beyond? Should a fixed point that is outside—but within sixty nautical miles of—the 200-mile limit be connected to that limit by drawing a line to another fixed point located on or inside the 200-mile limit that meets the requirements of Article 76(4)-(5)? Or may the coastal state draw any line up to sixty nautical miles in length that connects the fixed point outside the 200-mile limit to the coastal state’s 200-mile limit?<sup>78</sup>
- Is the primary test for determining the foot of the slope under Article 76(4)(b)<sup>79</sup> “the point of maximum change in gradient” at the base of the slope, with “evidence to the contrary” being applied only in the absence of credible information about the point of maximum change? Or may a coastal state rely at its discretion on either the point of maximum change or on “evidence to the contrary”?<sup>80</sup>
- How should the thickness of sedimentary rocks, referred to in Article 76(4)(a)(i),<sup>81</sup> be interpreted in cases of complex and irregular topography?<sup>82</sup>
- Is the CLCS legally entitled to not make outer limits recommendations in all cases involving land and maritime disputes? The CLCS has taken the position that it cannot make recommendations in such situations absent the consent of

76. See Comm’n on the Limits of the Cont’l Shelf [CLCS], *Summary of Recommendations in Regard to the Submission Made by Australia on 15 November 2004* ¶ 7 (Apr. 9, 2008), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/aus\\_summary\\_of\\_recommendations.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf) [hereinafter CLCS Summary of Recommendations for Australia]; Nelson, *supra* note 74, at 1244–45; *Second Report*, *supra* note 61, at 225–26.

77. LOS Convention, *supra* note 1, art. 76(4)–(7) (describing the determination of outer limits by reference to fixed points).

78. See *Second Report*, *supra* note 61, at 223–25 (suggesting the question remains unresolved). The CLCS considered this issue in connection with Australia’s submission. Australia took “the view that it is possible to use lines not more than 60 M [nautical miles] in length to join fixed points on the formula line beyond 200 M to any fixed point on the 200 M line.” CLCS Summary of Recommendations for Australia, *supra* note 76, ¶ 8. The Commission, however, took

the view that the determination of the last segment of the outer limits of the continental shelf shall be established either by the intersection of the formula line, in accordance with article 76, paragraphs 4 and 7, and the 200 M limit from the baselines from which the breadth of the territorial sea is measured, or it shall be determined by the line of shortest distance between the last fixed formula point and 200 M limit. In all cases, the segment cannot exceed 60 M in length in accordance with article 76, paragraph 7.

*Id.* The Commission’s specific recommendations were to the effect that specific proposed points and their connecting lines “be replaced by points and lines that conform to the outer edge of the continental margin.” *Id.* ¶¶ 35, 106, 144. The Commission did not interpret the Convention to give a general answer to the questions noted in the text. Australia has deferred to the Commission’s views.

79. LOS Convention, *supra* note 1, art. 76(4)(b).

80. See *Scientific and Technical Guidelines*, *supra* note 74, ¶ 6.1.2 (taking the position that the general rule is to calculate the foot of the continental slope by finding the point of maximum change); Nelson, *supra* note 74, at 1242–43; *Second Report*, *supra* note 61, at 222–23 (describing the flexible definition of “foot of the slope” under Article 76).

81. LOS Convention, *supra* note 1, art. 76(4)(a)(i).

82. See Nelson, *supra* note 74, at 1244.

all states involved.<sup>83</sup> Is this position consistent with Article 76 of the Convention, which specifies that the provisions governing outer limits determinations are “without prejudice to the question of delimitations of the continental shelf between States with opposite or adjacent coasts”?<sup>84</sup>

Certain legal issues relevant to setting the outer limits of the continental shelf beyond 200 nautical miles from baselines require interpretation of legal concepts outside the confines of Article 76. For example:

- Are particular straight baselines, which may be important for applying Article 76(1)-(2) and (4)-(8),<sup>85</sup> legal under the test set forth in Article 7 of the Convention?<sup>86</sup>
- Are the criteria in Annex II to the UNCLOS III Final Act (the Statement of Understanding) legally binding, and do they apply only to the Bay of Bengal?<sup>87</sup>

83. Comm’n on the Limits of the Cont’l Shelf [CLCS], *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Annex 1, Doc. CLCS/40/Rev.1 (Apr. 17, 2008), available at <http://daccess-ods.un.org/TMP/6710125.html> [hereinafter *Rules of Procedure*].

84. LOS Convention, *supra* note 1, art. 76(10). See *id.* Annex II, art. 9 (“The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.”); Constance Johnson & Alex G. Oude Elferink, *Submissions to the Commission on the Limits of the Continental Shelf in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the Convention on the Law of the Sea*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS* 161, 163–64 (David Freestone, Richard Barnes & David M. Ong eds., 2006); Alex G. Oude Elferink, *Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS*, *supra* note 69, at 263, 264–65, 276 (arguing CLCS rules on this topic are within the implied competence of the Commission); *Second Report*, *supra* note 61, at 236–37.

85. See LOS Convention, *supra* note 1, art. 76(1)–(2), (4)–(8) (referring to the relationship between baselines and a coastal state’s outer limits).

86. For views on whether the CLCS should take a position with respect to the legality of baselines, see Letter, United States of America, Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf, Ref. No. CLCS.01.2001.LOS/USA (Feb. 28, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_USAtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_USAtext.pdf); Alex G. Oude Elferink, *The Continental Shelf Beyond 200 Nautical Miles: The Relationship Between the CLCS and Third Party Dispute Settlement*, in *OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES* 107, 111–12 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2004); Comm. on Legal Issues of the Outer Cont’l Shelf, Int’l Law Ass’n, *Report*, in *INT’L LAW ASS’N, REPORT OF THE SEVENTY-FIRST CONFERENCE, BERLIN 773, 779 n.25* (2004) [hereinafter *First Report*].

87. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ FA.A.II.1–7 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter 2 LOS CONVENTION COMMENTARY] (implying that the principles at the heart of the Bay of Bengal dispute may have import in other regions); Syméon Karagiannis, *Observations sur la Commission des Limites du Plateau Continental*, 8 ESPACES ET RESSOURCES MARITIMES 163, 183–84 (1994) (Fr.) (discussing the application of Annex II of the Convention to the Bay of Bengal); Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT’L L. 211, 228, 230 (1981) (noting that the special method applied in the Bay of Bengal “because of the peculiar effect of Article 76 on the continental margin in question” was intended “to reproduce a result in that area equivalent to the effect of applying Article 76 in the rest of the world”). These criteria may be regarded as an

Finally, legal questions that go to the threshold issue of a coastal state's entitlement *vel non* to any continental shelf could arise in the context of a dispute over asserted outer limits. For example:

– Islands are entitled to a continental shelf, but “[r]ocks which cannot sustain human habitation or economic life of their own” are not.<sup>88</sup> Are particular ocean elevations, from which a coastal state may claim a continental shelf with outer limits beyond 200 nautical miles from baselines, really islands?<sup>89</sup>

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“equitable exception” from the substantive requirements of Article 76 in favor of Sri Lanka. UNCLOS III negotiators were persuaded that features of the Bay of Bengal made the application of Article 76 criteria particularly unfavorable to Sri Lanka. However, Kenya, for example, has relied on the Statement of Understanding criteria in its submission to the CLCS. Republic of Kenya, *Submission on the Continental Shelf Beyond 200 Nautical Miles* ¶¶ 2.2, 2.5, 4, delivered to the Commission on the Limits of the Continental Shelf (Apr. 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/ken35\\_09/ken2009\\_executivesummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/ken35_09/ken2009_executivesummary.pdf). See also India, *Partial Submission on the Continental Shelf Beyond 200 Nautical Miles*, at 2, delivered to the Commission on the Limits of the Continental Shelf (May 11, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/ind48\\_09/ind2009executive\\_summary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf) (requesting the right to provide new submissions at a later date); Union of Myanmar, *Submission on the Continental Shelf Beyond 200 Nautical Miles*, at 3, delivered to the Commission on the Limits of the Continental Shelf (Dec. 16, 2008), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mmr08/mmr\\_es.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf) (arguing for an extension of Myanmar's continental shelf boundary); Note Verbale, Ministry of Foreign Affairs of the Republic of Kenya, Notification Regarding Myanmar's Submission on the Continental Shelf Beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Ref. No. MFA.INT.8.15A/XXXI (Apr. 30, 2009), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mmr08/clcs16\\_2008\\_mmr\\_ken\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_ken_e.pdf) (arguing for an equitable interpretation upon a showing of special circumstances); Note Verbale, Ministry of Foreign Affairs of the Democratic Socialist Republic of Sri Lanka, Notification Regarding Myanmar's Submission on the Continental Shelf Beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Ref. No. L/UN/20(xii) (Mar. 2, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mmr08/clcs16\\_2008\\_mmr\\_lka\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_lka_e.pdf) (arguing for an equitable interpretation specific to Sri Lanka); Note Verbale, Permanent Mission of India to the United Nations, Notification Regarding Myanmar's Submission on the Continental Shelf Beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Ref. No. NY/RM/443/2/2009 (Mar. 26, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mmr08/clcs16\\_2008\\_ind\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_ind_e.pdf) (arguing for application of the Statement of Understanding to only Sri Lanka and India).

88. LOS Convention, *supra* note 1, art. 121(3).

89. China and the Republic of Korea raised this issue in connection with Japan's submission to the CLCS. Note Verbale, Permanent Mission of the People's Republic of China to the United Nations, Notification Regarding Japan's Submission on the Continental Shelf Beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Ref. No. CML/2/2009 (Feb. 6, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf); Note Verbale, Permanent Mission of the Republic of Korea to the United Nations, Notification Regarding Japan's Submission on the Continental Shelf Beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, Ref. No. MUN/046/09 (Feb. 27, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf). See also The Chairman, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission* ¶ 54, delivered to the Commission on the Limits of the Continental Shelf, Doc. CLCS/62 (Apr. 20, 2009) (noting Japan's reaction that the CLCS's mandate did not encompass this issue). China, the Ivory Coast, and Pakistan also sought to include the issue of islands/rocks on the agenda of the 2009 Meeting of

– Are states entitled to a continental shelf off Antarctica?<sup>90</sup>

In sum, states and other international actors may face a range of legal issues concerning how to interpret and apply rules about the outer limits of the continental shelf beyond 200 nautical miles from baselines. One significant measure of how well outer limits determinations reflect the rule of law will be how reliably and accurately the rules concerning these issues are applied to different states and situations.

### B. *The Commission on the Limits of the Continental Shelf*

The Commission on the Limits of the Continental Shelf, a body established by the Law of the Sea Convention, plays an important role with respect to establishing the final and binding outer limits of the continental shelf. The CLCS is a technical body; its twenty-one members, who reflect an “equitable geographical representation,” are experts in geology, geophysics, or hydrography.<sup>91</sup> Parties to the Convention elect the Commission members for five-year terms, but the members serve in their personal capacities.<sup>92</sup>

The CLCS exercises two main functions. One is to consider information that coastal states are required to submit concerning the

States Parties to the Law of the Sea Convention. *Proposal for the Inclusion of a Supplementary Item in the Agenda of the Nineteenth Meeting of States Parties: Note Verbale Dated 21 May 2009 from the Permanent Mission of China to the United Nations Addressed to the Secretary-General ¶¶ 3-5*, Doc. SPLOS/196 (May 22, 2009) [hereinafter 2009 Chinese Note]; *List of Supplementary Items Proposed for Inclusion in the Agenda of the Nineteenth Meeting of States Parties*, Doc. SPLOS/L.60 (May 22, 2009). The matter was not included in the agenda. See Comm’n on the Limits of the Cont’l Shelf [CLCS], June 22–26, 2009, *Nineteenth Meeting of States Parties Agenda*, Doc. SPLOS/197 (June 22, 2009) (showing the absence of the islands and rocks issue); Press Release, Law of Sea Parties Grapple With Decisions on Judges’ Selection to Key Treaty Bodies, Continental Shelf Commission Workload, Budgetary Matters, Doc. SEA/1919 (June 25, 2009) (comments of Japan and Romania) (noting parties’ apprehension in raising the issue). These recent developments highlight the sensitivity of this issue, suggesting that controversies concerning the status of certain islands or rocks may well arise in connection with assertions of particular outer limits.

90. Article IV(2) of the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71, which prohibits any “new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica,” raises concerns about any effort to set continental shelf limits off Antarctica. See Alex G. Oude Elferink, *The Continental Shelf of Antarctica: Implications of the Requirement to Make a Submission to the CLCS under Article 76 of the LOS Convention*, 17 INT’L J. MARINE & COASTAL L. 485 (2002). The issue is moot at present, given states’ willingness not to have the CLCS take action with respect to information about continental shelf limits appurtenant to Antarctica. See CLCS Summary of Recommendations for Australia, *supra* note 76, ¶ 3 (listing broad support for Australia’s recommendation not to define Antarctic continental shelf outer limits); *Note from the Permanent Mission of Australia to the Secretary-General of the United Nations Accompanying the Lodgement of Australia’s Submission*, Note No. 89/2004 (Nov. 2004), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_attachment.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf) (urging the Commission not to proceed with respect to the continental shelf off Antarctica).

91. LOS Convention, *supra* note 1, art. 76(8), Annex II, art. 2(1).

92. *Id.* Annex II, arts. 2(1), 2(4).

outer limits of the continental shelf beyond 200 nautical miles from baselines and make recommendations related to those limits.<sup>93</sup> Each coastal state sets its own continental shelf outer limits lines, but limits established “on the basis of” CLCS recommendations “shall be final and binding.”<sup>94</sup> The CLCS does not set or certify outer limits; it fills a procedural role, issuing recommendations that can help legitimate the outer limits that coastal states establish.<sup>95</sup>

The CLCS also serves a second function: to provide technical and scientific advice when requested by a coastal state in order to help that state prepare for its submission.<sup>96</sup> The CLCS has organized training programs to advise states about their submissions.<sup>97</sup>

Article 3(1)(a) of Annex II of the Law of the Sea Convention provides a link between CLCS work and legal standards. When the CLCS makes recommendations, it must do so “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.”<sup>98</sup> Although the CLCS is a technical body, this language suggests a connection between its work and international law. CLCS members may well not interpret and apply the Convention in accordance with the law of treaties, as would a government legal officer or an international court or tribunal. Perhaps the language quoted above simply emphasizes that the CLCS cannot substitute its own scientific concepts related to the deep seabed or the continental shelf for the ones used in the Convention. Still, when the CLCS determines the scope of its competence or addresses some of the legal issues noted in Part III.A, it at least implicitly takes legal positions, which observers will evaluate in terms of their conformity to the law. In the words of Judge Dolliver Nelson, “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.”<sup>99</sup>

93. *Id.* art. 76(8), Annex II, art. 3(1)(a).

94. *Id.* art. 76(8), Annex II, art. 7.

95. See McDorman, *supra* note 63, at 319–20 (stating that the Commission plays the role of “legitimator”).

96. LOS Convention, *supra* note 1, Annex II, art. 3(1)(b).

97. A voluntary trust fund also provides some resources to assist developing states in preparing their submissions. See G.A. Res. 58/240, Annex, U.N. Doc. A/RES/58/240 (Dec. 23, 2003); G.A. Res. 55/7, Annex II, U.N. Doc. A/RES/55/7 (Oct. 30, 2000).

98. LOS Convention, *supra* note 1, Annex II, art. 3(1)(a). For the text of Article 76, see *supra* note 61, and for discussion about the Statement of Understanding, see *supra* note 87.

99. Nelson, *supra* note 74, at 1238. See L.D.M. Nelson, *The Role of the Commission on the Limits of the Continental Shelf in the Interpretation and Application of the Convention*, in CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 255, 256–57 (Myron H. Nordquist & John Norton Moore eds., 2001) (“An important function of the Commission that is not expressly referred to in the Convention has to do with the interpretation or application of the Convention.”). *But see* Oude Elferink, *supra* note 86, at 109 (arguing that the fact that the twenty-one members of the Commission are “required to be experts in the fields of geology, geophysics or hydrography” indicates that the CLCS

Some may question whether the CLCS, as a technical body, should be evaluated according to rule of law criteria, but it is essential that the CLCS follow regular procedures and make its recommendations in accordance with Article 76.<sup>100</sup> The CLCS promotes reliability through its Rules of Procedure and its Scientific and Technical Guidelines,<sup>101</sup> the adoption of which falls within the body's inherent powers.<sup>102</sup> The CLCS obtains legal assistance from several sources. For procedural support, it relies on the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs.<sup>103</sup> For other legal questions, the CLCS may rely on state submissions, discussions at Meetings of States Parties to the Convention, or occasional advice from the Legal Counsel of the United Nations.<sup>104</sup> The fact that no lawyers are represented on the Commission has, however, occasioned critical comments.<sup>105</sup>

The International Law Association's Committee on the Outer Limits of the Continental Shelf has taken the position that "[t]he CLCS should accept a reasonable interpretation of relevant provisions of the Convention provided by a coastal State making a submission."<sup>106</sup> If this position were taken too literally, CLCS recommendations could become inconsistent should different states

engages in a "process involving scientific and technical questions" rather than consideration of legal issues).

100. The debate relates to a point raised in Part II.B of this Article: whether rule of law considerations apply to the CLCS. Many would agree that the Commission should follow rules and procedures set out in the Convention. Even though the CLCS does not issue any binding rulings, it may fall within the category of a "global administrative body," and hence, according to some, should "meet adequate standards of transparency, participation, reasoned decision, and legality." Kingsbury, Krisch & Stewart, *supra* note 47, at 17.

101. See *Rules of Procedure*, *supra* note 83; *Scientific and Technical Guidelines*, *supra* note 74.

102. *Second Report*, *supra* note 61, at 228.

103. See LOS Convention, *supra* note 1, Annex II, art. 2(5).

104. See, e.g., *Legal Opinion on Whether It Is Permissible, Under the United Nations Convention on the Law of the Sea and the Rules of Procedure of the Commission, for a Coastal State, Which Has Made a Submission to the Commission in Accordance with Article 76 of the Convention, to Provide to the Commission in the Course of the Examination by It of the Submission, Additional Material and Information Relating to the Limits of Its Continental Shelf or Substantial Part Thereof, Which Constitute a Significant Departure from the Original Limits and Formulae Lines That Were Given Due Publicity by the Secretary-General of the United Nations in Accordance with Rule 50 of the Rules of Procedure of the Commission*, Doc. CLCS/46 (Sept. 7, 2005); *Legal Opinion as to the Most Appropriate Procedure in Cases Where It Might Be Necessary to Institute Proceedings Following an Alleged Breach of Confidentiality*, Doc. CLCS/14 (May 18, 1999); *Legal Opinion on the Applicability of the Convention on the Privileges and Immunities of the United Nations to the Members of the Commission*, Doc. CLCS/5 (Mar. 11, 1998). See Oude Elferink, *supra* note 86, at 112.

105. See, e.g., 1 E.D. BROWN, SEA-BED ENERGY AND MINERALS: THE INTERNATIONAL LEGAL REGIME 31 (1992).

106. *Second Report*, *supra* note 61, at 228. See also McDorman, *supra* note 63, at 309 (arguing that in light of the "political reality of boundary-making," any ambiguity in Article 76(8) should be interpreted with a view to minimal interference with the "political prerogatives of coastal state boundary-making").

offer different but “reasonably accurate” interpretations of the Convention.<sup>107</sup> To the extent that states will choose the same interpretation because it maximizes the area of the continental shelf that the CLCS includes in its recommendation, the risk of inconsistent interpretations is minimized.

Although submissions began slowly, the CLCS now faces a heavy workload. The CLCS received its first submission from Russia in 2001, followed by Brazil and Australia in 2004, and Ireland in 2005.<sup>108</sup> In the last few years, submissions have increased dramatically. An extended ten-year period for submissions and preliminary information filings expired on May 12, 2009.<sup>109</sup> As of July 1, 2009, the CLCS had received fifty-one submissions or partial submissions<sup>110</sup> and forty-three preliminary information filings,<sup>111</sup>

107. If the Convention effectively incorporates a meta-rule to the effect that states may choose from among any reasonably accurate interpretation of Convention provisions concerning outer limits, then it would be consistent to “accept any reasonable interpretation . . . provided by a coastal State.” *Second Report, supra* note 61, at 228.

108. Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982 (Aug. 20, 2009), [http://www.un.org/Depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/Depts/los/clcs_new/commission_submissions.htm) [hereinafter Submissions].

109. According to Annex II, Article 4 of the Law of the Sea Convention, each state intending to establish limits of the continental shelf beyond 200 nautical miles from baselines must submit proposed limits and supporting data to the CLCS no later than ten years after the Convention enters into force for that state. LOS Convention, *supra* note 1, Annex II, art. 4. For states that had accepted the Convention before it entered into force in 1994, this ten-year period expired on November 16, 2004. *See id.* However, in 2001 the States Parties to the Law of the Sea Convention decided to extend this ten-year period to May 12, 2009. *Decision Regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set Out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea*, ¶ (a), Doc. SPLOS/72 (May 29, 2001). (May 13, 1999—the start of the revised ten-year period—was the date on which the CLCS adopted its Scientific and Technical Guidelines.) In June 2008, the States Parties to the Convention, noting the Commission’s heavy workload and challenges faced by developing states, decided that a state could satisfy the extended time period by filing preliminary information indicating the outer limits of the continental shelf, describing the status of preparation of the planned submission, and noting when the state intended to make its submission to the CLCS. *Decision Regarding the Workload of the Commission on the Limits of the Continental Shelf and the Ability of States, Particularly Developing States, to Fulfill the Requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the Decision Contained in SPLOS/72, Paragraph (a)*, ¶ 1(a), Doc. SPLOS/183 (June 20, 2008).

110. *See* Submissions, *supra* note 108.

111. *See* Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles (Sept. 10, 2009), [http://www.un.org/Depts/los/clcs\\_new/commission\\_preliminary.htm](http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm); *Issues Related to the Workload of the Commission on the Limits of the Continental Shelf—Submissions to the Commission and Receipt of Preliminary Information* ¶ 8, Doc. SPLOS/INF/22 (May 22, 2009). Although Annex II, Article 4 refers to a “coastal State” rather than a “State Party” making submissions to the CLCS, it is doubtful that a nonparty to the Law of the Sea Convention could make a submission to the CLCS, seeking to obtain a recommendation that the nonparty could then rely on to set generally recognized, final and binding continental shelf outer limits. *See* Tullio Treves, *Remarks on Submissions to the*

and had adopted recommendations with respect to eight submissions.<sup>112</sup>

Should a coastal state disagree with the recommendations of the CLCS, that state “shall, within a reasonable time, make a revised or new submission to the Commission.”<sup>113</sup> Russia’s 2001 submission concerning the continental shelf under the Arctic Ocean, for example, resulted in the CLCS recommendation that Russia make certain revisions.<sup>114</sup> A revised Russian submission is expected.<sup>115</sup>

Approximately three-fourths of the cases in which the legal continental shelf extends beyond 200 nautical miles from baselines involve situations requiring maritime boundary delimitations between adjacent or opposite states.<sup>116</sup> The actions of the CLCS “shall not prejudice matters relating to delimitation of boundaries between states with opposite or adjacent coasts.”<sup>117</sup> The CLCS has decided that it will not consider submissions implicating a land or maritime dispute unless all states party to such a dispute consent.<sup>118</sup> The CLCS may issue recommendations if all states concerned with such a dispute jointly make a submission; of the fifty-one submissions the CLCS had received as of July 1, 2009, five were joint submissions.<sup>119</sup> In cases of joint submissions, states with disputed

*Commission on the Limits of the Continental Shelf in Response to Judge Marotta’s Report*, 21 INT’L J. MARINE & COASTAL L. 363, 363–64 (2006); Rüdiger Wolfrum, President, Int’l Tribunal for the Law of the Sea, Statement at the 73rd Annual Biennial Conference of the International Law Association, *The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea* 6 (Aug. 21, 2008), available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html). But see Thomas A. Clingan, Jr., *Dispute Settlement among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf*, in THE LAW OF THE SEA: WHAT LIES AHEAD? 495, 497–99 (Thomas A. Clingan, Jr. ed., 1983) (asserting that the Convention “would permit non-parties to have access to the Commission”). To date, only States Parties to the Convention have made submissions. See Submissions, *supra* note 108. The Meeting of States Parties determined to seek an opinion of the Legal Counsel of the United Nations on this matter only if the need arises. See The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea* ¶ 67, delivered to the General Assembly, U.N. Doc. A/53/456 (Oct. 5, 1998).

112. See Recommendations Issued by the Commission on the Limits of the Continental Shelf (May 22, 2009), [http://www.un.org/Depts/los/clcs\\_new/commission\\_recommendations.htm](http://www.un.org/Depts/los/clcs_new/commission_recommendations.htm).

113. LOS Convention, *supra* note 1, Annex II, art. 8.

114. See The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea* ¶¶ 38–41, delivered to the General Assembly, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002). “The summary of the recommendations [concerning the Russian submission] does not shed any light on the question of whether the recommendations addressed the interpretation of provisions of the Convention.” Oude Elferink, *supra* note 86, at 114.

115. Erik Molenaar et al., Introduction to the Background Papers 10 (Sept. 8, 2008), <http://arctic-transform.org/download/Intro.pdf>.

116. See, e.g., Submissions, *supra* note 108.

117. LOS Convention, *supra* note 1, Annex II, art. 9. See also *id.* art. 76(10) (referring to the CLCS definition of the continental shelf).

118. *Rules of Procedure*, *supra* note 83, Annex I, ¶ 5(a).

119. See Submissions, *supra* note 108 (listing joint submissions by (i) the Republic of Mauritius and the Republic of the Seychelles, (ii) Malaysia and Vietnam,

boundaries could settle the delimitations at a later date. Alternatively, a state may make a partial submission, holding off on submitting data concerning an area in which maritime boundaries are disputed.<sup>120</sup>

The Law of the Sea Convention makes the CLCS process centrally important to states' determinations of the outer limits of the continental shelf beyond 200 nautical miles from baselines. The workload of the CLCS suggests that it will have ample opportunity to consider the scope of its competence and make recommendations "in accordance with article 76" of the Convention.<sup>121</sup> When the CLCS effectively interprets or applies Article 76, observers of the CLCS's operations will consider the reliability and accuracy of its positions. They may also evaluate whether the Commission acts with sufficient transparency and in accordance with other rule of law values.<sup>122</sup>

The CLCS process does not formally displace the third-party dispute settlement system of the Convention.<sup>123</sup> Part IV analyzes when third-party procedures may be used to review CLCS recommendations or to rule on legal questions related to a coastal state's outer limits.

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(iii) South Africa and France, (iv) Federated States of Micronesia, Papua New Guinea and Solomon Islands, and (v) France, Ireland, Spain, and the United Kingdom of Great Britain and Northern Ireland).

120. Donald R. Rothwell, *Issues and Strategies for Outer Continental Shelf Claims*, 23 INT'L J. MARINE & COASTAL L. 185, 202–09 (2008); see, e.g., Comm'n on the Limits of the Cont'l Shelf [CLCS], *Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Joint Submission Made by France, Ireland, Spain, and the United Kingdom of Great Britain and Northern Ireland in Respect of the Area of the Celtic Sea and the Bay of Biscay on 19 May 2006*, ¶ 2 (Mar. 24, 2009), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/frgbires06/fisu\\_clcs\\_recommendations\\_summary2009.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/fisu_clcs_recommendations_summary2009.pdf); Johnson & Oude Elferink, *supra* note 84, at 179.

121. LOS Convention, *supra* note 1, Annex II, art. 3(1)(a).

122. For discussion of transparency in the CLCS, see, for example, Alex G. Oude Elferink, "Openness" and Article 76 of the Law of the Sea Convention: *The Process Does Not Need to Be Adjusted*, 40 OCEAN DEV. & INT'L L. 36 (2009); Ron Macnab, *The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76*, 35 OCEAN DEV. & INT'L L. 1 (2004); Treves, *supra* note 111, at 367. For discussion of the independence and impartiality of CLCS members, see, for example, McDorman, *supra* note 63, at 311–12; Nelson, *supra* note 74, at 1238–39. The question of effective access to the CLCS, particularly by developing states, relates to the decision to extend the time period for filing submissions and to concerns about the sufficiency of financial and technical assistance available to those states. See *supra* note 109. For a discussion of rule of law criteria related to these concerns, see *supra* note 50.

123. Nelson, *supra* note 74, at 1239.

#### IV. THIRD-PARTY PROCEEDINGS CONCERNING THE OUTER LIMITS OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES FROM BASELINES

The dispute settlement provisions of the Law of the Sea Convention allow some third-party proceedings concerning the outer limits of the continental shelf beyond 200 nautical miles from baselines. Part IV.A analyzes the availability of compulsory international third-party dispute settlement in contentious outer limits cases involving substantive and procedural provisions of the Convention, and Part IV.B notes the possibility of contentious cases brought pursuant to special agreements. Finally, Part IV.C explores the possibility of advisory proceedings.

Some jurisdictional and standing requirements could block the pursuit of cases. However, even if these requirements are satisfied, other concerns remain. These concerns—which go to according proper deference to the Commission on the Limits of the Continental Shelf and the ability of courts and tribunals to learn and assess relevant scientific data—suggest that few cases may be pursued and few judgments rendered in which the detailed requirements of Article 76 are interpreted and applied.

##### *A. Contentious Cases Pursuant to Compulsory Procedures*

The focus now shifts to the availability of international courts or tribunals to hear disputes over the outer limits of the continental shelf under the Law of the Sea Convention's provisions concerning compulsory procedures entailing binding decisions—provisions found in Part XI, in Section 2 of Part XV, and in Annexes of the Convention. Certain interstate cases involving such disputes are available pursuant to the Convention's provisions. However, before analyzing those cases, this Article first notes categories of actors—private parties, the International Seabed Authority (ISA), and the CLCS—that cannot pursue contentious outer limits cases, at least absent (and in some cases even with) an agreement between the actor and a coastal state.<sup>124</sup>

##### 1. Non-amenability of Certain Entities to Compulsory Procedures

First, private parties may not challenge a coastal state's outer limits before an international court or tribunal under any basis for compulsory third-party jurisdiction provided in the Convention.<sup>125</sup> Indeed, it would have been astounding if the negotiators at the Third United Nations Conference on the Law of the Sea had agreed to allow

124. See also *infra* Part IV.B-C.

125. See LOS Convention, *supra* note 1, art. 291(2) (“The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in the Convention.”).

private parties to challenge, in an international court, any recommendation or action concerning coastal state “territorial” limits—a matter going to the core of sovereign prerogatives. Under the Convention itself, individuals may only participate in third-party proceedings in certain cases involving mineral exploration and exploitation in the Area.<sup>126</sup>

Second, the CLCS cannot participate in cases under the compulsory jurisdiction provisions of the Convention.<sup>127</sup> Possible relationships between the dispute settlement provisions of the Convention and the CLCS were discussed at UNCLOS III, but they were not pursued.<sup>128</sup> According to Article 291(2), the CLCS lacks access to the Convention’s dispute settlement forums because the Convention does not “specifically provide” such access for the CLCS.<sup>129</sup> Thus, no court or tribunal could hear a claim that the CLCS brought against a coastal state pursuant to the Convention’s provisions for compulsory procedures.<sup>130</sup> For example, the Commission could not claim in a third-party forum that a coastal state had set its outer limits without submitting sufficient data to the

126. Private parties may appear before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in some cases involving deep seabed mining contracts in the Area. LOS Convention, *supra* note 1, art. 187, Annex VI, art. 37 (providing for jurisdiction of the Seabed Disputes Chamber in several categories of cases involving natural or juridical persons, but only “with respect to activities in the Area”). The Statute of the ITLOS also recognizes that disputes may be submitted pursuant to “agreements,” a term that may encompass agreements to which natural and juridical persons are party. *See id.* Annex. VI, arts. 20(2), 21 (describing access to and jurisdiction of the Tribunal); *infra* note 241. *But see* GARCÍA, *supra* note 8, at 550 (arguing that such agreements must be treaties, thus precluding jurisdiction over natural and juridical persons). If a private party were to be prosecuted in municipal court for violating a coastal state’s continental shelf regulations, and the private party defended by arguing that those limits were illegal, then that court might rule on the legality under international law of the coastal state’s outer limits.

127. *First Report*, *supra* note 86, at 784 (“There is no explicit reference to the CLCS in any provision of the Convention addressing the access to these mechanisms.”). *See also* LOS Convention, *supra* note 1, Annex II, art. 3 (defining the role of the CLCS).

128. *See* 2 LOS CONVENTION COMMENTARY, *supra* note 87, ¶ A.II.2 (“[t]he scope of the powers of the Commission . . . and of the relationship with the proposed dispute settlement procedures under the new Convention, remain to be discussed”); *First Report*, *supra* note 86, at 784 n.49 (“The *travaux préparatoires* of article 76 do not indicate that the relationship between the CLCS procedure and dispute settlement mechanisms was addressed in any detail at UNCLOS III.”); Nelson, *supra* note 74, at 1239 (“Questions regarding . . . the relationship between the Commission with ‘the proposed dispute settlement procedures under the new Convention’ were raised in the Evensen Group but the matter never seems to have gone further.”).

129. *See* L.D.M. Nelson, *Claims to the Continental Shelf Beyond the 200-mile Limit*, in LIBER AMICORUM GÜNTHER JAENICKE – ZUM 85. GEBURTSTAG 573, 579 (Volkmar Götz, Peter Selmer & Rüdiger Wolfrum eds., 1998) (“It is certain however that the Commission has not been granted the power to submit any dispute concerning the outer limit of a coastal State’s continental shelf to any court or tribunal.”); Oude Elferink, *supra* note 86, at 116 (“The compulsory dispute settlement of the LOS Convention are open to States Parties to the Convention. These procedures are only open to other entities as specifically provided for in the Convention. No provision is made for the CLCS in this respect.”).

130. Vicente Marotta Rangel, *Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf*, 21 INT’L J. MARINE & COASTAL L. 347, 361–62 (2006).

Commission. Furthermore, a coastal state could not judicially challenge the CLCS, alleging that CLCS recommendations, on which a coastal state's outer limits are to be based in order to become "final and binding" under Article 76(8), do not comport with the law concerning outer limits.<sup>131</sup>

Third, the Convention does not authorize the International Seabed Authority to challenge the legality of a coastal state's outer limits in a contentious compulsory jurisdiction case.<sup>132</sup> It might have been sensible to provide for this possibility, since an extensive continental shelf reduces the geographical extent of the Area (as previously noted, the "common heritage" of humankind<sup>133</sup>) and correspondingly reduces the scope of the ISA's activities.<sup>134</sup> With such a provision, the ISA could have raised international community concerns about the impact of impermissible outer limits on the Area and the regime for deep seabed mining under Part XI and the 1994 Implementation Agreement.<sup>135</sup> According to the Convention, however, the ISA lacks access to the third-party forums specified in Part XV of the Convention in compulsory jurisdiction cases.<sup>136</sup>

The analysis under Part XI is more complex, since the ISA may participate in limited categories of contentious cases. May the Seabed Disputes Chamber of the ITLOS hear, pursuant to Article 187(b)(i) of the Convention, a case brought by the ISA against a coastal state, alleging a violation of Part XI—perhaps Article 137—because the coastal state had set overly broad outer limits and undertaken exploration or exploitation activities in a portion of what

131. A coastal state that disagrees with a CLCS recommendation is to make a new or revised submission to the Commission. LOS Convention, *supra* note 1, art. 76(8); *supra* note 113 and accompanying text.

132. Nor may the ISA intervene in interstate cases. See LOS Convention, *supra* note 1, Annex VI, art. 31.

133. *Id.* art. 136.

134. See *id.* art. 1 (defining a seabed as an area beyond the limits of coastal state jurisdiction).

135. See, e.g., MAHMOUDI, *supra* note 25, at 77. In 1970 the United States proposed allowing an International Seabed Boundary Review Commission to institute proceedings before the Tribunal of an International Seabed Resources Authority concerning unresolved differences over coastal state outer limits. U.N. Comm. on the Peaceful Uses of the Seabed & the Ocean Floor Beyond the Limits of Nat'l Jurisdiction, Draft United Nations Convention on the International Seabed Area art. 45, U.N. Doc. A/AC.138/25 (1970), 9 I.L.M. 1046, 1060 (Aug. 3, 1970) (prepared by the United States) (submitted to the U.N. General Assembly's Seabed Committee before UNCLOS III convened). See Nelson, *supra* note 74, at 1239 n.12. The issue of community interest in the outer limits of the continental shelf was raised anew in 2009 at the nineteenth Meeting of States Parties to the Law of the Sea Convention. See 2009 Chinese Note, *supra* note 89, ¶¶ 1–2.

136. See LOS Convention, *supra* note 1, art. 291; Cafisch, *supra* note 8, at 324 ("Access to these procedures is limited to States . . . and the question which arises is whether and in what forum the Authority could challenge a continental shelf claim."); Rangel, *supra* note 130, at 360, 362 ("The Authority has no *locus standi* before the settlement disputes rules under LOSC, Part XV.").

the ISA considered to be the Area?<sup>137</sup> Although this possibility has been suggested,<sup>138</sup> significant obstacles exist to such a case. Article 187 restricts the Chamber's jurisdiction in contentious cases to disputes involving so-called "activities in the Area"—a term of art that does not encompass disputes over outer limits.<sup>139</sup> In addition, Article 134, which addresses the scope of Part XI, specifically provides that "[n]othing in this article affects the establishment of the outer limits of the continental shelf in accordance with Part VI," and a binding decision issued by the Chamber would conflict with the Convention's provisions for coastal state establishment of outer limits.<sup>140</sup> As Judge Dolliver Nelson has observed,

the dispute which gives rise to such a cause of action concerns essentially the boundary between a coastal State's outer continental shelf and the international seabed area—a boundary which depends solely on the determination of the outer limits of the continental shelf. This is a matter to be dealt with not by the Authority . . . .<sup>141</sup>

In short, the Seabed Disputes Chamber exercises limited jurisdiction that does not extend to contentious cases relating to outer limits.

Finally, even apart from the Convention's formal limitations with respect to ISA involvement in contentious cases, it is politically unlikely that the states that comprise the ISA would authorize a challenge to a coastal state's outer limits. The ISA Council would have to approve any such authorization by consensus or supermajority vote, and no decision can be approved in the Council if a majority of the members of any one of the Council's four chambers has objected to it.<sup>142</sup>

137. See LOS Convention, *supra* note 1, art. 187(b)(1). Article 137 describes the legal status of the Area and its resources.

138. F.H. Paolillo, *The Institutional Arrangements for the International Seabed and their Impact on the Evolution of International Organizations*, 188 HAGUE RECUEIL DES COURS 139, 191 (1984) (cited in Nelson, *supra* note 129, at 576). See 2 E.D. BROWN, SEA-BED ENERGY AND MINERALS: THE INTERNATIONAL LEGAL REGIME 374 (2001) ("The argument would be that State A, by extending the limits of its continental shelf to include a part of the sea-bed considered by the Authority to form part of the Area, had acted in violation of Part XI."); Boyle, *supra* note 53, at 46 n.23 (arguing that the ISA may have authority to bring proceedings under Article 187(b)(1)); Yozo Yokota, *The Boundary Between Deep Seabed and Continental Shelf, in THE FRONTIER OF THE SEAS: THE PROBLEMS OF DELIMITATION* 36–37 (Ocean Ass'n of Japan ed., 1981) (suggesting how the ISA might bring judicial proceedings challenging coastal state outer limits under the LOS Convention).

139. See *supra* note 24 and accompanying text.

140. LOS Convention, *supra* note 1, art. 134(4).

141. Nelson, *supra* note 129, at 576–77. *Accord, e.g., First Report, supra* note 86, at 785; Cafilisch, *supra* note 8, at 324–25; Karagiannis, *supra* note 87, at 192. For discussion of advisory opinions by the Seabed Disputes Chamber, see *infra* notes 223–36 and accompanying text.

142. It seems likely that the Council, rather than the ISA Assembly, would have to authorize the institution of any judicial proceeding. Article 162(2)(u) explicitly grants the Council a related power with respect to judicial proceedings explicitly mentioned in the Convention, suggesting that it would be the appropriate organ to deal with the institution of any proposed contentious case related to outer limits. See LOS Convention, *supra* note 1, art. 160(2)(n) (Assembly shall decide "which organ of the

## 2. Interstate Cases

Interstate cases related to disputes over the outer limits of the continental shelf fall within the Convention's Part XV provisions governing compulsory procedures entailing binding decisions.<sup>143</sup> Disputes concerning the outer limits of the continental shelf beyond 200 miles from baselines are not among the categories of disputes that the Convention makes subject to limitations or optional exceptions.<sup>144</sup> Statements by some observers that the dispute settlement provisions of the Convention do not apply to outer limits disputes<sup>145</sup> perhaps implicitly reflect the view that outer limits—political boundaries—are a matter of high sensitivity that should not be subject to legal review by courts or tribunals, or, more narrowly, rely on an overly restrictive interpretation of the Convention provision that outer limits set “on the basis of” CLCS recommendations “shall be final and binding.”<sup>146</sup> However, a state might not set its outer limits “on the basis of” a CLCS recommendation, a point that will be addressed further below.<sup>147</sup> In general, according to the International Law Association's Committee on the Outer Limits of the Continental Shelf, “[i]f the outer limits of the continental shelf have not been established in accordance with the substantive and procedural requirements of article 76,” that “issue may be raised by other States Parties under Part XV of the Convention.”<sup>148</sup>

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Authority shall deal with any . . . matter [within the Authority's competence] not specifically entrusted to a particular organ, consistent with the distribution of powers and functions among the organs of the Authority.”). A supermajority vote is required on matters of substance, and a decision to authorize a judicial proceeding would likely be deemed substantive, since it does not concern internal procedures of ISA organs. See 1994 Part XI Implementation Agreement, *supra* note 1, Annex, § 3(2)–(3), (5). Furthermore, any decision to pursue litigation would have financial implications for the Authority, thus requiring a recommendation of the Finance Committee, which must proceed by consensus. See *id.* Annex, §§ 3(7), 9(8).

143. A Part XI interstate contentious case brought to the Seabed Disputes Chamber under Article 187(a) of the Convention (or to a special chamber under Article 188(1)(a)) would have to relate to “activities in the Area,” a restriction that would preclude legal challenges concerning outer limits. See *supra* note 24 and accompanying text; see also *infra* note 231 and accompanying text.

144. See *supra* text accompanying note 21.

145. U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: DEFINITION OF THE CONTINENTAL SHELF ¶ 87, U.N. Sales No. E.93.V.16 (1983); Smith & Taft, *supra* note 74, at 20. See also Karagiannis, *supra* note 87, at 189 (expressing skepticism about the availability of third-party dispute settlement, linked to concerns about *actio popularis*, discussed *infra* notes 182–84 and accompanying text).

146. LOS Convention, *supra* note 1, art. 76(8). For discussion of the meaning of “final and binding,” see *infra* notes 162–63 and accompanying text.

147. LOS Convention, *supra* note 1, art. 76(8).

148. *Second Report*, *supra* note 61, at 233. Most commentators agree. See, e.g., DAVID ANDERSON, MODERN LAW OF THE SEA: SELECTED ESSAYS 391 (2008); 1 BROWN, *supra* note 105, at 31–32; Cafilisch, *supra* note 8, at 324, 341 n.53; Gudmundur Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf*, in LEGAL AND SCIENTIFIC ASPECTS OF THE

The following comments focus on potential interstate cases in which a coastal state has set its outer limits line—cases in which a dispute over outer limits may be ripe or “live”—and those outer limits border on the Area.<sup>149</sup> Any such case will fall into one of four categories, namely those in which the coastal state has: (a) set its outer limits before submitting data to the CLCS; (b) set its outer limits after submitting data but before the CLCS has made its recommendation; (c) set its outer limits after a CLCS recommendation, but has allegedly not set those limits “on the basis of” that CLCS recommendation; and (d) set its outer limits “on the basis of” a CLCS recommendation.<sup>150</sup>

In all of these categories of cases, a central issue would likely be whether a coastal state’s outer limits comply with substantive provisions of the Law of the Sea Convention. In Category (a) cases, the complaining state could also challenge the coastal state’s failure to comply with procedural provisions. Article 76(8) requires that “[i]nformation on the limits of the continental shelf beyond 200 nautical miles” from baselines “shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf.”<sup>151</sup> Thus, a coastal state’s failure to submit data could provide the basis for a legal challenge.<sup>152</sup> A court or tribunal could find that failing to follow this Convention procedure violates the Convention and conclude that the coastal state should make a submission to the CLCS. To date, coastal states have, in practice, overwhelmingly indicated their willingness to submit data to the CLCS, so Category (a) cases may be most unlikely.<sup>153</sup>

In a Category (b) case, a coastal state has submitted data to the CLCS, but the Commission has not yet issued a recommendation. The CLCS process envisions a coastal state: (1) submitting data to the CLCS; (2) waiting for its recommendations; (3) in the event of a disagreement with the CLCS, making a revised or new submission to the CLCS; and (4) eventually setting outer limits “on the basis of” a CLCS recommendation and in conformity with Article 76.<sup>154</sup> Although coastal states setting their outer limits “on the basis of” CLCS recommendations have the advantage that such limits “shall be final and binding,”<sup>155</sup> delays in CLCS consideration of submissions

CONTINENTAL SHELF, *supra* note 69, at 251, 258; McDorman, *supra* note 63, at 317–19; Oude Elferink, *supra* note 86, at 115; Wolfrum, *supra* note 111, at 9–11.

149. *See supra* note 70.

150. LOS Convention, *supra* note 1, art. 76(8).

151. *Id.* *See also id.* Annex II, art. 4 (“Where a state intends to establish . . . the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission.”).

152. McDorman, *supra* note 63, at 320.

153. *See supra* notes 110–11 and accompanying text.

154. LOS Convention, *supra* note 1, art. 76(8).

155. *Id.* The Convention stops short of literally specifying that a coastal state must act “on the basis of” a CLCS recommendation when setting its outer limits. MAHMOUDI, *supra* note 25, at 77. *See also Second Report, supra* note 61, at 232 (arguing that, under the Convention, states cannot establish their outer limits on the

might tempt some states to proclaim outer limits lines before receiving a CLCS recommendation.<sup>156</sup> Analytically, cases in this category appear similar to Category (c) cases—cases in which a coastal state has set its outer limits following receipt of a CLCS recommendation but has allegedly not set those limits “on the basis of” that recommendation. Category (b) cases differ from Category (c) cases simply because in a Category (b) case the CLCS has issued no recommendation, and the coastal state would thus never have grounds to argue that its outer limits were established on the basis of a CLCS recommendation.

In Category (c) cases, a court or tribunal would have to construe the meaning of the phrase “on the basis of” under Article 76. The situations in which these cases would arise may be rare. The CLCS process envisions an eventual accommodation between the coastal state and the CLCS, with the coastal state adapting its submission in light of the views of the CLCS.<sup>157</sup> In line with this process, CLCS recommendations will be based on the submission as adapted, and the coastal state should not vary from the recommendations when it establishes its outer limits.<sup>158</sup> An actual Category (c) case may suggest that this process has broken down or perhaps that political considerations in the coastal state have led it to depart from the CLCS recommendation. (Note, however, that if a CLCS recommendation were to indicate specific outer limits, the phrase “on the basis of” does not suggest that the coastal state necessarily must follow every detail of the recommendation.<sup>159</sup>) One can hypothesize

basis of any information not considered by the CLCS). Annex II, Article 7 of the Convention provides that “[c]oastal States shall establish the outer limits of the continental shelf in conformity with the provisions of Article 76, paragraph 8.” LOS Convention, *supra* note 1, Annex II, art. 7. Article 76(8) of the Convention in turn requires coastal states to submit data to the Commission, provides that “[t]he Commission shall make recommendations to coastal States,” and provides that “[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.” *Id.* art. 76(8). Annex II, Article 8 addresses the requirement that the coastal state make a new or revised submission to the Commission in case it disagrees with the Commission’s recommendations. *Id.* Annex II, art. 8. Although Article 76(8) and Annex II, Articles 7 and 8, when read literally, only obligate coastal states to make submissions to the CLCS, some may infer from these provisions that a coastal state must, in setting its outer limits, act “on the basis of” CLCS recommendations.

156. In addition, states that have made only partial submissions might assert a complete outer limits line. See Oude Elferink, *supra* note 84, at 274.

157. See *supra* note 155.

158. See LOS Convention, *supra* note 1, art. 76(8). (“The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”).

159. During the Ninth Session of UNCLOS III, the words “on the basis of” replaced “taking account of” in drafts of what became Article 76(8). The latter formulation would have left coastal states with more discretion to reject CLCS recommendations. Other UNCLOS III proposals, however, would have created a stronger link between a coastal state’s outer limits determination and the CLCS’s recommendation. For example, some proposals would have required that outer limits be “in accordance with” CLCS recommendations. Other proposals would have required a Continental Shelf Boundary Commission to “certify” or “make decisions” concerning

cases in which a coastal state quite clearly does not act on the basis of a recommendation. A coastal state that establishes its outer limits when the Commission actually recommends that the coastal state submit additional data relevant to those limits could hardly be acting on the basis of a CLCS recommendation.<sup>160</sup> Similarly, a coastal state that claims as part of its continental shelf a formation that the CLCS recommendation describes as an oceanic ridge would not be acting on the basis of that recommendation.<sup>161</sup> In a Category (c) case, however, it is debatable whether a claimant state would prevail merely by showing that the coastal state had established an outer limit other than on the basis of a CLCS recommendation. For a claimant state to establish that an outer limit was not opposable to it, the claimant state should have to show that the outer limit violated the substantive provisions of the Convention.

Indeed, the core issue in any interstate case involving outer limits of the continental shelf is likely to be whether a coastal state's declared outer limits differ from the substantive requirements of the Law of the Sea Convention. This certainly would be true in any Category (d) case, in which the coastal state has established its outer limits "on the basis of" a CLCS recommendation. Since Article 76(8) specifically provides that limits set "on the basis of [CLCS] recommendations shall be final and binding," a court or tribunal in a Category (d) case would have to construe the meaning of "shall be final and binding." The phrase does not mean that limits set on the basis of CLCS recommendations are shielded from judicial review. Rather, the better conclusion is that outer limits

established in accordance with the substantive and procedural requirements of article 76 . . . will be final and binding on the coastal State concerned and other States Parties to the Convention. Outer limits lines that have not been established in accordance with these requirements will not become binding on other States.<sup>162</sup>

Outer limits lines "shall be" final and thus unalterable by the coastal state, once it files required information with the Secretary-General of

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coastal states' outer limits. See 2 LOS CONVENTION COMMENTARY, *supra* note 87, ¶¶ 76.12–15, 76.17, A.II.3, A.II.8 (describing alternate proposals concerning the role of the CLCS in states' outer limits determinations); Clingan, *supra* note 111, at 497 (explaining the significance of requiring states to act "on the basis of" CLCS recommendations); Karagianis, *supra* note 87, at 188–89; Oude Elferink, *supra* note 63, at 280–81 (evaluating different proposals); Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session*, 74 AM. J. INT'L L. 1, 22 (1980) (describing the UNCLOS III negotiations over the wording change).

160. See Oude Elferink, *supra* note 63, at 280 ("If the coastal state would then still proceed to establish the outer limits of its continental shelf, this will not have been done on the basis of the recommendations of the CLCS.").

161. See LOS Convention, *supra* note 1, art. 76(3) ("The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."); *supra* notes 73–74 and accompanying text.

162. *Second Report*, *supra* note 61, at 231.

the United Nations pursuant to Article 76(9) of the Convention; such limits “shall be” binding on third states if they do not object to the legality of the limits within a reasonable time.<sup>163</sup>

Category (d) cases might encompass various types of disputes. Imagine that a CLCS recommendation fails to take a position on the legality of a coastal state’s straight baseline, and the complaining state believes that an illegal straight baseline resulted in an outer limits line that is farther offshore than would be the case if the baseline followed (as it generally must when no straight baseline is permissible) the low water mark of the coastline.<sup>164</sup> This situation might exist because of the 350-mile cut-off that may apply—a cut-off that must apply, in the case of submarine ridges.<sup>165</sup> Or imagine that a complaining state objects to a coastal state’s assertion of any continental shelf off what the objecting state alleges is a rock that “cannot sustain human habitation or economic life of [its] own.”<sup>166</sup> Here, the objection to an outer limit line would be subsidiary to the argument that the coastal state was not entitled to a continental shelf at all. However, if the CLCS recommended outer limits off what the complaining state contends is such a rock, then the coastal state might argue that limits based on those recommendations were “final and binding.”<sup>167</sup> The issue of whether the formation was a rock or an island could thus arise in the context of a dispute related to outer limits.

Perhaps, however, the complaining state simply believes that the CLCS inaccurately interpreted Article 76 in its recommendations, and the coastal state set its outer limits on the basis of those recommendations.<sup>168</sup> Such Category (d) cases involve questions about

163. See *id.* at 232–33 (discussing Article 76(9) procedures for setting permanent limits on the continental shelf and when they can be challenged); Wolfrum, *supra* note 111, at 9–11. *But see* McDorman, *supra* note 63, at 315 (“‘final and binding’ . . . refers only to the submitting state in that the submitting state, having delineated its outer limit of the continental shelf *and that limit not being challenged by other states*, cannot subsequently change the location of its outer limit.”).

164. LOS Convention, *supra* note 1, art. 5.

165. See *id.* art. 76(4)–(5). The CLCS may well not address the legality of straight baselines. See, e.g., Comm’n on the Limits of the Cont’l Shelf [CLCS], *Summary of Recommendations in Regard to the Submission Made by New Zealand 19 April 2006* ¶ 162 (Aug. 22, 2008), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_nzl.htm#Recommendations\\_](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm#Recommendations_) (“The distance criterion constraint line submitted by New Zealand is constructed by arcs at 350 M [nautical miles] distance from the territorial sea baselines included in the Submission. The Commission agrees with the procedure and methods applied by New Zealand in the construction of this constraint line.” (emphasis added)). Note, however, that application of the arc of circles method will mean that there is often no difference between a 350-mile limit drawn from straight baselines and a 350-mile limit drawn from the coastline low water mark.

166. LOS Convention, *supra* note 1, art. 121(3).

167. *Id.* art. 76(8).

168. The CLCS recommendations should conform to Article 76:

The recommendations of the Commission should be formulated in such a way that the coastal State can assess if these recommendations are in

when deference is owed to CLCS interpretations of terms used in Article 76—a point to which this Article returns in Part IV.A.4.

### 3. Standing and the Invocation of State Responsibility in Interstate Cases

Interstate disputes often involve a breach of an international obligation, giving rise to state responsibility.<sup>169</sup> State responsibility issues may be involved in a dispute over a coastal state's failure to comply with the Convention's substantive or procedural requirements concerning the outer limits of the continental shelf beyond 200 nautical miles from baselines. One state responsibility question is which state or states may invoke the responsibility of a breaching state. With respect to the topic of this Article, this question may be phrased in terms of which state would have standing to claim that a coastal state had illegally established an outer limits line by failing to comply with substantive or procedural Convention requirements.<sup>170</sup> This subsection briefly explores this standing issue.

The law of state responsibility addresses, *inter alia*, which entities are owed an obligation and which states may invoke the responsibility of the breaching state. The International Law Commission addressed the invocation of responsibility by a "specially affect[ed]" state in its Articles on State Responsibility.<sup>171</sup> The obligation breached must be owed to "[a] group of States including that [specially affected] State, or the international community as a whole."<sup>172</sup> The specially affected state must be "injured," *i.e.*, "affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."<sup>173</sup>

A specially affected state may invoke the responsibility of a coastal state for establishing outer limits in violation of the Convention's substantive or procedural requirements. If a coastal state has illegally determined the outer limits of its continental shelf, another state could be specially affected in a range of situations. For example, an opposite or adjacent state would be specially affected if a coastal state set outer limits that impinged on the claimant state's

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accordance with article 76. This assures the coastal State that, in acting on the basis of the recommendations of the Commission, it also acts in accordance with article 76.

*Second Report, supra* note 61, at 231.

169. In maritime boundary determination cases between opposite or adjacent states, a dispute may exist absent any allegation of wrongful conduct on the part of a state. *See supra* note 10 (defining "dispute").

170. "Standing" is also sometimes equated to jurisdiction *ratione personae*. MALCOLM N. SHAW, *INTERNATIONAL LAW* 1072 (6th ed. 2008).

171. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 42(b)(i), U.N. Doc. 56/83/Annex (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

172. *Id.*

173. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 42, Commentary ¶ 12, in 2 Y.B. INT'L L. COMMISSION, pt. II, 31, 119 (2001).

continental shelf.<sup>174</sup> A state would also be specially affected if it had suffered harm as a result of its direct interest in exploring or exploiting the resources of a portion of the Area impacted by an excessive outer limit, or in sharing equitably in the benefits obtained from economic activities in that portion of the Area.<sup>175</sup> A flag state might also be specially affected if a coastal state were to arrest one of its vessels for violating the coastal state's continental shelf regulations just inside what the coastal state illegally claims as its outer limits line; in such a case, the arrest, which would violate rules of flag state jurisdiction, could be regarded as proximately resulting from the coastal state's breach of Article 76.<sup>176</sup>

More controversial, however, is the question whether *any* state—even if not specially affected—may assert an interest of the international community in the common heritage of the Area and its resources and could judicially challenge a coastal state's outer limits. The International Law Commission has addressed the basic or secondary rules applicable to this topic in Article 48 of its Articles on State Responsibility, under the heading “Invocation of responsibility by a State other than an injured State.”<sup>177</sup> Other sources present this issue in terms of obligations *erga omnes* and rights of *actio popularis*.<sup>178</sup> According to the Institut de Droit International, an obligation *erga omnes* is

- (a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or
- (2) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so

174. *Second Report*, *supra* note 61, at 246.

175. *See* Wolfrum, *supra* note 111, at 12–13; *First Report*, *supra* note 86, at 783; *Second Report*, *supra* note 61, at 246 (“The existence of this interest in the resources of the Area and these high seas freedoms can be considered to give individual States a legal interest in the definition of the outer limits of the continental shelf.”).

176. *See* LOS Convention, *supra* note 1, arts. 90, 110.

177. Article 48(1) provides:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.

Articles on State Responsibility, *supra* note 171, art. 48(1). Under Article 48(2), the claimant state may claim cessation of the wrongful conduct and reparation “in the interest of the injured State or of the beneficiaries of the obligation breached.” *Id.* art. 48(2).

178. *See, e.g.*, Dinah Shelton, *International Decision*, 96 AM. J. INT'L L. 937, 937 (2002); Nelson, *supra* note 74, at 1251; James R. Crawford, *State Responsibility*, para. 34, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., *supra* note 43.

that a breach of that obligation enables all these States to take action.<sup>179</sup>

The Law of the Sea Convention's deep seabed common heritage regime could be regarded as an obligation *erga omnes*, at least in the sense of the Institut's second definition.<sup>180</sup> Since the focus of a claim would be a coastal state's breach of Article 76, the question is whether the obligation owed to comply with Article 76 could be regarded as an obligation *erga omnes* because of the implications of the location of a coastal state's outer limits line for the common heritage regime. If so, any party to the Law of the Sea Convention, even if not specially affected, could "take action" or invoke the responsibility of the breaching state.<sup>181</sup> The Institut de Droit International regards one consequence of what it defines as an *erga omnes* obligation to be the right of any state to bring a judicial claim—a right of *actio popularis*—if it can satisfy a court's jurisdictional requirements:

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.<sup>182</sup>

However, the doctrine of *actio popularis* has not yet been generally recognized in practice, at least not when a treaty does not specifically authorize its use (and the Law of the Sea Convention contains no such specific authorization).<sup>183</sup> This reluctance perhaps reflects concern that the doctrine could disrupt negotiated settlements between a state in breach of its obligations and directly injured states. Some authorities also have suggested that a court or

179. Institut de Droit International, *Resolution: Obligations Erga Omnes in International Law* art. 1, Aug. 27, 2005, available at [http://www.idi-iil.org/idiE/navig\\_chon2003.html](http://www.idi-iil.org/idiE/navig_chon2003.html) [hereinafter IDI Resolution].

180. See also Crawford, *supra* note 178, para. 34 (distinguishing obligations *erga omnes*, in the sense of obligations owed to the international community as a whole, from obligations owed to all states parties to a treaty).

181. IDI Resolution, *supra* note 171, art. 2; see Articles on State Responsibility, *supra* note 188, art. 48.

182. IDI Resolution, *supra* note 179, art. 3. According to Judge Rüdiger Wolfrum, Article 48(1)(b) of the International Law Commission's Articles on State Responsibility encompasses "the initiation of proceedings for a judicial settlement" and is applicable to disputes over outer limits. Rüdiger Wolfrum, *The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf*, in MARITIME DELIMITATION 19, 30 (Rainer Lagoni & Daniel Vignes eds., 2006). Accord Wolfrum, *supra* note 111, at 14 ("To deny States the possibility of taking action to protect the interests of the international community in the international seabed Area would render this common heritage principle devoid of any meaning.").

183. The doctrine has been accepted rarely in practice, and then only where the underlying treaty explicitly recognized a right of *actio popularis*. See Nelson, *supra* note 74, at 1251 (noting trend in scholarly views towards acceptance of *actio popularis*); Shelton, *supra* note 178, at 937–38 (discussing a 2002 African Commission on Human and People's Rights decision that recognized *actio popularis*).

tribunal should not rule on the legality of a maritime boundary beyond 200 nautical miles from baselines—a decision that would have inevitable implications for all states—if all states (or an international institution reflecting the collective interest) are not before the tribunal.<sup>184</sup> The arbitral tribunal in the Barbados–Trinidad and Tobago maritime delimitation case appropriately disregarded this objection.<sup>185</sup> Taken literally, the suggestion could prevent essential rulings on the legality of outer limits, even in cases brought by specially affected states. Nevertheless, given the uncertainties about how *actio popularis* would be received in practice, it seems most likely that any interstate challenges over the legality of coastal state outer limits would be brought by specially affected states.<sup>186</sup>

#### 4. Judicial Interpretation of CLCS Findings and Scientific Data

Even if jurisdiction, access, and standing objections were surmounted in interstate cases, other concerns would arise if a court were called on to evaluate the legality of particular outer limits.

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184. The Court of Arbitration in the St. Pierre and Miquelon maritime boundary delimitation case in dicta wrote that it was “not competent to carry out a delimitation which affects the rights of a Party which is not before it.” *Delimitation of Maritime Areas (St. Pierre and Miquelon) (Can. v. Fr.)* para. 79, 31 I.L.M. 1145, 1172 (Ct. Arb. 1992). The Court of Arbitration viewed the “Party which is not before it” as the international community:

Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, not ‘between the Parties’ but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed Area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind.

*Id.* para. 78. See Boyle, *supra* note 53, at 46; Karagiannis, *supra* note 87, at 191; Nelson, *supra* note 129, at 574 (calling the dictum “unnecessary”); Oude Elferink, *supra* note 86, at 117–18; *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Judgment of Oct. 8, 2007) para. 319, available at <http://www.icj-cij.org/docket/files/120/14075.pdf> (last visited Sept. 21, 2009) (noting that “in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder”). Compare the techniques used to accommodate the concerns of third states in maritime delimitation cases involving adjacent or opposite states. See generally Alex G. Oude Elferink, *Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?*, in *THE FUTURE OF OCEAN REGIME-BUILDING* 611 (Aldo Chircop, Ted L. McDorman & Susan J. Rolston eds., 2009).

185. *Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barb. v. Trin. & Tobago)*, 27 R. Int’l Arb. Awards 147, para. 368 (Annex VII Arb. 2006), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXVII/147-251.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXVII/147-251.pdf).

186. Such cases could lead to rulings that illegal outer limits were “not opposable” to a successful claimant state. See, e.g., *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (July 25); KAIYAN HOMI KAIKOBAD, *THE INTERNATIONAL COURT OF JUSTICE AND JUDICIAL REVIEW* 72 (2000) (discussing non-opposability in the context of interstate disputes related to actions on the part of international organizations).

These concerns include: (1) the appropriateness of a court reinterpreting scientific data (or considering new data) when the CLCS has already assessed relevant data; (2) the difficulty of learning relevant data; and (3) the competence of legal tribunals to assess such data.

The first concern essentially implicates rule of law values. Respect for the rule of law requires respect for the CLCS process and for the accurate and consistent interpretation of substantive terms used in Article 76. The Law of the Sea Convention not only established relatively determinate criteria for setting outer limits but also created a process for the CLCS to review scientific data and apply Article 76 of the Convention.<sup>187</sup> Some terms, such as "oceanic ridge" and "submarine elevation," are both legal and scientific and may be construed using standard methods of treaty interpretation<sup>188</sup> and in light of changing scientific knowledge.<sup>189</sup> The Convention requires coastal states to follow Article 76, but implicitly does not require that a state's outer limits necessarily reflect the best and most current scientific consensus concerning the meaning of terms, for Article 76(8) recognizes that boundaries set "on the basis of" CLCS recommendations "shall be final and binding."<sup>190</sup>

When, if ever, should a tribunal decision displace CLCS interpretations of Article 76 terms that incorporate scientific meaning? For example, suppose a coastal state has set limits based on a CLCS recommendation incorporating the body's understanding of the term "oceanic ridge" in a particular case.<sup>191</sup> When could a complaining state challenge that understanding in an interstate case? As Alex Oude Elferink and the International Law Association's Committee on Legal Issues of the Continental Shelf have argued, it is appropriate to revisit CLCS determinations only if the CLCS has acted *ultra vires* or committed a "material" error, clearly misinterpreting some legal provision.<sup>192</sup> It is only in such a situation that a judicial challenge should be successful against a coastal state that has set its outer limits "on the basis of" a CLCS recommendation (i.e., in a Category (d) case).<sup>193</sup> Such a challenge would remain an

187. LOS Convention, *supra* note 1, Annex II, art. 3(1)(a).

188. See Vienna Convention on the Law of Treaties, *supra* note 47, arts. 31–33 (providing general rules of interpretation, supplementary means of interpretation, and rules of interpretation of treaties authenticated in two or more languages). For an excellent example of how legal interpretation sheds light on the meaning of "oceanic ridge" and "submarine ridge," see *Second Report*, *supra* note 61, at 219–22.

189. See Nelson, *supra* note 74, at 1243 (arguing that the Commission should "take the evolution of these scientific and technical terms into account" and that the LOS Convention concepts "were *not intended* to be static but by their very nature evolutionary").

190. LOS Convention, *supra* note 1, art. 76(8).

191. See *supra* notes 73–74, 188–89 and accompanying text for a discussion of how the CLCS understands the term "oceanic ridge."

192. Oude Elferink, *supra* note 86, at 121–23; *Second Report*, *supra* note 61, at 248.

193. *Second Report*, *supra* note 61, at 247–48.

interstate case even if the dispute in a sense resulted from the Commission's own inaccurate interpretation of a legal term. If a court found that a CLCS recommendation inaccurately interpreted the law, the coastal state could return to the CLCS, which should consider the court's ruling in making any new recommendations.<sup>194</sup>

Second, in challenging a coastal state's outer limits, it may also be difficult or impossible for a complaining state and, by extension, a court to learn about the data that the CLCS used to make its recommendations and the coastal state relied on to establish its outer limits. The CLCS, sensitive to the need to maintain the confidentiality of information submitted to it, conducts much of its work behind closed doors.<sup>195</sup> A coastal state that did not disclose all the data on which it based its decision to set its outer limits could not force dismissal of a case, but—without full information—it is not clear that a court could fairly evaluate whether an outer limits line complied with Article 76 requirements.<sup>196</sup> “The lack of detailed information on submissions to and recommendations of the CLCS may make it difficult for other States to establish whether the coastal State has in fact established the outer limits of its continental shelf on the basis of the recommendations of the CLCS.”<sup>197</sup> Courts and tribunals operating under the Convention may rely on experts,<sup>198</sup> but these experts may also lack access to all relevant data.

Third, even if a court or tribunal could learn the data necessary to assess whether an outer limits line complied with the requirements of Article 76, it could be difficult for judges, even with the assistance of experts, to fairly evaluate and apply complex scientific data.<sup>199</sup>

194. *Id.* at 248; *First Report*, *supra* note 86, at 788–89.

195. Coastal states are only required to publish an executive summary of their submissions, and the CLCS's evaluation of a coastal state's data is undertaken by a seven-person subcommission whose deliberations are closed except to representatives of the submitting state. The subcommission does, however, publish an executive summary of its recommendations. *Rules of Procedure*, *supra* note 83, Annex III, ¶ 11(3); see The Chairman of the Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission* ¶ 10, Doc. CLCS/36 (May 2, 2003) (proposing an executive summary with a general description and proposed coordinates of an extended continental shelf). Furthermore, some coastal states have indicated that they may share or unilaterally disclose the data justifying their outer limits. See Elizabeth Riddell-Dixon, *Canada and Arctic Politics: The Continental Shelf Extension*, 39 OCEAN DEV. & INT'L L. 343, 351 (2008) (discussing collaboration among Canadian, Danish, and Russian officials as well as officials in Canada, Australia, and New Zealand).

196. See *First Report*, *supra* note 86, at 787 n.63 (discussing the difficulties of incomplete information for courts).

197. *Id.* at 789.

198. LOS Convention, *supra* note 1, art. 289. See also *First Report*, *supra* note 86, at 787.

199. See David A. Colson, *Delimitation of the Outer Continental Shelf Between States with Opposite or Adjacent Coasts*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS, *supra* note 69, at 287, 289 (describing the difficulty facing the International Court of Justice in the Gulf of Maine case between Canada and the United States). Colson explains that:

When faced with the need to consider scientific and technical data, international courts and tribunals disclaim the existence of any formal bar to such consideration if necessary for a legal determination.<sup>200</sup> However, if tribunals have to rule on such difficult technical issues as the sedimentary thickness test of Article 76(4)(a)(i) or the meaning of the "foot of the continental slope" in Article 76(4)(b), they may have to, in the words of the International Court of Justice, "make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data."<sup>201</sup> If a court is to assess the legality of a particular outer limits line, it may not be able to escape the need to interpret scientific data, however, given the traditional judicial function of applying law to facts.

In practice, the difficulties of addressing scientific and technical data may limit formal judicial challenges to coastal states' outer limits. States that contemplate judicial proceedings under the Convention's third-party compulsory dispute settlement provisions will be aware of the aforementioned difficulties, which may retard the bringing of outer limits claims.

Disputes in which the interpretation of complex scientific data is not required may be more amenable to judicial proceedings, although states often find it politically inappropriate to bring any judicial claims against other states. Such cases could include Category (a) claims that a coastal state has set limits without submitting data to the CLCS, in which case the remedy would likely involve a ruling that reinforces the coastal state's procedural obligations under the Convention. Other cases might involve relatively manageable judicial tasks, not requiring consideration of complex technical data, such as challenges related to egregious straight baselines that a coastal state has used for drawing 350-mile cut-off lines.

### B. Contentious Cases Pursuant to Special Agreements

States may enter into special agreements to address specific disputes related to the outer limits of the continental shelf. Article 282 of the Law of the Sea Convention contemplates states entering agreements entailing binding decisions.<sup>202</sup> These agreements may

[I]t appeared obvious to us on the United States team for the U.S.-Canada case that the Court was in no position to decide competing scientific arguments. For one reason, no law said which scientific facts were legally relevant. And, even so, the Court had no capability to choose between opposing scientific presentations. In other words, the Court could not make head-nor-tails out of the competing natural prolongation arguments.

*Id.*

200. *First Report*, *supra* note 86, at 787-88.

201. *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 36 (June 3), *quoted in* Nelson, *supra* note 129, at 588. *See also* Colson, *supra* note 199, at 287, 289.

202. LOS Convention, *supra* note 1, art. 282.

replace the normally applicable third-party dispute settlement provisions of Part XV of the Convention.<sup>203</sup> In practice, however, it seems unlikely that a coastal state would agree to allow an international court to hear an interstate dispute over the location of its outer limits line, which is within its sovereign prerogative to set—subject to its own interpretation of international law. Nevertheless, particular political circumstances might lead states to enter into a special agreement, perhaps in conjunction with the resolution of a disputed boundary they shared.

A coastal state also could, in theory, enter into a special agreement with a non-state entity. Whether the CLCS could enter an agreement with a coastal state providing for an advisory opinion request is doubtful, in light of the limited mandate of the CLCS and its characteristics. The CLCS is a technical body, and the expenses of its members are defrayed by the states that have nominated them<sup>204</sup>; there is no general source of funding to support the Commission's involvement in international litigation.<sup>205</sup> The CLCS is an international expert body or treaty "organ" subject to provisions of the Convention on the Privileges and Immunities of the United Nations.<sup>206</sup> Not every international body has the authority to enter into international agreements.<sup>207</sup> In sum, "it can be questioned whether the participation of the CLCS as a party in proceedings before a court or tribunal would be either desirable or practically feasible in light of its nature and functions."<sup>208</sup>

The possibility of an international agreement between a coastal state and the International Seabed Authority is not similarly limited

203. *Accord id.* Annex VI, art. 22. *See also id.* art. 288(2) (providing for jurisdiction of courts or tribunals "over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement").

204. *Id.* Annex II, art. 2(5).

205. The Secretary-General of the United Nations provides the secretariat for the Commission, *id.*, but CLCS operations are not supported by any general assessment of States Parties to the Law of the Sea Convention or by any monetary contributions from the United Nations. Two trust funds exist, one of which provides assistance to Commission members from developing countries in order to defray the costs they incur in attending Commission meetings, while the second provides assistance, training and advice for developing countries in preparing and submitting information to the Commission. *See* Comm'n on the Limits of the Cont'l Shelf [CLCS], Voluntary Trust Funds (Jan. 13, 2004), [http://www.un.org/Depts/los/clcs\\_new/commission\\_trust\\_funds.htm#55th](http://www.un.org/Depts/los/clcs_new/commission_trust_funds.htm#55th); *supra* note 97.

206. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15. *See Legal Opinion on the Applicability of the Convention on the Privileges and Immunities of the United Nations to the Members of the Commission*, Doc. CLCS/5 (Mar. 11, 1998) (contending that CLCS is a treaty organ and that its members can be considered "experts on mission for the United Nations" as covered by Article VI of the Convention).

207. *See generally* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) (discussing the concept of "international personality").

208. *Second Report, supra* note 61, at 247 n.133; *First Report, supra* note 86, at 784 n.50.

on the grounds that the ISA is a technical body. The Law of the Sea Convention recognizes that the ISA has “international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes,”<sup>209</sup> an explicit recognition that is not accorded to the CLCS. The Convention authorizes ISA involvement in certain contentious cases,<sup>210</sup> suggesting that judicial proceedings involving the ISA are not per se precluded. However, the propriety of the ISA agreeing to participate in a case related to outer limits of the continental shelf must be doubted because the Convention leaves the setting of outer limits to coastal states.<sup>211</sup> Furthermore, it is difficult to envision, as a political matter, either coastal states or the ISA agreeing to submit a “dispute” over outer limits to international adjudication or arbitration via a special agreement.<sup>212</sup>

### C. Advisory Jurisdiction

Advisory proceedings could, in principle, offer some advantages over contentious cases concerning the outer limits of the continental shelf beyond 200 nautical miles from baselines. States and other international actors may, at least in theory, perceive advisory proceedings to be less adversarial and less controversial than contentious cases.<sup>213</sup> Advisory opinion requests also follow negotiation of the precise phrasing of the question that a court or tribunal is to address. Questions could thus present discrete and even complex legal issues that do not require the evaluation and application of scientific data. For this reason, a court or tribunal exercising advisory jurisdiction may be able to avoid the difficulties involving scientific data noted in Part IV.A.4.<sup>214</sup>

Different options should be considered for pursuing advisory opinions relating to the outer limits of the continental shelf beyond 200 miles from baselines. Three potential advisory jurisdiction forums, the latter two of which the Convention explicitly provides for,

209. LOS Convention, *supra* note 1, art. 176. See also Protocol on the Privileges and Immunities of the International Seabed Authority art. 3(1)(c), *opened for signature* Aug. 17, 1998, 2214 U.N.T.S. 133.

210. LOS Convention, *supra* note 1, art. 187.

211. See *supra* notes 94, 140–41 and accompanying text.

212. For discussion of the process of ISA approval of any legal proceeding, see *supra* note 142 and accompanying text.

213. See Julie Calidonio Schmid, Note, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE J. COMP. & INT'L L. 415, 415 (2006) (noting that advisory opinions are “in theory less confrontational than contentious cases because states are not parties and do not have to defend themselves against formal charges”).

214. Questions that relate to entitlement to a continental shelf—for example, questions about whether formations with certain characteristics do or do not meet the requirements of an “island” that can support a continental shelf, or questions about the legality of states having continental shelves off Antarctica—would probably not require consideration of complex scientific data.

are the International Court of Justice, the Seabed Disputes Chamber of the ITLOS, and the full ITLOS.

### 1. Advisory Opinions in the International Court of Justice

The first advisory opinion option is the International Court of Justice. The United Nations Charter and the Court's Statute provide for this option.<sup>215</sup> The General Assembly or Security Council may ask the ICJ to give an advisory opinion "on any legal question."<sup>216</sup> The quoted phrase refers to legal questions under consideration within the United Nations.<sup>217</sup> The Legal Counsel of the United Nations has given legal advice concerning issues facing the Commission on the Limits of the Continental Shelf.<sup>218</sup> The Secretary-General also reports regularly to the General Assembly on law of the sea matters, and the Assembly considers the reports.<sup>219</sup> The General Assembly might take an interest in clarifying legal issues relating to the continental shelf. Since the ICJ has decided numerous law of the sea cases, the General Assembly may well consider it an appropriate forum for an advisory proceeding.<sup>220</sup>

Even when the ICJ has competence to render an advisory opinion, it retains discretion to refuse to do so. However, no reasons appear likely to cause the Court to refuse to render an opinion on legal issues that concern the international community such as those related to the continental shelf and its outer limits.<sup>221</sup> If the question presented in a request for an advisory opinion relates to concerns

215. U.N. Charter art. 96; ICJ Statute, *supra* note 17, art. 65.

216. U.N. Charter art. 96, para. 1. For an overview of the ICJ's advisory jurisdiction, see KAIKOBAD, *supra* note 186, at 51–62 (noting the extensive literature on the topic). Article 96(2) of the Charter, which authorizes other U.N. organs and U.N. specialized agencies, when so authorized by the General Assembly, to request advisory opinions "on legal questions arising within the scope of their activities," is not relevant to questions related to the outer limits of the continental shelf. Neither the Commission on the Limits of the Continental Shelf nor the International Seabed Authority, both of which were created by the Law of the Sea Convention, is a U.N. organ or a U.N. specialized agency.

217. Rosalyn Higgins, *A Comment on the Current Health of Advisory Opinions, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 567, 580 (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996).

218. See, e.g., *Legal Opinion on the Applicability of the Convention on the Privileges and Immunities of the United Nations to the Members of the Commission*, Doc. CLCS/5 (Mar. 11, 1998).

219. See, e.g., The Secretary-General, *Oceans and the Law of the Sea*, delivered to the General Assembly, U.N. Doc. A/64/66 (Mar. 13, 2009), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/64/66&Lang=E>.

220. See Budislav Vukas, *The International Tribunal for the Law of the Sea: Some Features of the New International Judicial Institution*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*, *supra* note 25, at 59, 67 (arguing that the ICJ has "the right to give advisory opinions... on legal questions related to the LOS Convention and the law of the sea in general to all those who are generally entitled to request such opinions from the ICJ").

221. See CHITTHARANJAN F. AMERASINGHE, *JURISDICTION OF INTERNATIONAL TRIBUNALS* 537–42 (2003) (explaining how liberally the ICJ has exercised its discretion to give an advisory opinion, in fact never having refused to give a requested opinion).

facing the international community, the fact that an advisory opinion also may relate to a particular country's continental shelf should not prevent a court from reaching the merits of the question.<sup>222</sup> If states, acting through the General Assembly, could muster the political will to request an ICJ advisory opinion, the resulting opinion, although not legally binding, would widely be regarded as authoritative.

## 2. Advisory Opinions in the Seabed Disputes Chamber

A second possibility is for the Assembly or Council of the International Seabed Authority to ask the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to render an advisory opinion that could help clarify outer limits issues. This possibility is controversial. Article 187 of the Convention, which directly addresses the jurisdiction of the Chamber, specifies that the Chamber "shall have jurisdiction under this Part [XI] . . . in disputes with respect to activities in the Area," i.e., with respect to "all activities of exploration for, and exploitation of, the resources of the Area."<sup>223</sup> Does this jurisdictional provision restrict the scope of available advisory proceedings, which are provided for elsewhere in Part XI? Article 187 addresses jurisdiction with respect to disputes.<sup>224</sup> No article in the Convention explicitly addresses the Chamber's advisory jurisdiction by using the word "jurisdiction," but the Convention certainly envisages advisory proceedings.<sup>225</sup>

As noted in Part II of this Article, the Assembly or Council of the ISA may request an advisory opinion to consider "legal questions arising within the scope of their activities," and the Seabed Disputes Chamber "shall give" such opinions.<sup>226</sup> If the Chamber "shall give" an advisory opinion, the Chamber must have competence for that purpose. Furthermore, the ISA Assembly may request that the Chamber give an advisory opinion "on the conformity with th[e] [Law of the Sea] Convention of a proposal before the Assembly on *any matter*."<sup>227</sup> Article 187 itself, which addresses jurisdiction in cases

222. Cf. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16) (advisory opinion involving right to self-determination despite Spain's argument that the matter involved a bilateral dispute).

223. LOS Convention, *supra* note 1, arts. 187, 1(3).

224. *Id.* art. 187.

225. Louis B. Sohn, *Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber*, in OCEANS POLICY: NEW INSTITUTIONS, CHALLENGES AND OPPORTUNITIES 61, 66-68 (Myron Nordquist & John Norton Moore eds., 1999).

226. LOS Convention, *supra* note 1, art. 191.

227. *Id.* art. 159(10) (emphasis added). For background, see Sohn, *supra* note 225, at 62-68 (explaining how the advisory opinion provision was developed); Tullio Treves, *Advisory Opinions Under the Law of the Sea Convention*, in CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, *supra* note 99, at 81, 83-91 (providing general background on advisory proceedings before the Seabed Disputes Chamber of the International Law of the Sea Tribunal). See also LOS Convention, *supra* note 1, Annex VI, arts. 1, 14, 40; ITLOS Rules, *supra* note 27, arts. 130-137.

involving disputes and then proceeds to list categories of contentious cases, does not limit the scope of advisory proceedings.<sup>228</sup>

However, the range of issues that the ISA may legitimately address is indeed limited.<sup>229</sup> This fact will affect how the Seabed Disputes Chamber treats any request for advisory proceedings relating to the outer limits of the continental shelf. Although the phrases used to address the advisory jurisdiction of the Seabed Disputes Chamber—"legal questions arising within the scope of their [the ISA Council and Assembly] activities" (Article 191) and "the conformity with this Convention of a proposal before the Assembly on any matter" (Article 159(10))—suggest a broader range of issues than does "activities in the Area" (Article 187), that range is still limited.<sup>230</sup> The enumerated powers of both the Assembly and Council are usually explicitly linked to "activities in the Area" and do not include matters related to establishing the outer limits of the continental shelf, which form the boundary of the Area.<sup>231</sup> For these reasons, the ISA Assembly and Council could well refuse to seek an advisory opinion. Furthermore, although the duty of the Seabed Disputes Chamber to give advisory opinions "is absolute," that duty "does not prevent the Chamber from giving as its opinion that the question asked is not a legal question arising within the scope of the activities of the requesting organ."<sup>232</sup> Some commentators reject the possibility of the Seabed Disputes Chamber rendering an advisory opinion that would appear to have implications for the location of the outer limits of the continental shelf.<sup>233</sup>

Still, much may depend on the characterization of an issue. Is the issue that is the subject of the request for an advisory opinion

228. Yokota, *supra* note 138, at 37.

229. Thomas A. Mensah, *The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*, *supra* note 20, at 21, 27–28.

230. LOS Convention, *supra* note 1, arts. 159(10), 187, 191; Joseph Akl, *The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*, *supra* note 20, at 75, 84–86.

231. See LOS Convention, *supra* note 1, arts. 134(4), 157(2), 160, 162 (setting out the powers and function of both the Assembly and Council and noting (Article 134(4)) that "[n]othing in this article affects the establishment of the outer limits of the continental shelf in accordance with Part VI"); 1994 Part XI Implementation Agreement, *supra* note 1, Annex, § 1(1) ("The powers and functions of the Authority shall be those expressly conferred upon it by the Convention" plus "such incidental powers, consistent with the Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area."); *supra* notes 139–41 and accompanying text. However, not every Convention provision relating to the Authority's powers is explicitly linked to "activities in the Area." See, e.g., LOS Convention, *supra* note 1, art. 143(2) (providing that the Authority may "carry out scientific research concerning the Area").

232. 6 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 191.7(a) (Satya N. Nandan et al. eds., 2002).

233. See Nelson, *supra* note 129, at 577 ("If this line of reasoning is correct, the Seabed Disputes Chamber will not be able to give an advisory opinion on such delimitation issues."); Wolfrum, *supra* note 182, at 28–29.

primarily about outer limits or really about ISA activities?<sup>234</sup> If the latter, should the ISA be disabled from obtaining advice that would help it fulfill its functions? The ISA may legitimately need to know, for example, whether its efforts to promote marine scientific research in the Area could provisionally apply (pending a coastal state's establishing legal outer limits) to certain regions.<sup>235</sup> Although the Chamber should not give advice about the precise location of outer limits lines, its response to, for example, the legal characterization of a particular seabed formation might help the ISA in conducting its activities.<sup>236</sup> The fact that any advisory opinion would be nonbinding—for the ISA as well as for states—suggests a lack of any true interference with the Convention's mechanisms for establishing outer limits.

### 3. Advisory Opinions in the International Tribunal for the Law of the Sea Pursuant to International Agreements

Third, as an alternative to a special agreement leading to a contentious case, an advisory opinion might be sought from the ITLOS pursuant to an international agreement “related to the purposes of the Convention” to which a coastal state is a party.<sup>237</sup>

234. See Eiriksson, *supra* note 148, at 259. Eiriksson explains that:

[t]he key jurisdictional element is that the request must relate to the scope of the activities of the Assembly or Council. . . . [H]ere we would not be at the stage of actual or potential ‘activities in the Area’, a term with a specific and defined meaning, but rather at a more general stage, and what could be more relevant to activities of the organs of the Authority than disputes pertaining to their potential geographical scope?

*Id.* For a good discussion of the importance of characterization in the law of the sea context, see Boyle, *supra* note 53, at 44–46.

235. The example relates to an issue area in which the ISA does have a grant of authority, but which does not explicitly relate to “activities in the Area.” According to article 143(2) of the Convention:

The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall coordinate and disseminate the results of such research and analysis when available.

LOS Convention, *supra* note 1, art. 143(2). *But see also* 1994 Part XI Implementation Agreement, *supra* note 1, Annex, § 1(5(h)) (mandating that “[b]etween the entry into force of the Convention and the approval of the first plan of work for exploitation,” the Authority’s focus will be “[p]romotion and encouragement of the conduct of marine scientific research *with respect to activities in the Area*” (emphasis added)).

236. Because of the complexity of the issue of ridges, the CLCS will examine the issue “on a case-by-case basis.” *Scientific and Technical Guidelines*, *supra* note 74, ¶ 7.2.11. Under this approach, a request for an advisory opinion seeking a general, abstract rule relating to such formations would not be appropriate.

237. ITLOS Rules, *supra* note 27, art. 138(1) (“The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a

This avenue is unusual, for the advisory jurisdiction of international courts typically depends on requests from an international organization.<sup>238</sup> Consistent with Article 291(2) of the Convention, international organizations and other “entities” may have access to the ITLOS in cases “submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”<sup>239</sup> The jurisdiction of the ITLOS in turn “comprises all disputes and all applications submitted to it in accordance with this Convention and all matters”—a word with broader meaning than “disputes”—“specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”<sup>240</sup> Both the ITLOS Statute, quoted above, and ITLOS Rule 138, which authorizes advisory opinion requests pursuant to international agreements, encompass agreements between states and international organizations as well as interstate agreements.<sup>241</sup>

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request for such an opinion.”). See Sohn, *supra* note 225, at 68-69; Treves, *supra* note 227, at 91–92.

238. Schmid, *supra* note 213, at 415.

239. LOS Convention, *supra* note 1, Annex VI, art. 20(2). According to Judge Rüdiger Wolfrum of the ITLOS,

[t]he term “entities” is quite broad. It includes States which are not parties to the Convention, entities listed in art. 305 of the Convention which have not become parties to the Convention, international intergovernmental organizations in addition to those referred to in art. 305, subpara. 1(f) and Annex I, the Authority, including the Enterprise and its organs given they have separate juridical personality, as well as natural or juridical persons.

Rüdiger Wolfrum, *The Legislative History of Articles 20 and 21 of the Statute of the International Tribunal for the Law of the Sea*, 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT [RABELSZ.] 342, 345 (1999) (F.R.G.).

240. LOS Convention, *supra* note 1, Annex VI, art. 21. According to ITLOS Rule 138, a “body” “authorized by or in accordance with the agreement to make the request to the Tribunal” must request an advisory opinion, but this entity may include a state. ITLOS Rules, *supra* note 27, art. 138. See THE RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: A COMMENTARY 394 (P. Chandrasekhara Rao & Ph. Gautier eds., 2006) [hereinafter ITLOS RULES COMMENTARY]. The *Commentary* explains that:

As to the meaning of the expression ‘body’, it appears that any organ, entity, institution, organization or State that is indicated in such an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a ‘body’ within the meaning of article 138, paragraph 2, of the Rules.

*Id.* But see Treves, *supra* note 227, at 92 (suggesting that the Rule 138(2) requirement that a request be made by “a body” conforms to “the basic concept that advisory opinions are an instrument at the disposal of international organizations (although the word ‘body’ suggests a rather broad approach to this concept) and not of States”).

241. See ITLOS RULES COMMENTARY, *supra* note 240, at 267 (“[A]greements between . . . States and international organizations. . . would indeed be considered ‘international agreements’ for the purposes of article 138 of the Rules.”); EIRIKSSON, *supra* note 25, at 115. Rule 138 of the ITLOS Rules should be read in light of Article 288(2) of the Law of the Sea Convention (which refers to jurisdiction based on “international agreement[s] related to the purposes of this Convention”) and Articles 20 and 21 of Annex VI. As noted in the text above, Article 21 even more broadly allows

As previously noted, this “international agreement” mechanism for advisory jurisdiction applies to “matters specifically provided for in the agreement,” and Rule 138(1) emphasizes that the agreement must “relate to the purposes of the Convention.”<sup>242</sup> On their face, these phrases could encompass jurisdiction with respect to an instrument whereby the parties simply agreed to ask for advice about provisions of the Law of the Sea Convention. Some authorities suggest, however, that it may not be possible to raise questions relating only to the Convention via this “international agreement” mechanism; the mechanism was developed pursuant to Article 288(2) of the Convention, which contemplated new substantive agreements related to the law of the sea, not agreements that merely reiterated or referred to Convention provisions.<sup>243</sup> Suppose, however, that two adjacent coastal states agreed to conduct joint mineral exploration on their continental shelves out to a proposed outer limits line. If these states entered an interstate agreement providing for an advisory opinion request about an issue relevant to the legality of that line, that request could well concern “matters specifically provided for in the agreement” that “relate to the purposes of the Convention,” thus providing a basis for an advisory opinion.<sup>244</sup> Former Judge Gudmundur Eiriksson has offered another scenario, suggesting

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jurisdiction of the ITLOS pursuant to “agreements,” a term that could encompass private party agreements or mixed, state-private party agreements. Whether these Articles should be read so broadly has provoked controversy. Some commentators have argued that Article 288 of the Convention limits jurisdiction to matters relating to the Convention or “international agreements.” See, e.g., GARCÍA, *supra* note 8, at 550. However, it is also plausible that the specific provision of Annex VI, Article 21, should apply instead of Article 288, because Article 288 had to be phrased restrictively to accommodate the more limited jurisdiction of the International Court of Justice. See ICJ Statute, *supra* note 17, art. 35 (only states may be parties in contentious cases before the Court); Sohn, *supra* note 225, at 69 (“All international corporations that have fought for such access for many years should find these provisions very useful.”) Wolfrum, *supra* note 239, at 346. See also 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ A.VI.117, A.VI.124 (Shabtai Rosenne & Louis B. Sohn eds., 1989) [hereinafter 5 LOS CONVENTION COMMENTARY]; Jürgen Basedow, *The Law Applicable to the Substance of Private Litigation before the International Tribunal for the Law of the Sea*, 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT [RABELSZ.] 361, 362 (1999) (F.R.G.) (explaining that the limitation under Article 288 probably would not exclude the disputes of private parties relating to maritime commerce.); Boyle, *supra* note 53, at 47–50, 52–54; Tullio Treves, *Private Maritime Law Litigation and the International Tribunal for the Law of the Sea*, 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT [RABELSZ.] 350, 352–56 (1999) (F.R.G.). Whether a coastal state would ever enter into an agreement with a private party related to outer limits is, however, highly unlikely. In any event, to accommodate such a possibility the ITLOS would have to revise Rule 138 to allow advisory opinion requests pursuant to “agreements” rather than “international agreements.”

242. ITLOS Rules, *supra* note 27, art. 138(1).

243. See 5 LOS CONVENTION COMMENTARY, *supra* note 241, ¶ A.VI.115; *First Report*, *supra* note 86, at 784.

244. Cf. *Southern Bluefin Tuna Case* (Austl. & N.Z. v. Japan), 39 I.L.M. 1359, 1387 (Annex VII Arb. 2000) (supporting the proposition that a dispute may arise under both the Law of the Sea Convention and other agreements related to particular aspects of the law of the sea).

coastal states might enter an interstate agreement to “seek clarification in order to more effectively make their claims” where a number of outer limits are affected by provisions on submarine ridges.<sup>245</sup> Some states have cooperated by making joint submissions to the CLCS, and their cooperation could extend to seeking clarification of disputed legal points via an international agreement.<sup>246</sup> A decision of the ITLOS to render advice pursuant to such a request would provide a valuable service to the parties.

As noted in Part IV.B, the functions of the CLCS probably preclude its entering into an agreement with a coastal state.<sup>247</sup> This limitation eliminates the possibility of an advisory opinion—one source of authoritative legal advice for the CLCS. For example, if the CLCS refused to accept a coastal state’s assertion about an application of Article 76, and the coastal state still regarded its claim as legally supportable but did not want to risk setting limits that contravened a CLCS recommendation,<sup>248</sup> then a state–CLCS agreement authorizing an advisory opinion could lead to principled advice enabling the CLCS or the coastal state to modify its position.<sup>249</sup> An agreement providing for a request for an advisory proceeding in such a situation could clarify points of contention and would fit with the view that the CLCS is not an adversarial body.<sup>250</sup> From this perspective, it is unfortunate that CLCS–state agreements to seek advisory opinions are most likely not available.

The concerns noted in Part IV.B about the ISA and special agreements also apply in the context of international agreements with the ISA concerning advisory opinions.<sup>251</sup>

Among the options for advisory opinions relating to outer limits, the most attractive may be that provided in the United Nations Charter allowing requests by the General Assembly for advisory opinions from the ICJ. Any advisory opinion requests submitted to the Seabed Disputes Chamber from the Assembly or Council of the ISA would have to acknowledge limits on the powers of those organs. Such requests would have to take account of the fact that outer limits determinations rest with coastal states following their submission of

245. See Eiriksson, *supra* note 148, at 260.

246. See Submissions, *supra* note 108.

247. See *supra* notes 204–08 and accompanying text. In addition, an agreement between the CLCS and a coastal state would probably concern an interpretation only of the Law of the Sea Convention. As just noted, this fact could also preclude an advisory opinion.

248. The outer limits would then not be “final and binding” under Article 76(8) and would “not be opposable to other States.” *Second Report, supra* note 61, at 242.

249. Although in theory the resubmissions to the CLCS will eventually lead to a consensus between the coastal state and the CLCS, an agreement authorizing an advisory opinion and the resulting advice could further the prospect of an accommodation.

250. Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done about It)*, 42 TEX. INT’L L.J. 241, 275 (2007).

251. See *supra* notes 211–12 and accompanying text.

data to the CLCS.<sup>252</sup> Advisory opinion requests to the ITLOS based on an international agreement between states would probably have to relate to the particular substantive matter that is the subject of the agreement rather than solely to the Convention.

## V. CONCLUSION

Both the Commission on the Limits of the Continental Shelf and coastal states have legal responsibilities with respect to the outer limits of the continental shelf beyond 200 nautical miles from baselines. The CLCS, although a technical body, is charged with making its recommendations concerning outer limits "in accordance with article 76" of the Law of the Sea Convention.<sup>253</sup> Coastal states operating under the Convention are bound to comply with the Convention's provisions relating to outer limits. These legal responsibilities encourage us to ask what mechanisms are available to help promote compliance with the Convention. The fact that legal questions relating to outer limits involve some ambiguities also leads us to consider what mechanisms can promote accurate and consistent interpretations of those questions.<sup>254</sup>

Third-party dispute settlement provides only limited possibilities for promoting the reliability and legal accuracy of determinations concerning the outer limits of the continental shelf. Plausible alternatives include advisory proceedings in the ICJ pursuant to requests from the General Assembly and in the ITLOS pursuant to interstate treaties.<sup>255</sup> Advisory proceedings are attractive in part because the questions posed could highlight discrete legal issues and avoid the difficulties that international courts or tribunals may face in evaluating complex scientific data. (An international court or tribunal might also face such discrete legal questions in a contentious interstate case.) No formal rule precludes states from presenting technical questions about particular outer limits, although a court or tribunal may find it difficult to obtain or evaluate scientific data important to addressing those technical questions.<sup>256</sup> In sum, third-party forums might occasionally address legal questions about outer limits.

Yet, despite the considerable increase in the number of international judicial and arbitral decisions in recent years, international courts and tribunals appear unlikely to become

252. LOS Convention, *supra* note 1, art. 76(8), Annex II, art. 7.

253. *Id.* Annex II, art. 3(1)(a).

254. In this symposium on the Arctic, it is worth emphasizing that, with respect to the outer limits of the continental shelf beyond 200 nautical miles from baselines, the Arctic is not a *sui generis* legal regime. Law of the Sea Convention rules and procedures involving the CLCS and third-party dispute settlement bodies apply fully with respect to issues concerning the Arctic.

255. *See supra* Part IV.C.

256. *See supra* Part IV.A.4.

significant vehicles for promoting rule of law values with respect to the outer limits of the continental shelf beyond 200 nautical miles from baselines. First, political and other practical obstacles (e.g., cost) will make international cases or advisory proceedings irregular phenomena, even if they should be considered useful in principle.<sup>257</sup> Second, the most logical candidate to challenge legally questionable coastal state outer limits lines that border on the Area—the International Seabed Authority—is precluded from pursuing contentious cases under the Law of the Sea Convention’s provisions for compulsory procedures, and the ISA Assembly or Council probably could not obtain advice on outer limits questions via requests for advisory opinions.<sup>258</sup> Third, the Convention’s provisions for compulsory procedures entailing binding decisions do not authorize a role for the CLCS in any third-party proceeding.<sup>259</sup> The limited mandate of the CLCS suggests that it cannot enter international agreements to seek binding decisions or advisory opinions.<sup>260</sup> Fourth, and more generally, respect for the legal limitations on the jurisdiction of international tribunals and the access of entities to those tribunals (a rule of law concern<sup>261</sup>), along with appropriate deference to the functions of the CLCS, may preclude many cases.

Whether coastal states accurately apply the Law of the Sea Convention with respect to outer limits beyond 200 nautical miles from baselines will depend in large measure on factors other than actual third-party proceedings. The possibility of international tribunal challenges may indirectly promote the reliability and accuracy of coastal state determinations of outer limits, because even the theoretical threat of legal proceedings can deter states from taking actions that clearly contravene the Convention. It seems more likely, however, that coastal state compliance with legal requirements will also depend on diplomatic reactions from other states<sup>262</sup> and state officials internalizing the attitude that legal conduct respecting outer limits requires compliance with the procedural and substantive requirements of the Convention. One encouraging sign is that states

257. See *supra* Part IV.A, C.

258. See *supra* notes 132–42, 211–12, 251 and accompanying text.

259. See *supra* Part IV.A.1.

260. Because the CLCS must “make recommendations in accordance with article 76” of the Law of the Sea Convention, this technical body operates within the framework of international law. LOS Convention, *supra* note 1, Annex II, art. 3(1)(a). This connection to the law raises the question of whether the Commission should operate in accordance with rule of law values. (Some of the values often associated with the “rule of law” are not exclusive to legal institutions. For example, we expect even “scientific” institutions to act consistently and independently, free from political influence.) A full exploration of this question is beyond the scope of this Article, which focuses on third-party dispute settlement. Suggestions for promoting such values at the Commission deserve careful study. See also *supra* notes 50, 121–22 and accompanying text.

261. See *supra* notes 54–56 and accompanying text.

262. See McDorman, *supra* note 63, at 309–10.

have, to date, expressed their willingness to use the Convention's CLCS process.