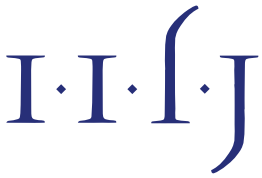

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ACCOUNTABILITY AND THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF: DECIDING WHO OWNS THE OCEAN FLOOR

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Abstract

States have long vied to control the resources found in the ocean floor. Under the United Nations Convention on the Law of the Sea (UNCLOS), coastal states have jurisdiction over the 200 nautical miles of continental shelf adjacent to their coastlines. UNCLOS article 76, however, gives certain countries "extended claims" to up to 350 nautical miles. These claims are reviewed by the Commission on the Limits of the Continental Shelf (CLCS), a panel of 20 scientific experts that can accept, modify or reject claims. This article asks whether, in making these determinations, the CLCS is held sufficiently accountable to the states in whose interest it is supposed to act. In responding no, the article analyzes the Commission's mandate and power, and presents several reasons why it should be held accountable to UNCLOS Parties. It then explores accountability gaps in CLCS procedures and proposes a number of reforms to fill those gaps.

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Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor

Introduction

On August 2, 2007, two small Russian submarines descended almost two miles below the surface of the Arctic Ocean and triumphantly planted a titanium Russian flag on the sea floor.[1] Most people would have considered it an odd, inconsequential move, if they noticed it at all. In the midst of wars, economic collapse, and countless celebrity meltdowns, a country's decision to stick a metal flag at the bottom of an ocean that most people will never see, let alone explore at its deepest depths, hardly seems important. But to many countries, including the United States and Canada, it was a major power play: an attempt by Russia to declare to the world that a huge swath of the Arctic seabed—and the resources found there, including potentially vast oil and mineral deposits—belonged to it.[2] Unfortunately for Russia, the world did not agree.[3] Unlike land grabs in the 15th or 16th century, claiming rights to the ocean floor is not as easy as getting there first. Under the United Nations Convention on the Law of the Sea (UNCLOS)—the international agreement carving up jurisdiction over the ocean and the seabed—while some portion of the Arctic floor might belong to Russia, figuring out exactly what portion that is will be a lot more complicated than planting a flag.[4]

In declaring its sovereignty over the Arctic, Russia was attempting to stake out rights in the continental shelf. The term "continental shelf" is a legal phrase that refers to what scientists call the continental margin—the portion of the sea floor that extends out from the continents and then drops down to connect with the deep seabed.[5] It consists of the shelf, which is directly adjacent to the coast and slopes down gently until about 130 meters; the slope, which comes next and is steeper, dropping down sharply to about 1,200 to 3,500 meters; and the rise, where the margin gradually merges with the deep seabed.[6] Together, these areas cover about one-fifth of the ocean floor.[7] The continental shelf is rich in natural resources. It has extensive oil and gas reserves—it is estimated that up to seventy percent of the world's undiscovered reserves lie offshore[8]—and huge deposits of heavy minerals such as tin, titanium, chromium and zirconium. The shelf also has significant concentrations of other minerals, such as diamonds, lead, zinc,

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[1] C.J. Chivers, *Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. TIMES, August 3, 2007, at A8.
[2] *See id*. (describing interest of Canada, Denmark, Norway, Russia, and United States in claims to Arctic seabed).
[3] *See id*. (quoting Canadian foreign minister, Peter Kay, as saying "You can't go around the world and just plant flags and say, 'We're claiming this territory.'"); Christian Wienberg, *Denmark Class Russia's Flag Planting at North Pole a 'Joke'*, BLOOMBERG.COM, http://www.bloomberg.com/apps/news?pid=20601082&sid=anLcS7RZgqk4&refer=canada (Aug. 15, 2007) (quoting Danish Minister of Science and Technology, Helge Sander, as saying "I see the Russian summer stunt as a joke.").
[4] United Nations Convention on the Law of the Sea, Dec. 10, 1982, *in force* Nov. 16, 1994, 1833 U.N.T.S. 3, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].
[5] R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 141 (1999).
[6] *Id*.
[7] *Id*.
[8] *Id.*

gold, silver, and copper,[9] and is packed with sedentary species such as oysters, clams, lobsters and crabs.[10]

Given its riches, states have long been interested in who holds the rights to explore and exploit the resources of the continental shelf.[11] With UNCLOS, which sets out a comprehensive legal framework for the world's oceans, they finally reached agreement on how to parcel out possession.[12] Article 76 of UNCLOS states that all coastal states—the countries that sit at the edge of the continents—have jurisdiction and control over up to 200 nautical miles of the continental shelf.[13] Recognizing that the continental shelf is actually just the underwater extension of these nations' above-water land territory—over which they have complete sovereign rights—this provision gives coastal states authority to decide who exploits shelf resources and how they go about doing so.[14] UNCLOS deems areas outside of coastal-state control part of the deep seabed; all states have equal and non-exclusive rights to this area, and access is controlled by an intergovernmental agency known as the International Seabed Authority (ISA).[15]

For many coastal states, 200 nautical miles of the seabed more than encompasses their entire continental margin.[16] For others, including Russia, it falls short—the margin physically extends past the 200-mile point.[17] Article 76 permits these states to extend their jurisdiction to up to 350 nautical miles of the ocean floor.[18] In order to do so, however, they must establish the limits of their claim through a complex formula laid out in article 76.[19] This formula requires extensive scientific testing and measurements to delineate a set of precise boundaries that mark the edges of the claiming state's exclusive seabed rights.[20] Before states can declare these boundaries final, they must have them verified by an expert body set up under article 76—the Commission on the Limits of the Continental Shelf (the "CLCS" or the "Commission").[21] The CLCS is composed of independent technical and scientific experts responsible for reviewing each extended shelf claim and ensuring that it adheres to the article 76 formula.[22] The Commission can agree with the limits the country has proposed or reject them, in which case the country must rework its evidence and resubmit its claim.[23] Only when the CLCS has given its stamp-of-approval can the country set final and binding boundaries.[24]

In 2001, Russia became the very first coastal state to submit a claim to the CLCS, in which it asserted extensive rights to portions of the Arctic Circle.[25] Considering that it involved

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[9] *Id*. at 141–42.
[10] *Id*. at 142.
[11] *Id*.
[12] *See* UNCLOS, *supra* note 4.
[13] *Id*. at art 76(1).
[14] CHURCHILL & LOWE, *supra* note 5, at 147–48.
[15] *See* UNCLOS, *supra* note 4, at Part XI.
[16] CHURCHILL & LOWE, *supra* note 5, at 148.
[17] *Id*.
[18] UNCLOS, *supra* note 4, at art. 76(6).
[19] *See id*. at art. 76(4)–(7).
[20] *See id*.
[21] *Id*. at art. 76(8).
[22] *Id*. at Annex II, art. 2–3. The CLCS consists of twenty-one experts, nominated by individual states but elected by all Parties, who serve renewable five-year terms. *Id.* at Annex II, art. 2(1), (4). Nominating states are responsible for covering the costs of their Commissioner's participation in the CLCS. *Id.* at Annex II, art. 2(5).
[23] *Id*. at Annex II, art. 8.
[24] *Id*. at art 76(8).
[25] David Malakoff, *Nations Look for an Edge in Claiming Continental Shelves*, 298 SCIENCE 1877, 1878 (2002).

the application of an obscure legal provision by an even more obscure international body, the Russian claim garnered a lot of international attention.[26] Countries like the U.S., Canada, and Norway, who also have potential Arctic claims, were incensed by what they saw as Russian overreaching.[27] The rest of the world waited to see how the CLCS process—and thus the delineation of rights to seabed resources—would play out. In 2002, the CLCS issued its recommendations, rejecting large portions of Russia's claim, including its Arctic limits.[28] Setback but undefeated, Russia returned to the drawing board, while its Arctic rivals cheered. Russia is expected to submit a new claim to the CLCS soon.[29] In the meantime, it is planting flags in order to remind the world that it still believes it has extensive Arctic rights and that it intends to claim them.[30] As the Arctic drama unfolds, the CLCS is moving forward. Countries or groups of countries have subsequently made fifty submissions.[31] The Commission has issued recommendations on eight claims, including fully approving Australia and New Zealand's submissions in the spring of 2008, and giving the countries jurisdiction over, respectively, an additional 2.5 and 1.7 million square kilometers of seabed.[32] While for most countries the official deadline to submit claims was May 14, 2009, the Commission is likely to receive several more submissions over the next several years.[33] As the early contenders have shown, the stakes are high. [34] The race to carve up the seabed has officially begun.

The Russian experience and the CLCS's ever-increasing workload show that article 76, while obscure, is not a meaningless bit of international law that states created only to ignore. As it determines who owns huge portions of the ocean's riches, many countries are interested and invested in the results of the article 76 delineation process—and in the international body that oversees it. Until now, however, the CLCS has carried out most of its work in secret—reviewing claims and drafting recommendations in closed meetings, and restricting access to complete

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[26] *See id*. at 1878 (describing reaction of U.S. and other countries to Russian submission).

[27] *See* UN Div. for Ocean Affairs and the Law of the Sea, Comm'n on the Limits of the Continental Shelf, *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baseline: Submissions to the Comm'n: Submission by the Russian Federation* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last visited May 16, 2009) [hereinafter *Russian Sumbission*] (providing information regarding Russia's submission and response comments from five nations).

[28] *See*Malakoff, *supra* note 25, at 1878.

[29] *See Drawing Lines in Melting Ice*, THE ECONOMIST, Aug. 16, 2003(stating Russia's deadline to make a claim is 2009).

[30] *See* Chivers, *supra* note 1.

[31] *See* UN Div. for Ocean Affairs and the Law of the Sea, *Submissions, through the Sec'y-Gen. of the United Nations, to the Comm'n on the Limits of the Continental Shelf, Pursuant to Art. 76, Para.8 of the United Nations Convention on the Law of the Sea of 10 Dec. 1982* , http://www.un.org/Depts/los/clcs_new/commission_submissions.htm [hereinafter *CLCS Submissions*] (last visited May 16, 2009) (listing all claims submitted to the CLCS as of May 16, 2009).

[32] Press Release, Hon. Martin Ferguson, Austl. Minister for Res. and Energy, *UN Confirms Australia's Rights Over Extra 2.5 Million Square Kilometres of Seabed*, Apr. 21, 2008, *available at* http://minister.ret.gov.au/TheHonMartinFergusonMP/Pages/UNCONFIRMSAUSTRALIA%E2%80%99SRIGHTSOVEREXTRA.aspx; Press Release, Rt. Hon. Helen Clark, *UN Recognizes NZ's Extended Seabed Rights*, Sept. 22, 2008, *available at*http://www.beehive.govt.nz/release/un+recognises+nz+extended+seabed+rights .

[33] *See* Nathaniel Gronewold, *Seabed Claims Mount, Swamping U.N. Commission*, N.Y. TIMES, May 14, 2009, *available at* http://www.nytimes.com/gwire/2009/05/14/14greenwire-seabed-claims-mount-swamping-un-commission-10572.html?pagewanted=1.

[34] *See* Malakoff, *supra* note25, at 1877.

submissions and recommendations to Commissioners and the submitting state.[35] This article asks whether such secrecy is appropriate.

Over the past decade, as formal and informal international institutions have multiplied, scholars and government officials have become increasingly concerned that the world is building an international institutional infrastructure that is unaccountable to the states and individuals it supposedly serves.[36] The field of global administrative law has arisen in response to these concerns; it asks if it is possible to use administrative procedure mechanisms to increase the accountability of international actors.[37] This article takes this question to the CLCS, exploring whether the CLCS's secrecy is just one sign that it is making important decisions for which no one can demand that it answer. In responding yes, the article presents several reasons why the CLCS should be held accountable to the UNCLOS Parties that created it and explores accountability gaps in existing CLCS procedures; it then proposes a number of reforms that may be able to fill those gaps. The article aims to increase the responsiveness of the CLCS without undermining the article 76 process, so that the world does not have to resort to planting flags in order to figure out who owns the ocean floor.

The article is divided into four sections. Part I provides a brief historical overview of the continental shelf regime and article 76, in order to flesh out the rights and interests at stake. Part II introduces the CLCS, analyzing its mandate and describing its review procedures. Part III introduces the concept of accountability, develops several reasons that the CLCS should be accountable to UNCLOS Parties, and identifies accountability gaps in its current functioning. Finally, Part IV identifies a number of mechanisms that could be used to increase the Commission's accountability.

I. The Continental Shelf Regime

A. Background of the Continental Shelf Regime

The idea that a state can have rights to the ocean floor—and the extensive resources buried within it—has been around for over a century.[38] In the beginning, coastal states had jurisdiction over the seabed and subsoil within their territorial seas, which extended between three and twelve nautical miles from the shoreline.[39] In the areas beyond—the high seas—any state could establish property rights through effective occupation.[40] In the mid-1940s, however, this understanding of jurisdiction over the shelf began to evolve. On September 28, 1945, U.S. President Harry Truman made a Presidential Proclamation in which he declared that the U.S. would have complete jurisdiction and control over all natural resources located within the seabed

[35] *See id.* at 1878 (quoting officials discussing secrecy of CLCS process); 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, 12–13 (2004) (describing transparency problems that arise from CLCS confidentiality rules).

[36] *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29–30 (2005) (describing growing concerns over accountability and democracy in international regimes).

[37] *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMPORARY PROB. 15, 31–42 (2005) (describing accountability mechanisms used in domestic systems and discussing their extension to international sphere).

[38] *See* CHURCHILL & LOWE, *supra* note 5, at 142 (providing historical overview of development of law on state possession of continental shelf).

[39] *See id.*

[40] *See id.* at 142–43.

and subsoil of the country's entire continental shelf.[41] Truman justified this claim as a matter of right—the continental shelf contiguous to the U.S. was the natural extension of the U.S. landmass.[42] Under international law, states have inherent sovereign rights to their land territory.[43] Thus, President Truman reasoned, the sovereignty of coastal states like the U.S. extended to the underwater prolongation of that territory and coastal countries could control access to the shelf and its resources.[44]

The Truman Proclamation faced little international resistance and other coastal states soon followed the U.S.'s example, declaring rights to the resources found in their own shelves.[45] By the late 1950s, states' "sovereign rights for the purpose of exploring . . . and exploiting" the continental shelf were firmly established in customary international law;[46] the International Court of Justice declared that coastal-state sovereignty over the shelf was, like sovereignty over land, "an inherent right."[47]

As coastal states were consolidating their continental shelf rights, another issue of seabed jurisdiction was beginning to emerge: if coastal states owned the shelf, who had rights to the deep seabed that lay beyond it? In the early days of seabed mining, jurisdiction in the high seas had not been a burning issue—the sea floor in these areas lay so far below the ocean's surface that mining was technologically infeasible.[48] As science and technology progressed, however, it became apparent that the valuable minerals buried in the deep seabed would one day be accessible, and states looked to international law to establish to whom those minerals belonged.[49] In 1970, after a movement led by developing countries concerned that rich nations would

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[41] *United States: Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 40 AM. J. INT'L L. (SUPPLEMENT: OFFICAL DOCUMENTS) 45, 45–48 (1946) ("I, Harry S. Truman, President of the United States of America, do hereby proclaim . . . [that] the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.").

[42] *Id.* at 42.

[43] *See* North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3, 22 (Feb. 20) (noting states exercise sovereign authority over their territory).

[44] *Id.* at 45 ("[T]he exercise of jurisdiction over the natural resources of . . . the continental shelf by the contiguous nation is reasonable and just . . . [because] the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it.").

[45] *See* CHURCHILL & LOWE, *supra* note 5, at 144 (describing claims after U.S. proclamation).

[46] Convention on the Continental Shelf art. 2, Apr. 29, 1958, 499 U.N.T.S. 311. In 1958, states attempted to codify the law of the sea at the Geneva Conference on the Law of the Sea. *See* CHURCHILL & LOWE, *supra* note 5, at 15 (describing work of the first United Nations Conference on the Law of the Sea). The Conference resulted in four Conventions, including the Continental Shelf Convention. *Id.* The Convention codified the Truman Proclamation approach to the continental shelf—that coastal states had sovereignty to explore and exploit the shelf's resources—a position the International Court of Justicefound to be part of customary international law. *See* id. at 7. The Convention garnered enough ratifications to come into force in 1964. *See* International Law Commission, *Law of the Sea: Regime of the Territorial Sea*, http://untreaty.un.org/ilc/summaries/8_2.htm (last visited June 8, 2008) (detailing history of codification of law of the sea, including Convention on the Continental Shelf).

[47] *See* North Sea Continental Shelf, *supra* note 42, at 22 ("[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist . . .by virtue of its sovereignty over the land. . . . In short there, is here an inherent right."). *See also*, Convention on the Continental Shelf, *supra* note 45, at art. 2(3) ("The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.").

[48] *See* CHURCHILL & LOWE, *supra* note 5, at 223–24 (discussing beginnings of seabed mining industry).

[49] *See* Johan Ludvik Lovald, *In Search of an Ocean Regime: The Negotiations in the General Assembly's Seabed Committee 1968-1970*, 29 INT'L ORG. 681, 681–82 (1975) (describing how new technologies have led to discovery of resources in the deep seabed); CHURCHILL & LOWE, *supra* note 5, at 224–28 (providing background on legal discussions over rights to deep seabed resources).

colonize the sea floor, the UN General Assembly (UNGA) declared that the seabed beyond the shelf was the "common heritage of mankind" and not subject to appropriation by any individual or state.[50] All states, coastal and land-locked, now had equal rights to the deep seabed and its resources; they would create an international regime to govern its exploration and exploitation and ensure that all would share any profits derived from it.[51]

But while states accepted the Common Heritage of Mankind (CHM) in principle, none understood exactly where the continental shelf and coastal-state rights ended, and the deep seabed and the CHM began.[52] In declaring jurisdiction, coastal states were not actually mapping the points at which their continental margins merged into the deep seabed; they were simply making broad declarations of control over the continental shelf, wherever and whatever that might be.[53] In other words, the term *continental shelf* was a legal concept based on the idea of territorial sovereignty, not a scientific one based on geological reality.[54] To develop an access-and-benefit sharing regime for the deep seabed, however, reality would have to come into play—states would need to decide exactly what parts of the ocean floor belonged to coastal states and what parts to everyone.[55]

In 1973, 137 states met to address the continental shelf versus deep seabed question (and a host of other ocean issues) at the first round of the Third Conference on the Law of the Sea, which eventually produced UNCLOS.[56] It was already understood that UNCLOS would codify customary territorial and universal rights to the seabed.[57] But states still had to define exactly how far jurisdiction stretched and determine how to establish jurisdictional boundaries. Most

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[50] *See Seabed*, 20 INT'L & COMP. L.Q. 583, 583–85 (1971) (announcing that U.N. General Assembly had adopted "Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, beyond the limits of National Jurisdiction," setting forth the "common heritage of mankind" principle); CHURCHILL & LOWE, *supra* note 5, at 225–27 (discussing differences between positions of developing and industrialized nations on seabed regulation).

[51] *See* Lovlad, *supra* note 48, at 682–83 (describing work at United Nations to define seabed as "common heritage of mankind"); *Seabed*, *supra* note 49, 583–85 (describing passage of U.N. Resolutions establishing "common heritage of mankind" principle and introducing idea of international seabed regime).

[52] *See* 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 829 (Satya N.Nadan, Shabtai Rosenne & Neal R. Grandy eds., 1993) [hereinafter UNCLOS COMMENTARY] (describing how imprecision of early claims made it impossible to define boundary between national jurisdiction and deep seabed).

[53] *See id.* at 493–95 (describing indefinite nature of early claims; CHURCHILL & LOWE, *supra* note 5, at 146 (describing early practice of claiming extended shelf rights without defining outer limits)..

[54] *See id*. at 829 (explaining how early claims over continental shelf were based on water depth and exploitability, not geologic or geomorphologic characteristics of shelf itself). *See generally* David A. Colson, *The Delimitation of the Outer Continental Shelf between Neighboring States*, 97 AM. J. OF INT'L L. 91 (2003) (describing how *continental shelf* as used in UNCLOS is legal concept not scientific one).

[55] *See* UNCLOS COMMENTARY, *supra* note 51, at 829 (explaining that acceptance of CHM principle necessitates definition of limits of national jurisdiction over shelf); Nuno Marques Antunes & Fernando Maia Pimentel, *Reflecting on the Legal-Technical Interface of Article 76 of the LOSC: Tentative Thoughts on Practical Implementation*, 20 (presented at the ABLOS Conference Addressing Difficult Issues in UNCLOS, 2003), *available at* http://www.gmat.unsw.edu.au/ablos/ABLOS03Folder/PAPER3-1.PDF(explaining that purpose of creating article 76 was to balance common heritage of mankind against coastal state shelf rights).

[56] *See* EDWARD L. MILES, GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: 1973–1982,3–7 (1998) (introducing UNCLOS negotiations and describing major issues under discussion, including deep seabed and continental shelf).

[57] *See Seabed*, *supra* note 49, at 583–84 (describing provisions in U.N. resolutions on deep seabed calling for conference to create international seabed regime and codify other law of the sea issues). The agreement endured. *See* UNCLOS, *supra* note4, art. 77 (giving coastal states sovereign rights over shelf delineated under article 76), art. 136–37 (recognizing that rights to the deep seabed are invested in "mankind as a whole").

states agreed that control should extend at least up to 200 nautical miles from the territorial sea baselines, which would match the breadth of the Exclusive Economic Zone (EEZ).[58] For many coastal states, 200 nautical miles was more than acceptable.[59] Others, however, had continental shelves that physically stretched beyond 200 miles.[60] These "wide-margin" states argued that an arbitrary numerical limit could not extinguish their rights, and pushed for a delineation process that would grant them more extensive jurisdiction.[61]

How to deal with wide-margin states was not merely an academic question—UNCLOS parties had significant political and economic interests in who controlled what on the sea floor.[62] Jurisdiction would give coastal states the right to control access to the shelf's resources,[63] meaning wide-margin states wanted rights to as much of the sea floor as possible.[64] On the other hand, the CHM principle would govern any area falling within the deep seabed.[65] Under a regime established at the UNCLOS negotiations, any state could mine the deep seabed, provided it shared some of its profits with the rest of the international community.[66] An international organization—the International Seabed Authority (ISA)—would be responsible for regulating mining and collecting and distributing shared revenues; UNCLOS Parties would develop the ISA's mining regulations through multilateral negotiations.[67] For states with mining industries, an international agency applying internationally agreed-upon standards was preferable to coastal states unilaterally imposing regulations or denying access.[68] For states without mining

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[58] *See* MILES, *supra* note 55, at 128–29 (explaining that most states agreed on at least a 200 mile limit). In keeping with the understanding of the shelf as a legal, rather than scientific, concept, this definition did not depend on how far a state's continental shelf actually physically extended—coastal states would have rights to all the seabed resources that fell within 200 nautical miles, even if, according to geology, some of that area was actually part of the deep seabed. *See* Antunes & Pimentel, *supra* note 54, at 5 (describing how claims under article 76 may or may not match physical reality of continental margin).

[59] *See* CHURCHILL & LOWE, *supra* note 5, at 148 (explaining that many nations, particularly those with narrow shelves, had an interest in maximizing area of CHM seabed).

[60] *See id*. (explaining that states with wide shelves had interest in maximizing area of seabed within scope of national jurisdiction).

[61] *See* MILES, *supra* note 55, at 129 (describing disagreement between wide-margin states and other delegations); UNCLOS COMMENTARY, *supra* note 51, at 831 (explaining that states understood that negotiations would need to "balance interests of States with narrow continental shelves or with no continental shelf, and those of states with broad shelves . . . .").

[62] *See* UNCLOS COMMENTARY, *supra* note 51, at 831–33 (describing efforts of various factions of states to enhance their control over seabed resources); Robert Smith, *The Continental Shelf Commission*, *in* OCEANS POLICY: NEW INSITUTIONS, CHALLENGES AND OPPORTUNITIES 135, 135 (Myron H. Nordquist & John Norton Moore eds., 1999) [hereinafter OCEANS POLICY] (explaining that all states have interest in article 76 regime).

[63] *See* UNCLOS, *supra* note 4, at art 77. This means that if, for example, an oil company from State A wanted to drill for oil in the shelf of State B, it would only be able to do with State B's permission and subject to State B's regulations; neither State A nor its oil company would have any say over whether and how it could access State B's oil. *See id.* If State B wanted to close off its shelf to all other countries and exploit all the resources itself, neither State A nor anyone else could stop it from doing so. *See id*.

[64] *See* CHURCHILL & LOWE, *supra* note 5, at 148 (describing reluctance of wide-margin states to give up control over resources beyond 200 nautical miles).

[65] *See Seabed*, *supra* note 49, at 583 (describing incorporation of CHM principle in UN resolutions).

[66] *See* UNCLOS, *supra* note 4, at art. 82.

[67] *See id*. at Part XI; CHURCHILL & LOWE, *supra* note 5, at 239–48 (describing composition and function of International Seabed Authority).

[68] *See* MILES, *supra* note 55, at 382 (explaining how countries with large oil and gas industries advocated for narrow shelf limits in order to maximize mining areas under deep seabed regime).

industries, the deep seabed regime's profit-sharing provisions were deeply appealing.[69] Therefore, most of these states wanted to maximize the international seabed regime's reach.

Knowing the strength of the interests at stake, UNCLOS negotiators understood that jurisdiction would need to better match the actual physical expanse of wide-margin states' continental shelves, without ceding to them huge chunks of the deep seabed.[70] The final compromise—reached after nine rounds of debate—created an exceptionally complex formula for recognizing "extended claims" to the continental shelf beyond 200 miles.[71] That formula is enshrined in article 76 of UNCLOS.

B. Article 76 and the UNCLOS Continental Shelf Regime

Article 76 begins by establishing a basic definition of the continental shelf that recognizes the interests of wide-margin states: A coastal state's continental shelf consists of either 200 nautical miles of the seabed measured from its territorial sea baselines, or, where the shelf stretches beyond this point, of the entire natural prolongation of its landmass up to one of two seaward limits (described in more detail below).[72] The article sticks with the legal understanding of *continental shelf*—the term refers to the entire continental margin, including the shelf, slope and rise.[73] If a state is claiming only 200 nautical miles, article 76 has no more to say—the entire seabed within those 200 miles falls under the state's control, even if it is not, from a geological standpoint, part of the continental margin.[74]

For wide-margin states making extended claims, however, the article lays out a complicated formula for determining the actual outer boundaries of the continental margin. According to article 76, a state's extended continental shelf hits its outer limit *either* at any point where the thickness of the sedimentary rock is less than one percent of the distance between that point and the foot of the continental slope, *or* at any point sixty nautical miles from the foot.[75] The foot of the continental slope is the point of maximum change in the gradient of the slope's base.[76] To mark these outer limits, states use either of the two formulas to measure a collection of outer points at intervals of sixty nautical miles or less, and then draw a straight line from point-to-point.[77] This line is the official boundary—beyond it lies the deep seabed—and it can extend no further than 350 nautical miles from the territorial sea boundaries, *or* "100 nautical miles from the 2,500 met[er] isobath, which is a straight line connecting the depth of 2,500

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[69] *See* UNCLOS COMMENTARY, *supra* note 51, at 844–46 (discussing interests of developing countries in constrained national jurisdiction over seabed); CHURCHILL & LOWE, *supra* note 5, at 226–29 (describing movement by developing countries to create strong International Seabed Authority to control deep seabed exploitation).

[70] *See*, UNCLOS COMMENTARY, *supra* note 51, at 831 (describing need for compromise).

[71] *See id*. at 868–72 (describing ninth and final round of negotiations); Robert W. Smith & George Taft, *Legal Aspects of the Continental Shelf*, *in* CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE 17, 17 (Peter J. Cook & Chris M. Carleton eds., 2000) [hereinafter CONTINENTAL SHELF LIMITS] (calling article 76 formula "complex, but workable").

[72] UNCLOS, *supra* note 4, at art. 76(1).

[73] *Id.*at art. 76, para. 3.

[74] *See id.* at art. 76. Article 76(1) establishes that states have a claim to the shelf up to 200 nautical miles or an extended claim beyond that; the rest of article 76 creates a formula for establishing limits for extended claims, but does not address basic claims of 200 nautical miles. *Id*. *See also*, CHURCHILL & LOWE, *supra* note 5, at 148 ("Areas of the seabed that lie beyond the physical continental margin are included, so long as they are within 200 miles of the coast.").

[75] UNCLOS, *supra* note 4, at art. 76(4)(a).

[76] *Id*. at art. 76(4)(b).

[77] *Id.*

met[ers]."[78] States can use any collection of measurement options they want to make their claim—for example, establishing some points based upon sedimentary thickness and others at sixty nautical miles, depending on which measurement will give them the most territory.[79] This is intended to allow wide-margin states to maximize their claims within the constraints of the outer limit requirements.[80]

Oceanic experts agree that UNCLOS creates a monstrously difficult formula for recognizing extended claims,[81] one far harder to employ and verify than any of UNCLOS' other procedures for establishing oceanic limits.[82] To gather the submarine measurements that article 76 requires, states have to take sonic images of the sea floor, identify the various parts of the article 76 formula, figure out how to measure them based on the different options permitted, and satisfy other procedural requirements.[83] This process is incredibly complicated, especially

[78] *Id.* at art. 76(5); *see* Philip Allot, *Power Sharing in the Law of the Sea*, 77 AM. J. INT'L L. 1, 18 (1983) (describing four potential cutoffs for continental shelf—200 nautical miles, outer limits of continental margin, 350 nautical miles, or 100 nautical miles from 2,500 meter isobath).

[79] *See* UNCLOS, *supra* note 4, at art. 76 (article 76 provides measurement options but does not say that states have to choose one approach or another, thus allowing states to combine measurements). *See also*, International Law Association, *Legal Issues of the Outer Continental Shelf*, *in* Report of the Seventy-Second Conference, Toronto, Can., 215 (2006) [hereinafter ILA Report] (stating that article 76 provides flexible formula). Having established the shelf's limits, UNCLOS goes on to divvy up rights to the resources found within it. *See* UNCLOS, *supra* note 4, at art. 77. Article 77 gives coastal states unfettered rights to explore and exploit the natural resources within their continental shelves up to 200 nautical miles. *See id*. States with shelves beyond 200 miles still have complete authority to explore and exploit natural resources, but must share profits derived from these activities with the international community by giving a percentage share to the ISA, which distributes the money to UNCLOS Parties. *Id*. at art 82.

[80] *See* ILA Report, *supra* note 78, at 215 (revealing that flexibility in article 76 formula is intended to allow states to maximize claims within established limits).

[81] *See* L.D.M. Nelson, *The Continental Shelf: Interplay of Law and Science*, *in* 2 LIBER AMICORUM JUDGE SHIGERU ODA 1241–47 (Nisuke Ando, Edward McWhinney & Rudiger Wolfrum eds., 2002) (describing difficulties arising from interpretation of article 76); Richard Haworth, *The Continental Shelf Commission*, *in* OCEANS POLICY, *supra* note 61, 147, 147–48 (describing some of the difficulties of determining limits through the article 76 process and stating "this is not very, very simple at all").

[82] *See* MacNab, *supra* note 25, at 2 ("[T]he Article requires a series of technical procedures that are substantially more intricate than the determination of other types of maritime limit (*sic*) and which represent a significant departure from common boundary-making practice."). States construct territorial sea and EEZ limits by measuring out a set of latitudinal and longitudinal points that stretch twelve and 200 nautical miles, respectively, past their territorial sea baselines. UNCLOS, *supra* note 4, at art. 3, 57, Territorial sea baselines either follow the low-water line along a State's coast or are constructed through well-established procedures of connecting with straight lines certain points of latitude and longitude off the coast. *Id.* at art. 5, 7. States deposit charts or lists of geographical points mapping their baselines with the UN. *Id*. at art. 16. For regular claims to the continental shelf—those not exceeding 200 nautical miles—states simply have jurisdiction over the portion of the shelf that falls within their EEZ. *See id.* at art 76; Victor Prescott, *Resources of the Continental Margin and International Law*, *in* CONTINENTAL SHELF LIMITS, *supra* note 70, at 82. This process of establishing territorial, EEZ and regular continental shelf jurisdiction is fairly straight-forward—the boundaries are nothing more than a set of geographic points. It is also transparent—if one state wishes to question another's boundaries, it can consult a map or satellite image of that country's coast and determine whether the territory claimed is limited to twelve nautical miles.

[83] *See* Prescott, *in* CONTINENTAL SHELF LIMITS, *supra* note 70, at 72 (explaining that data collection for some aspects of article 76 formula will be "a complex, lengthy, and probably expensive task"); MacNab, *supra* note 35 at 2–9 (describing basic process of substantiating article 76 claim). *See generally* CONTINENTAL SHELF LIMITS, *supra* note 70 (providing detailed discussion of technical and scientific processes involved in article 76 claim).

because states are allowed to mix and match the formula's different elements, creating a jumble of hard-to-decipher points that belie straightforward delineation.[84]

Further, article 76 does not adopt the standard definitions and principles that geologists use to trace the continental margin.[85] Rather, it creates a brand-new legal process for defining the shelf and marking its boundaries, which depends on sedimentary thickness and lines drawn from territorial baselines and 2,500-meter isobaths, not on scientific precision.[86] Article 76 does not abandon science—each element of a claim must be validated with geological and geomorphologic evidence, such as the measurement of the foot of the slope and the location of the 2,500-meter isobath.[87] It does, however, create its own process for obtaining, measuring and arranging this evidence that serves a legal definition of the shelf not necessarily tied to physical reality—a state's actual continental margin may end at the exact spot where the sedimentary rock is less than one percent of the distance from the territorial baseline, but it might not. Either way, the state can claim the seabed up to that point, but no further, as its continental shelf.[88] As a result, states cannot necessarily rely on existing scientific understanding of the ocean floor when making claims—they must gather and interpret data according to article 76.[89]

By skirting the edges of law and science, article 76 combines the "influences of geography, geology, geomorphology and jurisprudence"[90] to create a technical-legal delineation formula that raises more questions than it answers: If traditional scientific understanding of the continental margin is not applicable, how, exactly, should states employ article 76?[91] What are

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[84] *See* Colson, *supra* note 53, at 103–07 (showing how different measurement combinations can produce four different extended claims).

[85] *See* Comm'n on the Limits of the Continental Shelf, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, ¶ 1.3, U.N. Doc. CLCS/11 (May 13, 1999) [hereinafter *CLCS Guidelines*] (explaining that CLCS needed to create Technical Guidelines clarifying article 76's meaning because "Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology"); *United States: President's Transmittal of the United Nations Convention of the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary* (Oct. 7, 1994), *reprinted in* 34 INT'L LEGAL MATERIALS 1393, 1426 (1995) [hereinafter *U.S. Commentary*] ("Although [article 76's] formula uses certain geological concepts as points of departure, its object is legal not scientific."). *See also*, Antunes & Pimental, *supra* note 54, at 5 ("Some scientific-technical terms incorporated in [the] provision have acquired a meaning that departs from their geo-scientific, ordinary meaning.").

[86] *See* Antunes & Pimentel, *supra* note 54, at 2–4 (emphasizing that article 76 creates legal delineation process, even though it incorporates scientific and technical information).

[87] *See* UNCLOS, *supra* note 4, at art. 76; Antunes & Pimentel, *supra* note 54, at 2–6 (discussing the dual technical-legal nature of article 76); Colson, *supra* note 53, at 102 ("Article 76 provides . . . new . . . agreed categories of geological and geomorphological facts that are legally relevant for the purpose of determining title to the outer continental shelf . . . .").

[88] *See* UNCLOS, *supra* note 4, at art. 76(1); Antunes & Pimentel, *supra* note 54, at 6 (explaining how legal definition of continental margin used in article 76 could result in shelf claims that do not reach edge of continental rise or that stretch beyond it).

[89] *See generally* Philip A. Symonds, Olav Eldholm, Jean Mascle & Gregory F. Moore, *Characteristics of Continental Margins*, *in* CONTINENTAL SHELF LIMITS, *supra* note 70, at 25–59 (describing how article 76 deals differently with many aspects of continental margin than scientists and geologists).

[90] D.M. JOHNSTON, THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING 91 (1988).

[91] *See CLCS Guidelines*, *supra* note 84, at ¶ 1.3 (discussing how article 76's use of many terms leaves their meaning unclear); Haworth, *supra* note 80, at 148 ("[Calling article 76's terms] not clear is the gentlest of phrases that I can use."); MacNab, *supra* note 34, at 2–10 (discussing many complications in article 76 formula); Piers R. R. Gardiner, *The Limits of the Area Beyond National Jurisdiction – Some Problems with Particular Reference to the Role of the Commission on the Limits of the Continental Shelf*, *in* MARITIME BOUNDARIES AND OCEAN RESOURCES 65–68 (Gerald Blake ed., 1987) (discussing several problems that arise in interpreting article 76).

the appropriate means of measuring sediment depth or 2,500-meter isobaths?[92] How does article 76 regard geological formations like submarine ridges?[93] How is the foot of slope measured?[94] What constitutes a straight line for the purposes of an outer boundary?[95] How should experts deal with sedimentary wedge thickness that is not uniform?[96] And so on. Answering these questions requires interpreting article 76, which, given the article's mixed technical/legal pedigree, means analyzing technical concepts through the lens of treaty interpretation—a tricky endeavor that occurs during the process of making claims.[97]

Thus, article 76 relies on hard-to-obtain and even-harder-to-decipher submarine data, which states must use to meet a complex formula that bases outer limits on undefined terms and confusing measurements. This not only complicates the delineation process, but also makes it hard for other UNCLOS Parties to verify that claims actually adhere to article 76 and do not infringe on the deep seabed.[98] For most states, it is difficult—and expensive—enough to image and map their own seafloor, let alone that of 152 of their fellow UNCLOS Parties.[99]

The states negotiating UNCLOS were aware of the challenges article 76 presented.[100] They understood that they were balancing competing rights, and they did not want to allow wide-margin states to obfuscate behind legal and technical vagaries in order to establish excessive claims.[101] Further, they knew that a complicated boundary-setting process would be easy to manipulate, meaning states might not trust the limits set and disputes would inevitably arise, slowing the development of clear seabed jurisdiction.[102] Therefore, the negotiators sought out a

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[92] *See* Haworth, *supra* note 80, at 148, 150–51 (describing difficulties of measuring sediment wedge using article 76 formula); Symonds et al., *in* CONTINENTAL SHELF LIMITS, *supra* note 71 at 56–59 (describing problems in measuring sediment thickness and how to measure 2,500 metre isobath) .

[93] *See* Antunes & Pimentel, *supra* note 54, at 19–21 (describing difficulty of determining original intent of states with regards to oceanic ridges); Symonds et al., *supra* note 88, at 59 (describing potential for differences over how to address ridges under article 76).

[94] *See* Haworth, *supra* note 80, at 149–150 (discussing how article 76 fails to explain how states should measure the maximum gradient or determine slope's base); Antunes & Pimentel, *supra* note 55 at 13–18 (discussing complex legal and technical analyses that must go into interpreting foot-of-slope provision) .

[95] *See* Haworth, *supra* note 80, at 150.

[96] *See id*. at 150–51.

[97] *See* Antunes & Pimentel, *supra* note 54, at 2–6 (discussing how article 76's mixed technical-legal nature requires using treaty interpretation to understand scientific and legal concepts); *CLCS Guidelines*, *supra* note 84, at ¶ 1.3 (discussing how States will face interpretational challenges when creating claims).

[98] *See* 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, 269–285 (2007) (describing difficulties that many countries, especially developing ones, have with meeting the scientific and financial demands of article 76).

[99] *See id.* at 274 ("Given the training and expertise required, even a very small desktop study is likely to be quite expensive for a small country."); Prescott, *in* CONTINENTAL SHELF LIMITS, *supra* note 81, at 72 (stating that much of technical research required for article 76 process is expensive).

[100] *See* Allot, *supra* note 77, at 20 (discussing how Parties knew that article 76 was complex and that all had an interest in its application).

[101] *See id*.; CHURCHILL & LOWE, *supra* note 5, at 149 (describing potential for disputes due to complexity of article 76 formula); 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, 308 (2002) (stating that Commission's main concern should be whether state has made an exaggerated claim).

[102] *See* McDorman, *supra* note 100, at 319 (arguing that main purpose of CLCS is to legitimate boundaries provided by states in order to avoid disputes); MacNab, *supra* note 35 at 10–11 (describing how disputes could arise during article 76 delineation); Shirley V. Scott, *The Contribution of the LOS Convention Organizations to its Harmonious Implementation*, *in* OCEAN MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 321–25 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2004) (discussing CLCS's role in preventing conflict over continental shelf claims).

way to check states using article 76.[103] They came up with the Commission on the Limits of the Continental Shelf.[104]

II. The Commission on the Limits of the Continental Shelf

A. Mandate of the CLCS

Having created a complicated and unclear delineation formula, UNCLOS Parties sought an article 76 oversight mechanism to fulfill two purposes: to safeguard against excessive claims on the part of wide-margin states while ensuring that those states could fully realize their rights to the shelf;[105] and to legitimate proposed boundaries with an independent stamp-of-approval in order to mitigate disputes between states.[106] To achieve this, they settled on the CLCS—an independent commission composed of twenty-one experts in geology, geophysics and hydrography charged with reviewing states' article 76 claims.[107]

Ironically, while the CLCS is supposed to clarify the article 76 process, its own mandate—laid out in article 76 and Annex II of UNCLOS—is more than a little murky.[108] According to UNCLOS, when a state wishes to make a claim, it must submit information on its proposed limits to the CLCS, which reviews it for compliance with article 76 and makes recommendations to the coastal state.[109] If the submitting state agrees with these recommendations, it can establish "final and binding" limits based upon them.[110] If it does not, it can resubmit its claim to the Commission for a new set of recommendations.[111] That's it. UNCLOS does not explain what the CLCS' recommendations should consist of, how many times a state can redo its submission, what "on the basis of" means, or what happens if a state establishes boundaries without the Commission's approval.[112]

Faced with article 76's vague language, a number of commentators and scholars have tried to figure out what, exactly, the CLCS is supposed to do.[113] Unsurprisingly, states negotiating the Commission split into two familiar camps: wide-margin states and everyone else. Wide-margin states argued that article 76 recognized coastal states' unique legal capacity to set continental shelf limits.[114] In order to respect sovereignty, the CLCS could not independently interpret article 76 and demand that states establish limits based on its interpretations; states' understandings should govern, as long as they fell within the realm of

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[103] *See* Scott, *supra* note 101, at 315–21 (discussing negotiations for dispute settlement mechanisms).
[104] *See id*. at 321–27 (discussing creation and function of CLCS).
[105] *See* McDorman, *supra* note 100, at 308 (noting role of Commission in guarding against unwarranted claims); *U.S. Commentary*, *supra* note 84, at 1428 (stating that U.S. should play a role in CLCS because it would help protect U.S. interests in its shelf while guarding against excessive claims by other states).
[106] *See U.S. Commentary*, *supra* note 84, at 1427 (explaining that CLCS is a mechanism to reduce uncertainty about limits and prevent disputes).
[107] *See* Noel Newton St. Claver Francis, *The Continental Shelf Commission*, *in* OCEANS POLICY, *supra* note 61, at 142–45.
[108] *See* UNCLOS, *supra* note 4, at art. 76(8); Annex II, art. 8.
[109] *Id.* at art. 76(8).
[110] *Id*.
[111] *Id*. at Annex II art. 8.
[112] *See id.* at art. 76 and Annex II. *See also*, Gardiner, *supra* note 90, at 69–70 (discussing uncertainties that arise if country establishes boundaries that do not respect CLCS recommendations).
[113] *See, e.g.*, Nelson, *supra* note 80, at 1237–47 (discussing the creation and role of CLCS).
[114] *See* UNCLOS COMMENTARY, *supra* note 51, at 1012–13 (quoting the Canadian delegation arguing that CLCS could not infringe upon coastal state sovereignty by imposing boundaries that differed from article 76); McDorman, *supra* note 100, at 313–14 (discussing implications of Canadian statement for interpreting mandate of Commission).

possible article 76 meanings.[115] According to the wide-margin states, any other approach would interfere with their ultimate right to declare the extent of their territory.[116] Other states, however, pointed out that article 76 also concerned their rights to deep seabed resources; a robust Commission capable of making and enforcing independent determinations about article 76 was necessary to ensure that the delineation process respected deep seabed rights.[117]

In the end, states agreed to what commentators have called article 76's "ping-pong" process of submission-recommendation-resubmission.[118] Under this process, the CLCS is limited to "making recommendations" about the boundaries proposed.[119] The state retains the ultimate right to define its boundaries, but must do so "on the basis" of the CLCS recommendations.[120] The state can submit a revised claim if it is displeased with the Commission's position.[121] In theory, ping-ponging results in a narrowing-down of differences between the state's and Commission's understanding of article 76 that checks states' interpretations but never infringes on their right to set outer limits.[122] According to some scholars, by leaving the ultimate authority to declare boundaries with states, article 76 adopts the wide-margin states' negotiating position and limits the Commission to simply verifying basic adherence to the formula.[123]

In the Commission's own statements on its mandate, it often emphasizes its technical role.[124] The Commission calls itself a "technical review" body charged with making sure that states have followed article 76's technical and scientific requirements, such as properly identifying the foot of the slope and using sound scientific methods for measuring sedimentary

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[115] *See* UNCLOS COMMENTARY, *supra* note 51, at 1012–13; McDorman, *supra* note 100, at 306 (discussing States' insistence that they, not Commission, would ultimately declare limits under article 76); Nelson, *supra* note 80, at 1239–40 (describing debate during negotiations over whether Commission would infringe on sovereignty of coastal States).

[116] *See* McDorman, *supra* note 100, at 313–14 (noting that several states raised concerns over possible infringements on national sovereignty).

[117] *See* UNCLOS COMMENTARY, *supra* note 51, at 1012 (stating that Mongolia and other delegations argued that Commission needed to respect interests of "land-locked and geographically disadvantaged States").

[118] *See* Gardiner, *supra* note 90, at 69 (describing how "ping-pong" process will work); McDorman, *supra* note 90 at 306–07 (discussing "ping-pong" submission process).

[119] *See* UNCLOS, *supra* note 4, at art. 76(8)(restricting the CLCS's role to "mak[ing] recommendations" to nations seeking to define their continental shelf).

[120] *See id*. (noting the outer limits are "limits established by the coastal state"); McDorman, *supra* note 100, at 306 ("One certainty is that . . . the costal state . . . has the legal capacity to set the state's outer limit . . . .").

[121] *See* UNCLOS, *supra* note 4, at Annex II, art. 8.

[122] *See* Gardiner, *supra* note 90, at 68–71 (describing role of Commission and ping-pong process).

[123] *See, e.g.*, McDorman, *supra* note 100, at 319–21. In this influential and widely quoted article, Professor McDorman argues that the role of the Commission is simply procedural and informational. By requiring that states submit information to the Commission, article 76 creates a procedural hurdle to setting limits. It does not, however, specify what information a state should submit. This, Professor McDorman argues, gives states huge latitude to decide how to approach the Commission process. After states submit whatever evidence they see fit, Professor McDorman believes that the Commission's purpose is purely informational—it provides recommendations on how the state might improve its proposed boundaries, but has no authority to demand that it make any specific changes to its proposals. *See id*.

[124] *See* Francis, *The Continental Shelf Commission*, *supra* note 106, at 141–42 (highlighting technical nature of CLCS's composition and role); Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf*, *in* LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS225–26 (Myron H. Nordquist, John Norton Moore & Tomas H. Heidar eds., 2004) [hereinafter LEGAL AND SCIENTIFIC ASPECTS] (explaining that Commission is a "scientific organ" whose work depends on technical and scientific precision)

thickness.[125] Emphasizing the CLCS's technical nature also downplays its role in the delineation process—the Commission is merely applying objective scientific facts and procedures to ensure that a submission complies with certain minimum standards.[126]

Dig a little deeper, however, and it becomes clear that the Commission plays a much bigger part in shelf delineation than notions of ping-ponging and technical review might indicate. As discussed, most of article 76's terms and procedures are undefined.[127] This ambiguity goes beyond uncertainty over what sorts of technical processes states should use, for example, to measure sediment; the essential meaning of many elements of the article 76 formula is unclear.[128] The Commission, therefore, cannot simply review states claims against a formulistic technical checklist—there is no consensus on what, exactly, it would check. Further, article 76 is a legal *and* technical provision—it incorporates geological and geomorphologic facts into a legal delineation process laid out in an international treaty.[129] Figuring out what it means, therefore, requires interpreting a treaty provision—an inherently legal, not technical, undertaking.[130]

The Commission confronted article 76's ambiguity and legal nature head on. In its earliest meetings, the CLCS created the Scientific and Technical Guidelines, which set out its understanding of most of article 76's terms and explained what evidence it would like states to include in their submissions.[131] Because there is no scholarly or government consensus on article 76, a number of the positions the Commission takes in the Guidelines are controversial.[132] Nonetheless, while states are not bound to follow the Guidelines, the Commission strongly urges them to do so.[133] The Guidelines are also the only publically available comprehensive review and interpretation of article 76. This means that for reasons of expediency and strategy, states have an incentive to rely on the Commission's interpretation of article 76 when establishing their claims, rather than coming up with their own.[134] Even where a state offers an alternative interpretation, the Commission will naturally compare it against the Guidelines to determine its

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[125] *See id.*

[126] *See* Zinchenko, *supra* note 123, at 225–26 (emphasizing that Commission focuses on scientific facts and working with States to determine mutually acceptable boundaries).

[127] *See supra* Part I.B.

[128] *See* Antunes & Pimentel, *supra* note 54, at 2 (stating that importation of scientific terms to article 76 leaves meaning of many terms unclear); Nelson, *supra* note 80, at 1241–42 (stating that an essential element of Commission's work is interpreting article 76 to clarify ambiguous terms); Haworth, *supra* note 80, at 147–52 (indicating some of unclear terms that Commission will have to clarify in order to carry out its mandate); 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, *supra* note 124, 251, 251 (stating that many provisions of UNCLOS are unclear, including those related to CLCS).

[129] *See* Antunes & Pimentel, *supra* note 54, at 2–6 (noting article 76 is a legal provision and, thus, must be analyzed using principles of treaty interpretation).

[130] *See supra* notes 84–103 and accompanying text (discussing technical-legal nature of article 76).

[131] *See CLCS Guidelines*, *supra* note 84, at ¶ 1.1–1.5 (discussing the purpose of the Guidelines).

[132] *See* McDorman, *supra* note 100, at 322–23 (taking issue with a number of positions Commission has expressed in Guidelines). For examples of varying interpretations of article 76, see Antunes & Pimentel, *supra* note 54, at 10–29 (attempting to interpret provisions on meaning of continental shelf, measurement of isobaths and foot of continental margin, and ridge claims); ILA Report, *supra* note 79 (providing interpretations of many of article 76's terms).

[133] *See CLCS Guidelines*, *supra* note 84, at ¶ 1.4 (explaining that Guidelines present only one possible interpretation of article 76 and that Commission will accept claims based on other legitimate interpretations, but encouraging states to use Guidelines in compiling claims).

[134] Some states might follow the Guidelines to avoid antagonizing the Commission and smooth the approval process. For others, particularly developing countries, it will be easier and cheaper to use the Commission's work than to hire lawyers and technicians to analyze the article independently.

validity.[135] The Commission, therefore, is taking a far more active role in unpacking the delineation process than wide-margin states and their advocates envisioned: It is developing a uniform and highly influential interpretation of article 76.

Further, the article's procedures allow the Commission to use its interpretation to influence the final placement of boundaries, rather than simply deferring to states' positions.[136] Article 76's "on the basis of" requirement and the Commission's ability to reject a submission continuously forces many states to amend the boundaries they initially submit to better reflect the Commission's position.[137] It is true that a state can stop making submissions and establish boundaries whenever it wants, even without the Commission's approval.[138] But if the state wants its boundaries to be "final and binding," it must continue working with the Commission until they determine mutually acceptable limits.[139] Resubmission allows a state to push back against the Commission's determination, but the CLCS is not likely to accept a state's claim simply because the state asserts it repeatedly.[140] Further, the Commission's lack of direct enforcement powers does not mean that states will disregard article 76; many international agreements have no direct enforcement mechanism, but states still consider them law and comply with their terms.[141]

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[135] *See* Nelson, *supra* note 80, at 1242.

[136] *See* McDorman, *supra* note 100, at 319–21 (discussing how CLCS can shape location of final border through procedural role).

[137] *See id.* at 306 (describing how ping-pong review process is supposed to reduce differences between state and Commission's positions until they concur).

[138] *See* Zinchenko, *supra* note 123, at 225 (pointing out that article 76 permits state to stop making submissions to CLCS any time it wishes).

[139] *See id.* at 225–26. Zinchenko, a Legal Officer in the U.N. Division of Ocean Affairs and the Law of the Sea and the Secretary of the CLCS, admits that states are free, if they wish, to discount the Commission or disengage from the ping-pong process. He argues, however, that "common sense" will keep states from doing so—without CLCS approval, they cannot establish final and binding outer limits. *See id*.

[140] *See id*. (arguing that CLCS cannot be too deferential to State's proposed limits because it is required to ensure scientific and technical precision); Nelson, *supra* note 80, at 1239–40 (arguing that Commission and states must reach accommodation on recommendations because neither can completely impose its will on the process). Russia's reaction to the rejection of its proposals is an early indication that the Commission will have actual power to influence limits. It is unclear what Russia will propose when it finally makes a new submission, but the amount of time and effort it has put in to its second try indicate that it is taking the Commission's recommendations and role very seriously. Given how important the shelf claim is for Russia, the fact that it is willing to alter its position indicates that the Commission will wield actual power in the delineation process. *See* Malakoff, *supra* note 25, at 1878 (describing Russia's reaction to CLCS's rejection of its submission); Yuri Zarakhovich, *Why Russia is Bailing Out Iceland*, TIME, Oct. 13, 2008, http://www.time.com/time/world/article/0,8599,1849705,00.html (describing importance of offshore oil to Russia).

[141] *See* ABRAMS CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 4 (1998) ("[A]s a general rule, states acknowledge an obligation to comply with the agreements they have signed."). The UNCLOS negotiating history also indicates that deference to wide-margin states is not necessarily article 76's paramount concern. Early versions of the article provided that states had to set boundaries "taking into account the Commission's recommendations;" this was later changed to the current language—"on the basis of"—despite objections by some wide-margin states that the new phrasing gave the CLCS too much power and unfairly infringed on their sovereignty. *See* Nelson, *supra* note 80, at 1239–40 (describing negotiating history and attempts by wide-margin States to maintain the old language). The fact that the stronger language stayed, despite these protests, suggests that negotiators intended the Commission to have influence over boundary placement. *Id*. at 1240 (arguing that the language change indicates that states and Commission must reach accommodation on proposed limits).

The Commission's power to shape outer limits is further heightened by its unique position—it is the only international body mandated to review the article 76 process.[142] The Convention does not explicitly establish an independent body to which states can appeal the Commission's decisions.[143] States can question the Commission's interpretation, but they cannot necessarily force it to modify an erroneous decision.[144] Some commentators argue that if a state establishes limits that do not conform to the Commission's recommendations, other states can challenge those limits before the International Tribunal of the Law of the Sea (ITLOS), the adjudicatory body that hears disputes arising under UNCLOS, or the International Court of Justice (ICJ).[145] This could, in theory, lead to judicial review of the Commission's recommendations and interpretations.[146] This article does not attempt to resolve this question, except to say that an ITLOS or ICJ claim may well be possible. Such claims, however, would be a roundabout way for a state to challenge the Commission—the state would have to set non-conforming limits, wait for another state to raise a claim against it, and then challenge the Commission's findings as a defense to the claim. Further, such a suit would probably take years to resolve—neither ITLOS nor the ICJ has the technical expertise necessary to review the Commission's determinations quickly—and it is not clear how court precedent would feed into the Commission's work.[147] All of this means that, at least for the moment, the Commission is the definitive body on article 76—it is the only institution working systematically to interpret the article's provisions and the only one with a clear mandate to review and verify proposed limits. This exceptional position enhances its authority over the delineation process.[148]

Given the Commission's interpretive role and its ability to influence territorial claims, it appears to serve as a sort of article 76 court.[149] This analogy is somewhat apt, but it should not be taken too far. While the Commission's power is undeniable, it still does not have ultimate authority to declare article 76's meaning and demand that the state adhere to it precisely.[150] Through resubmission, states are also supposed to influence the Commission's interpretation of

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[142] As noted many times in this article, article 76 only permits states who disagree with the Commission's recommendations to resubmit. It never says what happens if the state and Commission are unable to reach agreement and the state attempts to set boundaries without the Commission's approval. *See* McDorman, *supra* note 100, at 306.

[143] *See* Eiriksson, *supra* note 127, at 255 (noting that there is no appeals body to check Commission's decisions or its adherence to UNCLOS provisions).

[144] *See* Smith & Taft, *supra* note 70, at 20 (noting the ping-pong submission process could theoretically continue forever, seemingly eliminating the possibility of appeal).

[145] *See* Eiriksson, *supra* note 127, at 257–60 (arguing that states can challenge each other's limits through third-party dispute settlement mechanisms); McDorman, *supra* note 100, at 317–19 (arguing that "final and binding" does not mean determinative for all states parties to UNCLOS, so that states can challenge each other's boundaries through outside adjudicatory mechanisms, such as ITLOS or ICJ). *But see*, Smith & Taft, *supra* note 70, at 20 (arguing that UNCLOS negotiators opted to exclude Commission's determinations from third-party dispute settlement procedures).

[146] *See* Eiriksson, *supra* note 127, at 257–60 (discussing how dispute resolution under third-party mechanism might proceed).

[147] *See id*. at 258–59 (acknowledging that ITLOS would have great difficulty interpreting Commission's findings and that other avenues of dispute resolution may not be available).

[148] *See* Donald R. Rothwell, *Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions*, 35 OCEAN DEV. & INT'L L. 131, 133 (2004) (arguing that Commission's quasi-judicial role will give it substantial influence on creation of maritime boundaries).

[149] *See id*. at 133 (referring to CLCS process as "quasi-judicial").

[150] *See* Antunes & Pimentel, *supra* note 54, at 8 (stating that Commission's mandate does not permit it to authoritatively interpret article 76 and impose its interpretation on states).

article 76.[151] And it is undeniable that the ultimate authority to set limits still rests with states.[152] Ping-ponging creates a dialogue between the CLCS and states that is supposed to result in a definitive understanding of article 76's meaning and in clear seabed boundaries.[153] In this regard, the CLCS is more of an administrative agency, mandated by lawmakers to flesh out the details of a vague statutory scheme and to develop a system to regulate its application, while, in theory, taking into consideration the interests and concerns of those it is regulating.[154]

As this section revealed, the Commission's mandate goes beyond checking submissions for technical accuracy. It is responsible for interpreting article 76's legal and technical provisions, assessing the state's interpretation against its own, determining how to reconcile differences, ensuring the states' technical and scientific data supports the reconciled understanding, and recommending to the state that it either establish the proposed boundaries or amend them. Even if the state does not immediately accept the Commission's recommendations, they will, in all likelihood, influence the boundaries the state ultimately establishes. The CLCS, therefore, serves as something of an administrative/judicial body for outer continental shelf claims. As such, it plays a direct role in establishing and enforcing the meaning of article 76, which gives it power to affect the extent of territorial shelf rights and the shape of the deep seabed.

B. CLCS Procedures

To date, the Commission has received fifty-one submissions.[155] If all countries expected to make submission actually do so, roughly a third of UNCLOS's 158 Parties will be directly involved with the CLCS.[156] UNCLOS provides only a brief sketch of the process these states must follow when submitting their claims. The CLCS fleshed out the rest in its Rules of

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[151] *See* McDorman, *supra* note 100, at 306 (noting that the ping-pong process should progressively reduce differences between positions of submitting state and CLCS).

[152] *See* Antunes & Pimentel, *supra* note 54, at 8 (noting that role of CLCS is providing validity to state's unilateral action).

[153] *See* McDorman, *supra* note 100, at 306.

[154] As is probably obvious, the point of this article is that the CLCS does not sufficiently take into consideration all the interests and concerns it is supposed to—it is not sufficiently accountable to UNCLOS Parties. *See infra* Part III.

[155] *See CLCS Submissions*, *supra* note 31 (providing regularly updated list of current submissions). The Parties to UNCLOS established a deadline for submissions of May, 2009. *See* UNCLOS, Meeting of States Parties, 11th mtg., *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 or Annex II to the United Nations Convention on the Law of the Sea*, U.N. Doc. SPLOS/72 (May 29, 2001) [hereinafter *11th SPLOS*]. Given the technical complexity and financial demands of putting together a submission, however, many countries pushed for an extension of that deadline, at least for developing countries. *See* UNCLOS, Meeting of States Parties, 17th mtg. , *Report of the Seventeenth Meeting of States Parties*, ¶ 71, U.N. Doc. SPLOS/164 (July 16, 2007). At the 2008 SPLOS Meeting, States Parties reached a decision that permits states to satisfy the ten-year deadline by submitting preliminary findings on their outer limits, a description of the status of their progress, and an intended final submission date. *See* UNCLOS, Meeting of States Parties, 18th mtg., *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), U.N. Doc. SPLOS/183 (June 20, 2008).

[156] *See generally* UN Div. for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications, of Accessions and Successions to the Convention and the Related Agreements as at 04 May 2009*, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea (last visited May 20, 2009) (providing list of all nations party to UNCLOS).

Procedure, which the Commissioners created during early meetings.[157] The Rules, together with the Guidelines, provide insight into the basic functions of the CLCS engaged in article 76 review.[158]

If a state believes it has an extended shelf claim, it must first carry out extensive geological and geomorphologic testing to establish every piece of the article 76 formula: the test of appurtenance;[159] the foot of the continental slope; points along the outer edges of the margin established either by measuring sediment thickness or determining the sixty nautical mile marker; the 2,500-meter isobath; and the straight lines that measure the distance between the territorial sea baselines and the outer points, and between the outer points themselves.[160] The Commission drafted the Guidelines in order to facilitate this process.[161]

Once the tests and measurements are complete, the state must establish proposed boundaries and prepare a report for the Commission explaining how it arrived at them.[162] Under confidentiality rules developed by the CLCS, the state can declare any of the information and data it submits confidential, so that only Commissioners have access to it.[163] Thus far, most states have declared their entire submission confidential.[164] In order to alleviate a bit of the secrecy, the CLCS requires the submitting state to include an executive summary explaining the basics of its claim, which the CLCS releases to all UNCLOS Parties so that they can review the proposal and provide comments on aspects that interest them.[165] After the state submits, the CLCS waits three months to begin review in order to give interested states time to examine the

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[157] *See* Comm'n on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS/40/Rev.1 (Apr. 17, 2008) [hereinafter *Rules of Procedure*].

[158] *See* UN Div. for Ocean Affairs and the Law of the Sea, *Commission on the Limits of the Continental Shelf: Selected Documents of the Commission*, http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Documents (providing access to the Commissions "basic documents").

[159] *See CLCS Guidelines*, *supra* note 84, at ¶ 2.2 (discussing test of appurtenance, through which a state seeks to demonstrate to CLCS that it is entitled to make a claim by proving that its continental margin physically extends beyond 200 nautical miles).

[160] *See generally CLCS Guidelines*, *supra* note 84 (describing steps countries must take to establish article 76 claim).

[161] *See id.* at ¶ 1.2.

[162] *See Rules of Procedure*, *supra* note 156, at rule 45(a).. The report cannot propose boundaries for areas where there is a dispute between states over boundary delineation, which often occur where states shelves overlap. *See id.* at rule 46(1); Annex I, art. 5(a).

[163] *Id.* at Annex II, art. 2(1); art. 3(1). The Secretary-General and designated members of the Secretariat may also have access within the scope of the process. *See id.* at Annex II, art. 3(1).

[164] *See CLCS Submissions*, *supra* note 31. There are several reasons states might make claims confidential. In compiling CLCS submissions, states gather a huge amount of new data that, when analyzed, may reveal the location of many important mineral and oil deposits. *See* Zinchenko, *supra* note 123, at 227 (discussing states' proprietary interest in the information it collects). States do not want to release this data to the rest of the world before they have had a chance to assess exactly what they have, what it might be worth, and how they want to regulate access. *See* Haworth, *supra* note 80, at 153 (describing interest of mining companies in confidentiality of seabed data). Further, if the data show significant deposits, other UNCLOS Parties might try to challenge shelf boundaries, in an attempt to force the state to cede some of its wealth to the deep seabed regime. A submitting state may not want its neighbors to know its proposed limits for fear that they will spark a boundary dispute. *See id*. This is certainly what motivated Russia to keep its claim secret. *See U.S. Reaction to Russian Continental Shelf Claim*, 96 AM. J. INT'L L. 969, 969–70 (2002) (describing U.S. protest that Russia's proposed Arctic boundaries might infringe on its own Arctic rights).

[165] *See CLCS Guidelines*, *supra* note 84, at ¶ 9.1.4 (describing contents of executive summary); *Rules of Procedure*, *supra* note 156, at rule 50 (stating that the U.N. Secretary-General will promptly make executive summary available to public).

executive summary and Commissioners time to prepare.[166] To date, most submissions have received comments from a variety of UNCLOS Parties, including neighboring states disputing a specific boundary and other states with broader concerns.[167]

When the three months are up, the entire Commission holds a meeting with the submitting state, during which the state presents the submission and answers preliminary questions.[168] The Commission then appoints a sub-commission to carry out a detailed technical and scientific review.[169] The sub-commission is comprised of seven Commissioners, who are chosen taking into account geographical representation and excluding Commissioners who are nationals of the submitting state or of states with whom the submitting state has a boundary

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[166] *See Rules of Procedure*, *supra* note 156, at rule 51.

[167] *See, e.g.*, UNCLOS, Meeting of State Parties, 12th mtg., *Note Verbale Dated 25 February 2002 from the Permanent Representative of Japan to the United Nations Addressed to the Secretary-General of the United Nations, Regarding the Submission Made by the Russian Federation on 20 December 2001 to the Commission on the Limits of the Continental Shelf*, Annex, ¶ 1, U.N. Doc. SPLOS/82 (Mar. 21, 2002) (disputing Russia's claim in "Four Islands" region); Letter from Ann W. Patterson, U.S. Deputy Representative to the United Nations, to Nicolas Michel, U.N. Under-Secretary-General and Legal Counsel, *Notification Regarding the Submission Made by Brazil to the Commission on the Limits of the Continental Shelf* (Aug. 25, 2004), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_los_usatext.pdf [hereinafter Patterson Letter] (taking issue with Brazil's method of measuring sediment thickness in Vitoria-Trinidade feature of its claim). *See CLCS Submissions*, *supra* note 31 (providing access to all submissions and comments). Non-neighboring states may be interested in submissions for a variety of reasons. A number of countries, including the U.S., Canada, Norway, the Russian Federation, and Japan, have developing deep-sea mining industries that are interested in carrying out operations in areas where significant mineral deposits are found. *See* REPORT OF THE SECRETARY–GENERAL: OCEANS AND THE LAW F OF THE SEA, ¶¶ 325–43, A/54/429 (Sept. 30, 1999); Craig H. Allen, *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management*, 13 GEO. INT'L L. REV. 563, 578–79 (2001); ALEXANDRA MERLE POST, DEEPSEA MINING AND THE LAW OF THE SEA (1984) (analyzing the difficulties of developing a comprehensive legal regime to govern deepsea mining, in part because of competing national interest) . These governments would be interested in monitoring the article 76 process and ensuring claims (other than their own) are not excessive. Powerful developing countries, such as China, India, South Africa and Brazil, are deeply committed to the Common Heritage of Mankind principle, a developing country initiative, and want to minimize infringements on the deep seabed. *See* MILES, *supra* note 55, at 42 (discussing advocacy of G-77 countries for expansive international seabed regime). Finally, states that have or will make a submission want to verify that the Commission applies article 76 consistently across claims so that no state receives preferential treatment. *See* Comm'n 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*, ¶ 12, U.N. Doc. CLCS/54 (Apr. 27, 2007) [hereinafter *CLCS 19th Session Report*] (discussing Brazil's comments to Commission regarding importance of consistent and fair application of criteria).

[168] *See Rules of Procedure*, *supra* note 156, at Annex III, Part II, ¶ 2.

[169] *See* UNCLOS, *supra* note 4, at Annex II, art. 5 (noting CLCS generally works through sub-commissions); *Rules of Procedure*, *supra* note 156, at Annex III, Part III, ¶¶ 3, 5 (discussing sub-commission's examination of submission).

dispute.[170] The CLCS has decided that it is only obligated to consider comments related to boundary disputes and, thus, it disregards comments from states related to other issues.[171]

The sub-commission process is intense. During an initial review, the sub-commission determines if the submission is complete, properly formatted, and satisfies a preliminary analysis.[172] The sub-commission then meets as many times as necessary to complete a full technical and scientific review, which involves examining the data and methodology underlying each element of the article 76 formula, and determining whether the data submitted is sufficient in quality and quantity to justify the proposed boundaries.[173] The sub-commission uses the Technical Guidelines to direct its review.[174] Sub-commissions are permitted to seek outside technical or legal assistance in cases where Commissioners are unsure of how to interpret a particular issue or a piece of evidence.[175] During this process, the sub-commission may request further information or clarification from the submitting state whenever it has questions regarding the claim.[176] In addition, since 2006, sub-commissions have met with the submitting state late in the sub-commission process to present their preliminary recommendations and take the state's comments.[177] The state cannot attend sub-commission meetings, however, unless the sub-commission invites them.[178]

After completing its review, the sub-commission drafts recommendations on the proposed limits.[179] The recommendations take one of three directions: finding that the data submitted supports the limits proposed and recommending that the state adopt them; finding the information supports other limits and recommending that the state adopt those instead; or finding that the data is insufficient to support any limits and recommending how the state can improve its testing and measurements to develop boundaries consistent with article 76.[180] The sub-commission's recommendations next go to the entire Commission, which can accept or modify

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[170] UNCLOS, *supra* note 4, at Annex II, art. 5. *See* Comm'n 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*, ¶¶ 12–20, U.N. Doc. CLCS/32 (Apr. 12, 2002) (hereinafter *CLCS 10th Session Report*) (describing CLCS decision to use sub-commission to examine Russian submission and establishing rules for composition and function of sub-commission); Comm'n 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*, ¶¶ 18–22 U.N. Doc. CLCS/42 (Sept. 14, 2004) (hereinafter *CLCS 14th Session Report*) (describing CLCS decision to usesub-commission to examine Brazilian submission).

[171] *See CLCS 14th Session Report*, *supra* note 169, at ¶ 17 (describing Commission decision to disregard U.S. comment on Brazil submission because Commission only obligated to consider comments related to boundary dispute between states with opposite or adjacent coasts).

[172] *See Rules of Procedure*, *supra* note 155, at Annex III, Part VI, ¶ 15(outlining sub-commission's initial examination of a submission).

[173] *See id.* at Annex III, Part IV (describing sub-commission's main review process).

[174] *See id.* at Annex III, Part IV, ¶ 9(1) (stating the sub-commission will base its review on the Guidelines); *CLCS Guidelines*, *supra* note 84, at ¶¶ 1.1–1.3 (describing reason for and use of Technical and Scientific Guidelines).

[175] *See Rules of Procedure*, *supra* note 155, at rule 57; Annex III, Part IV, ¶ 10(1)–(2).

[176] *Id.* at Annex III, Part IV, ¶ 10(1).

[177] *Id.* at Annex III, Part IV, ¶ 10(3)–(4). *See also* Comm'n 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*, ¶ 36, U.N. Doc. CLCS/50 (May 10, 2006) [hereinafter *CLCS 17th Session Report*] (describing amendment to Rules of Procedure to require meetings).

[178] *See Rules of Procedure*, *supra* note 156, at rule 52 (stating the coastal state must be invited to participate in "relevant proceedings"); Annex III, Part VI, ¶ 15 (defining "relevant proceedings").

[179] *See id*. at Annex III, Part V.

[180] *Id.* at Annex III, Part V, ¶ 12(4)–(6).

them.[181] Again, the submitting state cannot attend these meetings.[182] Finally, the Commission forwards the final recommendations to the state, which can either establish final and binding boundaries based on them or make a new submission and start the process all over again.[183] If the state decides to resubmit, it can work with the Commission to reduce the disparities between the recommendations and its submission.[184] The Commission also provides the recommendations to the Secretary-General, who provides a summary of the recommendations to UNCLOS Parties as he sees fit.[185]

So far, the Commission has completed the recommendation process for eight claims.[186] While the complete submissions and recommendations are secret, it is known that the CLCS rejected large parts of Russia's claim to the Arctic.[187] Russia is reconsidering its submission. The CLCS fully approved Australia and New Zealand's claims, enabling each country to establish "final and binding" limits based upon its submission.[188] The CLCS should issue recommendations for several others in the coming years.[189] Given the number of claims submitted, the CLCS is likely to be reviewing submissions and resubmissions for at least the next decade.[190] It will be a long and laborious process, but, as this section has made clear, an extremely important one. Article 76 gives final definition to rights over continental shelf resources and to the form of the universally-held deep seabed. UNCLOS Parties empowered the CLCS to help interpret and apply article 76 to guard against excessive claims, mitigate disputes between Parties over legitimate boundaries, and guarantee respect for the rights of all states. The CLCS has established significant rules and procedures to carry out its mandate. The next section will ask whether these procedures hold the Commission sufficiently accountable to the states under whose authority it acts.

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[181] *Id.* at rule 53(1).

[182] *See id.* at Annex III, Part VI, ¶ 15(1 bis.) (noting coastal state has opportunity to make presentation to Commission following the sub-commission's recommendations, after which the Commission will evaluate the recommendations privately). *See also* Comm'n 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*, ¶¶ 18–27, U.N. Doc. CLCS/34 (Jul. 1, 2002) [hereinafter *CLCS 11th Session Report*] (recounting CLCS decision during consideration of Russian recommendations to not permit state to attend Commission meetings).

[183] *See id.* at rule 53(4)–(5).

[184] *See* McDorman, *supra* note 100, at 306 (noting states and CLCS work together in ping-pong submission process).

[185] *See Rules of Procedure*, *supra* note 156, at rule 54(3) (directing the Secretary-General to give "due publicity" to the recommendations of the Commission). The Secretary-General must keep confidential information secret in accordance with the Rules. *See id.* at Annex II, ¶ 3 (defining the circumstances under which confidential information may be distributed).

[186] *See CLCS Submissions*, *supra* note 31 (showing CLCS adopted recommendations for claims submitted by Russia, Brazil, Australia, Ireland, New Zealand, a joint submission by several European nations, Norway, and Mexico).

[187] *See* Malakoff, *supra* note 25, at 1878.

[188] *See* Steven de Tarczynski, *Australia: Diffident on UN Grant of Larger Continental Shelf*, INTER PRESS SERVICE (May 14, 2008), *available at* http://www.ipsnews.net/news.asp?idnews=42359; New Zealand Ministry of Foreign Affairs & Trade, Treaties and International Law, *New Zealand's Continental Shelf and Maritime Boundaries*, http://www.mfat.govt.nz/Treaties-and-International-Law/04-Law-of-the-Sea-and-Fisheries/NZ-Continental-Shelf-and-Maritime-Boundaries.php (last visited November 16, 2008).

[189] *See* Malakoff, *supra* note 25, at 1878 (stating Russia is studying the Commission's recommendations); *CLCS Submissions*, *supra* note 31 (revealing sub-commissions are examining several claims).

[190] *See* UNCLOS, Meeting of States Parties, 17th mtg., *Issues Related to the Workload of the Commission on the Limits of the Continental Shelf—Note by the Secretariat*, U.N. Doc. SPLOS/157 (April 30, 2007) (discussing CLCS's unexpectedly heavy workload and several proposed solutions).

III. Accountability and the CLCS

Over the past several decades, the increasing institutionalization of international law and policy has led many to ask whether states have ceded too much power to an international architecture that is unaccountable to the interests it supposedly serves.[191] In domestic systems, accountability mechanisms that increase transparency and participation, require reasoned decision-making, and permit independent review of decisions, have long been available to allow citizens and governments to check the power of unelected administrative bodies.[192] Internationally, unelected administrators now abound but accountability mechanisms are much less prevalent.[193] The field of global administrative law (GAL) has developed in response to this mismatch.[194] GAL argues that international regime accountability is necessary because it helps to ensure that regime actors perform their assigned roles, constrains the ability of institutions to infringe on state or individual rights, and can help promote democracy.[195] Based upon this normative foundation, GAL examines whether and how accountability mechanisms can be introduced into the international system.[196]

With the CLCS, UNCLOS Parties brought the institutionalization movement to the law of the sea. Since the Commission began considering submissions in 2002, however, many have commented that its procedures are secretive—submissions and recommendations are confidential, states cannot attend Commission meetings, and Commissioners cannot speak openly about the decision process.[197] But most commentators made these observations in passing; there has been surprisingly little sustained analysis of the Commission's accountability.[198] The Commission has emphasized that it is an "autonomous body" that has no formal relationship with states, and UNCLOS Parties do not appear, thus far, to have questioned this position.[199] As most scholars have focused on the difficulty of the CLCS's technical mandate, rather than its procedural safeguards, it would seem that the CLCS is ripe for an accountability analysis. Before diving into such an enquiry, however, it is first necessary to ask: who cares? Is there any fundamental reason why the CLCS should be held accountable? And if so, to whom and for what purpose?

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[191] *See* Grant & Keohane, *supra* note 35, at 29–30 (describing growing concerns over accountability and democracy in international regimes).

[192] *See* Kingsbury et al., *supra* note 36, at 31–42 (describing accountability mechanisms used in domestic systems and discussing their extension to international sphere).

[193] *See id.* at 16 (discussing existence of accountability gaps in international institutions).

[194] *See id.* at 27–29.

[195] *See id.* at 42–51 (discussing normative arguments for global administrative law: intra-regime efficiency, protecting rights, and promoting democracy).

[196] *See id*. at 28 (describing scope of global administrative law).

[197] *See, e.g.*, Malakoff, *supra* note 25, at 1878 (stating that many outside experts question the Commission's reliance on secrecy in article 76 review); Macnab, *supra* note 34, at 2 (arguing that Commission's secrecy could complicate application of article 76); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 838–839 (2006) (stating CLCS could benefit from more transparency).

[198] *But see* Macnab, *supra* note 34 (arguing the CLCS should be more transparent). Ron Macnab, a Canadian geologist who has worked extensively on continental shelf issues, published the only in-depth analysis of any accountability aspects of the CLCS; most other articles focus on technical issues.

[199] *See CLCS 11th Session Report*, *supra* note 181, at ¶ 38 (stating that Commission received observer status at SPLOS meetings, increasing interaction with States Parties otherwise limited by lack of formal relationship with states); Zinchenko, *supra* note 123, at 230 ("The Convention does not envisage that the Commission should report to any international organ . . . .").

A. The Need for an Accountable CLCS

Formally, *accountability* means "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that these responsibilities have not been met."[200] This definition assumes that the two sets of regime actors associate in such a way that one set has a right to hold the other to account.[201] Such a relationship can exist in two situations: where the account holder grants, delegates, or transfers authority or resources to the accountee, so that the latter can act in the interests of the former; or where the accountee infringes the account holder's legal rights.[202] In international relations literature, however, discussions of accountability have blurred the formal definition somewhat by applying the term to broader governance issues.[203] Holding an international institution accountable might refer to the establishment of rules and procedures to allocate and regulate the authority to make decisions, or to the need to ensure that actors are sufficiently responsive to the legitimate interests of an identified group.[204] This use of accountability does not necessarily depend on an accountor-accountee relationship, and its central focus is the promotion of "just [and] equitable decisions by the global regime in question."[205]

In order to cast as wide of a net as possible, this article uses the term *accountability* to refer to an amalgam of the concepts just outlined. It establishes that a formal accountability relationship exists between the CLCS and UNCLOS Parties; in examining the extent to which the Commission is or is not accountable, however, it uses a broader understanding of the term. The article asks whether UNCLOS Parties have access to sufficient mechanisms to ensure that the CLCS respects their rights and addresses their legitimate interests. Assurance of this protection may require formal accountability mechanisms through which states can demand that the CLCS explain its decisions and, if necessary, impose sanctions.[206] It may also involve procedures to regulate CLCS decision-making or mechanisms focused on transparency, reason-giving, and participation that can check the Commission's actions as well as enhance its responsiveness to states' interests without formal dispute settlement or sanctions.[207] Discussing accountability in this sense may not be formally precise, but it is in line with the way many scholars use the term[208] and permits consideration of a wider array of accountability mechanisms.[209]

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[200] Grant & Keohane, *supra* note 35, at 29.
[201] *See id.*
[202] *See* Robert B. Stewart, *Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance*, 1 (Sept. 20, 2006) (Discussion Draft, New York University Law School Hauser Colloquium on Globalization and its Discontents), *available at* http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html.
[203] *See* Grant & Keohane, *supra* note 35 (using *accountability* to refer to broader global governance issues).
[204] *See* Stewart, *supra* note 201, at 1 (stating these concepts are distinct governance mechanisms, rather than types of accountability mechanisms).
[205] *See id*. at 4.
[206] *See id.* at 1 (describing basic purpose of formal accountability mechanisms).
[207] *See id.* at 9 (describing proposals to improve accountability in global organizations).
[208] *See, e.g.*, Grant & Keohane, *supra* note 35 (using accountability in the broad sense).
[209] *See* Stewart, *supra* note 201, at 8–9 (describing how different types of mechanisms can be used to address responsiveness to affected interests and regulated decision-making).

The first step in analyzing the accountability of an international institution is determining to whom, if anyone, that institution owes account and why.[210] For the CLCS, there is one fairly clear response: the Commission should be accountable to UNCLOS Parties because it is acting in their interests through authority they delegated to it.[211] Before the CLCS, states had complete sovereignty over territorial boundary setting.[212] Creating the Commission forced them to cede some of that control: today, "final and binding" seabed boundaries cannot exist without Commission approval.[213] Thus, while states remain key players in the delineation process, they have delegated to the Commission some of their original authority over seabed boundaries.[214] This means that, while it is an independent body, the Commission acts on behalf of states through a grant of power that derives, in part, from their sovereign rights. Under a classical understanding of accountability, therefore, the CLCS should answer to UNCLOS Parties.[215]

Beyond this very formalistic reasoning, there are two additional arguments for CLCS accountability to UNCLOS Parties that are, perhaps, more normatively compelling. First, one of the central arguments for accountability in international organizations has been their ability to affect states' rights.[216] For example, the International Monetary Fund has the power to force countries receiving its loans to adopt certain macro-economic policies.[217] This creates a situation in which unelected international bureaucrats are constraining the right of states to set domestic policy.[218] Development of mechanisms to increase the accountability of the IMF to its client states could help correct the balance of power and ensure that the IMF is not unduly interfering with a country's sovereign rights.[219]

Considering the mandate of the CLCS described in Part II, it is also susceptible to a rights-affecting argument for accountability. The Commission is responsible for helping interpret article 76, which defines the extent of states' various seabed rights, and for determining how the article applies to actual claims to shelf jurisdiction.[220] This means that the Commission plays a central role in establishing the breadth of coastal state jurisdiction and the extent of the deep seabed. As a result, the Commission's work directly affects the rights of UNCLOS Parties. Therefore, those Parties should be able to hold the CLCS accountable to ensure that it is respecting their rights and responding to concerns and interests related to them.

Scholars have also argued for accountability in international regimes because it can "uphold and secure the cohesion and sound functioning of an institutional order."[221] In other

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[210] *See id*. at 10 (stating that analysis should determine "who is accountable [to] whom for what, with what sanctions, and under what standards and procedures if any.").
[211] *See* Grant & Keohane, *supra* note 35, at 42 ("[Holder of authority] can be called to account by those who authorized them as well as by those affected by them.").
[212] North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3, 22 (Feb. 20) (noting states exercise sovereign authority over their territory).
[213] *See* UNCLOS, *supra* note 4, at art. 76.
[214] *See supra* Part II.A.
[215] *See* Stewart, *supra* note 201, at 10 (describing accountability as a function of relationship between accountor and accountee).
[216] *See* Kingsbury et al., *supra* note 36, at 46–48 (discussing rights protection as normative justification for global administrative law).
[217] *See* Ofer Eldar, *Reform of IMF Conditionality:A Proposal for Self-Imposed Conditionality*, 8 J. INT'L ECON. L. 509 (2005) (proposing new procedure for IMF lending to enhance transparency and accountability in IMF's use of conditionality).
[218] *See id.* at 514.
[219] *See id*. at 523–28 (discussing basic function and benefits of implementing proposed procedure).
[220] *See supra* Part II.
[221] Kingsbury et al., *supra* note 36, at 44.

words, mechanisms that promote transparency and reason-giving or regulate decision-making could help ensure that the CLCS adheres to and competently performs its mandate.[222] This, in turn, will help ensure that the continental shelf regime functions as intended.[223] This argument has particular resonance here due to the tricky nature of the Commission's job. When reviewing shelf claims, it must accurately interpret the vague and complicated delineation formula, consistently assess and reconcile its interpretation against those of submitting states, and give states recommendations that will, eventually, lead them to adopt boundaries that conform to article 76.[224] It must also remember and safeguard the interests of other UNCLOS Parties in the deep seabed, even though they are not directly represented in the review process.[225] It is easy to imagine a myriad of ways that the CLCS might get any of these steps wrong. If the Commission does not have to explain or justify its actions to states, or if states cannot observe its work, then there is no way to make sure that it is adhering to its mandate; this could result in final boundaries that do not actually respect article 76.

Further, an unaccountable CLCS could undermine the entire article 76 process. The development of a clear, uncontested seabed jurisdiction requires all of the UNCLOS Parties to trust and respect the boundaries established. If they have no way to verify that the CLCS is working as intended, however, Parties will be far less likely to buy-into to its determinations.[226] This may cause submitting states to ignore recommendations when setting limits or encourage other Parties to dispute the limits other states set. Already, the relatively small numbers of shelf claims submitted have generated a number of comments and criticisms from UNCLOS Parties.[227] These comments indicate that setting limits can and will be contentious, and that states are poised to contest those boundaries that they believe are arbitrary or unfair. In addition, many states have called for greater participatory rights in CLCS meetings,[228] and Commissioners themselves have stated that the opaqueness or perceptions of bias or unfairness will undermine the Commission's work.[229] Thus, accountability could be an important means of ensuring that the CLCS fulfills its role in the continental shelf regime, and, by extension, that the regime actually results in the firm seabed boundaries intended.

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[222] *See id.* (stating international administrative organizations require normative procedures to ensure proper performance, though such mechanisms often function internally).
[223] *See id*.
[224] *See supra* Part II.
[225] *See* Macnab, *supra* note 34, at 10 (noting CLCS must consider interests of three categories of parties: the submitting state, the CLCS, and other states).
[226] *See id.* at 14 (arguing that greater transparency would "promote broad acceptance" of boundaries approved by the Commission).
[227] *See, e.g.*, Patterson Letter, *supra* note 166 (providing text of U.S. comment on Brazil proposal). *See generally CLCS Submissions*, *supra* note 31(providing access to comments on all current submissions).
[228] *See* UNCLOS, Meeting of States Parties, 15th mtg., *Report of the Fifteenth Meeting of States Parties*, ¶ 74, U.N. Doc. SPLOS/135 (July 25, 2005) [hereinafter *15th SPLOS*] (discussing concerns of states over CLCS procedures that restrict their access to meetings).
[229] *See* Francis, *supra* note 106, at 144 (emphasizing importance of Commissioners avoiding influence of politics); Malakoff, *supra* note 25, at 1878 (noting CLCS Chairman favored reducing secrecy in Commission). Academic and shelf experts have echoed this concern. *See, e.g.*, Macnab, *supra* note 34, at 2 (stating secrecy of Commission might generate problems in dealing with submissions); Oxman, *supra* note 196, at 838–39 (noting potential advantages of increased transparency in Commission's work).

B. Accountability Gaps in the CLCS

An examination of the Commissions procedures reveals significant potential for accountability gaps.[230] The Commissioners decide whether claims meet the article's requirements and formulate recommendations without any state participation.[231] Submissions and recommendations are kept secret.[232] The CLCS created the Rules of Procedure and the Technical and Scientific Guidelines with minimal input from the states affected by them.[233] The accusations of secrecy made by experts and government officials reinforce the instinct that the CLCS has serious accountability problems. To ferret out these lapses and determine if reform is necessary, this section will examine three areas: the Commission's make-up; its work in reviewing submissions; and the process of creating the Scientific and Technical Guidelines and Rules of Procedure.

1. *Composition of the Commission*

The Commission is a body of twenty-one experts in the areas of geology, geophysics and hydrology.[234] Individual nations nominate Commissioners and UNCLOS Parties elect them to renewable five-year terms, taking into regard equitable geographic distribution.[235] Commissioners serve in their individual capacity, but nominating states are responsible for covering their costs of service.[236] The full Commission meets at the UN Headquarters in New York as often as necessary, typically two times a year; all Commissioners are expected to attend.[237] For each claim, the CLCS chooses sub-commissions whose members remain in New York after full-Commission meetings, often for several weeks, to review the submission.[238]

This brief sketch reveals several aspects of the CLCS that are interesting from an accountability standpoint. Most obviously, elections seem to make the Commissioners directly accountable to UNCLOS Parties. There are, however, several problems with CLCS elections as an accountability mechanism. First, UN elections often depend more on intra-UN politics than substance; many Parties cast ballots based on regional and national alliances or favors owed, not on a nominee's actual positions or work.[239] Second, because the Commission conducts much of

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[230] *See supra* Part II.B.

[231] *See Rules of Procedure*, *supra* note 156, at Annex III, Part VI, ¶ 15 (defining types of proceedings to which submitting state has right to attend).

[232] *See* Macnab, *supra* note 34, at 11–12 (discussing confidential nature of CLCS work).

[233] *See* UN Div. for Ocean Affairs and the Law of the Sea, *Rules of Procedure of the Commission*, http://www.un.org/Depts/los/clcs_new/commission_rules.htm (last visited May 20, 2009) (discussing process of drafting the Rules of Procedure); UN Div. for Ocean Affairs and the Law of the Sea, *Scientific and Technical Guidelines*, http://www.un.org/Depts/los/clcs_new/commission_guidelines.htm (last visited May 20, 2009) (discussing process of drafting the Guidelines).

[234] UNCLOS, *supra* note 4, at Annex II, art. 2(1).

[235] *Id.* at Annex II, art. 2(1)–(2), (4).

[236] *Id.* at Annex II, art. 2(1), (5).

[237] *See Rules of Procedure*, *supra* note 156, at rule 2(1); rule 4(1); rule 7(4).

[238] *See id.* at Annex III, Part IV, ¶ 9(2) (noting sub-commissions generally function at UN Headquarters).

[239] Most U.N. elections, including those for the CLCS, are a two-stage process. First, to ensure fair geographical representation, seats are divided up among the organization's five regional groups, each of which chooses a slate of candidates, often through procedures that have little to do with a candidate's merits. *See* Meeting of States Parties to the United Nations Convention on the Law of the Sea, *Decision on the allocation of seats on the Commission on the Limits of the Continental Shelf and the International Tribunal for the Law of the Sea*, ¶ 2, U.N. Doc. SPLOS/182 (July 9, 2008) (allocating seats on Commission by region); David M. Malone, *Eyes on the Prize: The Quest for Nonpermanent Seats on the UN Security Council*, 6 GLOBAL GOVERNANCE 3, 5 (2000) (explaining various regional selection procedures for Security Council seats). Second, the general membership (either the entire General

its work in secret, states do not know how various Commissioners have acted or what positions they have taken, leaving them with little substance upon which to base votes. While alliance-building and favor-trading are a natural part of most electoral processes, they do little to enhance CLCS accountability—whether a Commissioner remains on the Commission depends more on whether his sponsoring state has the political clout necessary to garner sufficient votes than on his actual positions on article 76 and his work on the Commission.[240] Finally, elections alone are a rather blunt means of improving accountability and could actually be counter-productive. While the Commission must be accountable, it must also maintain its independence; unbiased review is an essential part of article 76.[241] Threatening to remove support for a Commissioner's candidacy would likely bully them into unquestioningly accepting the positions of states most interested in a particular submission. Subtler mechanisms focused on transparency, reason-giving, participation and review are likely to produce more reasoned and consistent responsiveness, without sacrificing independence.

Elections raise a related but contrary concern: they could make individual Commissioners *too* accountable to their nominating states. If a Commissioner's ability to participate depends upon his state's nomination and financial support, it will be hard for him to put aside national interests and act independently.[242] This is not just a hypothetical problem—Commissioners themselves have recognized the difficulty.[243] Bias in the CLCS would seriously undermine the article 76 process as well as attempts to instill accountability to all UNCLOS Parties, not just the ones footing the bill. The support requirement could also skew the Commission in favor of wealthier countries.[244] In the past, costs have impeded developing countries from nominating Commissioners or sending elected members to meetings.[245] UNCLOS Parties created a voluntary trust fund to defray expenses,[246] but as submissions

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Assembly or, in the case of the CLCS, all States Parties to UNCLOS) votes on the regional candidates. Ideally, the preliminary process produces an "agreed slate"—the exact number of candidates needed to fill the region's slots—and the general vote simply confirms the regional decision. *See* Malone, *supra* at 5 (stating that Member States usually prefer "agreed slate"). When this does not happen, however, nominating countries engage in spirited electioneering to secure their nominee's seat, often resorting to vote trading, promises of aid, and "cult of personality" campaigns to win. *See id*. at 12–17 (describing various tactics used to win Security Council seats).

[240] *See* Malone, *supra* note 238, at 11–18 (describing how finances and political clout are key to winning U.N. elections).

[241] *See* Francis, *supra* note 106, at 144 (commenting on the importance of independence to CLCS work); MacNab, *supra* note 34, at 11 (discussing importance of transparency to CLCS's mandate).

[242] *See* McDorman, *supra* note 100, at 312 (discussing issues created by financial relationship between Commissioners and nominating states).

[243] *See* Francis, *supra* note 106, at 144 (questioning whether Commissioners can be independent and unbiased if reliant on support of nominating state).

[244] Commentators have raised similar concerns about other international bodies. *See, e.g.* Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health*, 96 GEO. L.J. 331, 364 (2008) (observing considerable influence of wealthy nations in setting policy of health organizations).

[245] During the early years of the Commission, the Commissioners regularly discussed the financial difficulties that developing states faced in sponsoring Commissioners and pressed UNCLOS Parties to create a Trust Fund to help defray these costs. *See, e.g.*, Comm'n 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*, ¶¶ 5, 19, U.N. Doc. CLCS/18 (Sept. 3, 1999) [hereinafter *CLCS 6th Session Report*] (stating Commission discussed creation of trust to facilitate participation by developing countries).

[246] UNCLOS, Meeting of States Parties, 10th mtg., *Decision Regarding the Establishment of a Voluntary Trust Fund for the Purpose of the Commission on the Limits of the Continental Shelf*, U.N. Doc. SPLOS/58 (June 6, 2000) [*10th SPLOS Trust Fund Decision*].

increase and sub-commission demands intensify, countries and Commissioners are concerned that funding will be inadequate and decrease participation by developing countries.[247] Caving to pressure from particular states is not accountability; finding ways to mitigate financial and electoral pressures will be necessary to create a truly responsive CLCS.

2. *Submission Review*

Examining accountability in the article 76 review process is particularly important because it is the heart of the CLCS's work; it directly concerns both states' rights and the Commission's role in the continental shelf regime.[248] As with elections, the process appears to have one obvious accountability mechanism: states can resubmit their claims, which is supposed to provide an opportunity to dispute and influence the Commission's interpretation of article 76.[249] In theory, this is true, but there are several problems with resubmission as the main or only point of accountability in the submission process. First, the CLCS needs to be accountable to *all* UNCLOS Parties, but resubmission gives only submitting states a window into the Commission's work. Second, even for submitting states, resubmission is far from an ideal accountability tool. It does not provide an independent review—states just revise their arguments and send them back to the same decision-maker. Third, resubmission is not particularly useful if states do not understand how the Commission makes its decisions or considers their arguments. The rest of this section shows that the Commission's current procedures are inadequate on these points and hobble the utility of resubmission as an accountability mechanism.

States have limited rights to participate in the CLCS submission process. Under the Commission's Rules of Procedure, submitting states are allowed to attend sub-commission meetings that the CLCS "deem[s] relevant," defined as the initial meeting where the state presents its claim, meetings to which the sub-commission invites the state, and meetings through which the state seeks to clarify its submission.[250] Otherwise, states are not permitted to observe or participate in sub-commission or Commission deliberations.[251] Many governments have criticized the privacy of Commission meetings, and Commissioners themselves have pointed out that it gives the CLCS a secretive air.[252] In 2006, the CLCS responded to these comments by amending the Rules of Procedure to require the sub-commission to meet with the submitting state late in the review process to present preliminary recommendations and receive comments from the submitting state.[253] It also permitted the submitting state to make a presentation on matters related to its submission prior to Commission deliberations on sub-commission

[247] *See CLCS 14th Session Report*, *supra* note 169, at ¶ 54 (discussing concerns of Commissioners that governments may not be able to finance stays for sub-commission meetings).
[248] *See supra* notes158–184 and accompanying text (discussing submission process).
[249] *See* McDorman, *supra* note 100, at 306 (describing ping-pong process as one which narrows down differences between state and Commission interpretations).
[250] *Rules of Procedure*, *supra* note 156 at Annex III, Part VI, ¶ 15.
[251] *See id.* at Annex II, ¶ 4(1).
[252] *See 15th SPLOS*, *supra* note 227, at ¶ 74 (discussing complaints from states that led to Commission discussion on state involvement in meetings); Comm'n 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*, para. 39–47, U.N. Doc. CLCS/48 (Oct. 7, 2005) [hereinafter *CLCS 16th Session Report*] (describing Commission discussion about complaints from some states, including Brazil, over exclusion from Commission meetings).
[253] *See Rules of Procedure*, *supra* note 156, at Annex III, Part IV, ¶ 10(3)–(4). *See also*, *CLCS 17th Session Report*, *supra* note 176, at ¶¶ 31–45 (discussing Commission decision to amend Rules of Procedure).

recommendations.[254] These changes have increased contact with Commissioners during the recommendation-writing process and give submitting states a somewhat more expansive view into the Commission's work.[255] Nonetheless, states still may not attend sub-commission and Commission deliberations, meaning they do not have unfiltered access to the Commission's decision-making process or a complete picture of the debates, issues, and factors that inform the final recommendations.[256]

Closed meetings are not the only thing clouding the Commission's work. The confidentiality requirements in the Rules of Procedure forbid the CLCS from keeping notes, so there are no formal records of any of the review work, including sub-commission meetings and the final Commission review of recommendations.[257] The Chair of the Commission produces an annual report presented to UNCLOS Parties at the annual States Parties on the Law of the Sea meeting (SPLOS), but it focuses on final decisions, rather than on the specifics of the debate and discussion that informed them.[258] The newly introduced late-stage presentation by the sub-commission provides an opportunity for the submitting state to question the sub-commission on its decisions, but the sub-commission is not required to provide any particular level of detail in its presentation or to produce a written record of its deliberations that would endure beyond the meeting.[259] Further, while this meeting occurs at an "advanced stage" in the process, the

[254] *See Rules of Procedure*, *supra* note 156, at Annex III, Part VI, ¶ 15(1 bis.). *See also*, *CLCS 17th Session Report*, *supra* note 176, at ¶¶ 39–45 (discussing Commission decision to amend Rules of Procedure).

[255] *See* UNCLOS, Meeting of States Parties, 16th mtg., *Report of the Sixteenth Meeting of States Parties*, ¶ 82, U.N. Doc. SPLOS/148 (July 28, 2006) (reporting some states thanked Commission for amending Rules of Procedure to improve state access to Commission deliberations).

[256] *See id*. (noting that some states did not believe that amendments fully addressed their concerns about exclusion from the Commission process). The amendment to the Rules of Procedure permitting a final presentation to the Commission explicitly states that the Commission and submitting state may not discuss the recommendations and that the Commission must deliberate on them in private. *Rules of Procedure*, *supra* note 156, at Annex III, Part IV, ¶ 15(1bis.). *See also*, *15th SPLOS*, *supra* note 227, at ¶ 74 (discussing states concerns over limited access to Commission meetings and potential inconsistencies in Rules of Procedure).

[257] *See Rules of Procedure*, *supra* note 156, at Annex II, ¶ 4(3).

[258] *See* Comm'n 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*, ¶¶ 14–44, U.D. Doc. CLCS/54 (Apr. 13, 2007) [hereinafter *CLCS 19th Session Report*] (giving procedural details of Commission's consideration of Brazil, Australia, New Zealand and Norway's submissions but providing no details on content of discussions). *See also* Comm'n 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*, ¶¶ 19–44, U.N. Doc. CLCS/56 (Oct. 4, 2007) [hereinafter *CLCS 20th Session Report*] (giving perfunctory statements on Commission's consideration of several submissions); *CLCS 17th Session Report*, *supra* note 177 at ¶¶ 29, 31–45 (stating Commission discussed issue of how to correctly connect line of outer edge of continental margin to 200 nautical-mile line but providing no details of discussion, and recounting Commission's debate about amending Rules of Procedure but focusing on procedural issues and not in-depth discussion of Commissioners' positions and debate); Comm'n on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf of the Progress of Work in the Commission*, ¶¶ 14–16, U.N. Doc. CLCS/9 (Sept. 11, 1998) [hereinafter *CLCS 4th Session Report*] (stating that Commission deliberated on Scientific and Technical Guidelines but providing no details on deliberations); Comm'n 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*, ¶¶ 13–15, U.N. Doc. CLCS/7 (May 15, 1998) [hereinafter *CLCS 3rd Session Report*] (stating that Commission debated Rules of Procedure but providing no information on content of debate).

[259] *See Rules of Procedure*, *supra* note 156, at Annex III, Part IV, ¶ 10(3)–(4).

recommendations presented are not finalized and do not necessarily reflect the sub-commission's ultimate product.[260]

The Commission does face one requirement to explain its decision-making in writing: its recommendations to the submitting states must include the "rationale" on which they are based.[261] This is an important condition, which can shed light on how the Commission is applying article 76 and help guide the state in re-working its submission. However, there are no real requirements for what this "rationale" must entail—it might include a detailed discussion of how the Commission interpreted and applied various provisions of article 76, or it might just state that the submission failed to meet certain requirements and explain what information to include in a new submission.[262] If the state does not agree with the CLCS's recommendations, the only way to contest them is through resubmission,[263] where the process is exactly the same as the initial one—closed and opaque—and it is difficult for the state to determine how the Commission is dealing with its response.

The submission process is even more closed to the rest of the UNCLOS Parties. These countries have no participatory opportunities whatsoever, as all meetings are off-limits to them.[264] While they can submit comments to the Commission on Submissions, the Commission has discretion to decide what to do with them and is not required to explain whether or how it considered the opinion.[265] Further, the Commission created very strict confidentiality provisions that permit states to declare confidential any of the data they submit with their proposal.[266] This means that submitting states do not have to make their submissions public, and other Parties cannot see or analyze them. The executive summaries are often fairly perfunctory and of limited utility to those states that are truly concerned about boundaries proposed.[267] The Commission's

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[260] *See id.* at Annex III, Part IV, ¶ 10(3). The Rules require that the meeting occur at an "advanced stage" of the process, but state that the sub-commission will present its views on "part or all" of the submission. *Id.* This indicates that the sub-commission does not even need to have completed its deliberations before meeting with the state. In addition, the Rules state that the sub-commission will continue deliberations and draft its recommendations after meeting with the state. *See id.* at Annex III, Part IV, ¶ 10(5) (providing that the sub-commission will continue deliberations and draft recommendations after meeting with submitting state). Staging the meeting this way permits the sub-commission to take into consideration the state's views when drafting the recommendations. This is important in terms of providing states increased access to the recommendation-writing process, but still means that states do not see the full recommendations before the sub-commission forwards them to the Commission. *See id.* (

[261] *Rules of Procedure*, *supra* note 156, at Annex III, Part V, ¶ 12(4).

[262] *See id*. The Rules of Procedure simply say "rationale;" they do not elaborate on the meaning of the requirement. *See id.*

[263] *See* UNCLOS, *supra* note 724, at Annex II, art. 8.

[264] *See Rules of Procedure*, *supra* note 156, at Annex II, ¶ 4(1).

[265] The Rules of Procedure do not include any provisions on the participation of non-submitting states or on responding to comments. In reports, the chairperson simply notes that the Commission received a comment and what it chose to do with it. *See, e.g.*, *CLCS 10th Session Report*, *supra* note 170169, at ¶ 10 (noting that Commission received comments on Russian submission but never explaining whether Commission considered them); *CLCS 14th Session Report*, *supra* note 169, at ¶¶ 16–17 (discussing U.S. comment sent to CLCS regarding Brazilian submission).

[266] *See Rules of Procedure*, *supra* note 156, at Annex II.

[267] *See Russian Submission*, *supra* note 27 (providing access to Russia's brief executive summary and supporting documents, as well as the comments of other nations). Few countries found this summary helpful. *See, e.g.*, Permanent Mission of Canada to the United Nations, *Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf*, (Jan. 18, 2002), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf (stating that the Russian executive summary did not provide sufficient information for Canada to properly analyze the claim).

recommendations are similarly restricted—the CLCS transmits full recommendations and explanations to the submitting states and the UN Secretary-General,[268] while other Parties receive only a summary of the recommendations provided by the Secretary-General..[269] This means that the Commission never has to give a full accounting of its decisions to all UNCLOS Parties, even though all are interested in and affected by its work. Furthermore, as they never see full recommendations or the submissions, it may be difficult for Parties to challenge them.

As has been shown, the Commission's closed review process raises significant concerns. Limited participatory opportunities and transparency make it difficult for states to know whether the Commission is accurately and consistently interpreting article 76. Recommendations provide insight into the Commission's reasoning, but they may not fully explain the Commission's decision-making process and only the submitting state has access to them. Combined with the lack of a clearly defined external review process, this means there is almost no significant check on the Commission's interpretation and application of article 76, even though it directly impacts states' rights.[270] This is particularly worrisome given that interpreting article 76 involves both legal and technical analysis; Commissioners are technical experts but could easily get the law wrong.[271] Further, the Commission engages in an interpretive dialogue with states, and it is supposed to assess and update its position based on alternative explanations they provide.[272] This is a delicate and nuanced process, so it is hard to trust that the CLCS will always get it right without effective accountability mechanisms.

Extensive secrecy also makes it more difficult to convince states to trust the CLCS process and accept its recommendations. There are many ways for CLCS review to go awry; Commissioners may misinterpret article 76, misunderstand evidence submitted by a state, or be biased in favor or against a particular state.[273] States know this and may be less likely to accept the CLCS's recommendations if they have no way to verify that the review is legitimate or feel that the CLCS has arbitrarily excluded them from the process. In sum, the lack of accountability in the submission process has the potential to undermine the continental shelf regime. While concerns about confidentiality and independence must be taken into account, enhanced accountability is still warranted.

3. *The Technical and Scientific Guidelines and the Rules of Procedure*

As discussed above, the Scientific Guidelines and Rules of Procedure are important contributions to the extended claim process. The Guidelines provide a baseline interpretation of article 76 that is the Commission's main review tool and that many states rely on to fashion their claims.[274] The Rules of Procedure clarify how the Commission carries out review, including procedures on the sub-commission process, state participation in meetings, and

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See also CLCS Submissions, *supra* note 31 (providing access to all current submissions, executive summaries, and comments).

[268] *See Rules of Procedure*, *supra* note 156, at rule 53(3) (directing CLCS to submit recommendations to UN Secretariat, which will transmit a copy to the submitting state).

[269] *See id.* at rule 54(3) (stating Secretary-General will give "due publicity" to the Commission's recommendations).

[270] *See supra* notes 141–47 and accompanying text (discussing unique position of CLCS as only international body charged to review article 76 submissions)..

[271] *See supra* notes 80–103 (discussing article 76's technical and legal nature).

[272] *See supra* notes 117–121 (discussing ping-pong review process).

[273] *See generally* Macnab, *supra* note 34, 10–16 (discussing some potential problems associated with CLCS review process).

[274] *See supra* notes 130–34 and accompanying text (providing general discussion of Guidelines).

confidentiality.[275] The Guidelines, therefore, directly influence states' claims, and both the Guidelines and Rules control how the Commission functions, the extent to which it adheres to its mandate, and the trust and respect it receives from states.

The CLCS developed the Guidelines and Rules mostly at closed meetings, though it permitted some state participation. For the Rules, the UN Secretary-General provided an initial set of recommendations, which the Commissioners discussed and amended.[276] Before adopting the final document, the Commission presented it to UNCLOS Parties at an early SPLOS.[277] Parties were permitted to submit comments, but, as with submission review, the Commission had discretion to consider or disregard them and it never provided an explanation of whether or how the comments influenced the final document.[278] The Commission created the Guidelines from scratch—breaking into drafting groups, each of which was responsible for researching and developing rules for a particular element of article 76.[279] It then presented drafts to interested states at an open meeting, where it responded to questions and took comments.[280] Again, the Commission never explained the extent to which the meeting shaped the Guidelines, if at all.[281] The Commission has no formal procedures for regularly reviewing or updating the Guidelines or for allowing states to comment on them.[282] Though the Commission has amended the Rules in

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[275] *See generally Rules of Procedure*, *supra* note 156 (defining processes through which CLCS functions).

[276] *See* Comm'n 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*, ¶¶ 8–13, U.N. Doc. CLCS/1 (June 30, 1997) [hereinafter *CLCS 1st Session Report*] (explaining process through which Commission considered, amended, and adopted rules based on draft prepared by UN Secretariat); United Nations Secretariat, *Commission on the Limits of the Continental Shelf: Its Functions and Scientific and Technical Needs in Assessing the Submission of a Coastal State*, U.N. Doc. SPLOS/CLCS/INF/1 (June 10, 1996) (providing Secretariat's initial assessment of Commission's needs).

[277] *See* Comm'n 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 the Work in the Commission*, ¶ 11, U.N. Doc. CLCS/4 (Sept. 17, 1997) [hereinafter *2nd Session Report*] (noting Commission refrained from adopting Annex I to the Rules of Procedure until states considered it at a Meeting of States Parties).

[278] *CLCS 3rd Session Report*, *supra* note 257, at ¶ 15 (explaining that CLCS would forward parts of the Rules to states for comments, though not disclosing how the CLCS would consider such comments); *CLCS th[h] Session Report*, *supra* note 257 at ¶¶ 18–20 (noting that Commission considered comments from states before formally adopting Rules).

[279] *See CLCS 3rd Session Report*, *supra* note 258 at ¶ 10–13 (discussing decision to create an editorial committee, subdivided into drafting groups, to complete Guidelines).

[280] *See* Div. for Oceans Affairs and the Law of the Sea, *UNCLOS and the Delineation of the Continental Shelf: Opportunities and Challenges for States*, http://www.un.org/Depts/los/clcs_new/documents/clcsopen.htm (last visited Dec. 26, 2008) (describing open meeting); Comm'n on the Limits of the Continental Shelf, *United Nations Convention on the Law of the Sea and the Delineation of the Continental Shelf: Opportunities and Challenges for States* (Apr. 20, 2000), *available at* http://www.un.org/Depts/los/clcs_new/documents/CLCS_26.pdf (providing transcript of open meeting); Comm'n 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*, ¶¶ 4–6, U.N. Doc. CLCS/21 (May 5, 2000) [hereinafter *CLCS 7th Session Report*] (describing open meeting).

[281] *See CLCS 7th Session Report*, *supra* note 279 (revealing that states were allowed to comment, though does not address extent to which CLCS considered comments). The Commission formally adopted the Guidelines prior to the 2000 Open Meeting. *See* Comm'n 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*, ¶ 14, U.N. Doc. CLCS/12 (May 18, 1999) [hereinafter *CLCS 5th Session Report*] (stating that Commission adopted Guidelines); *CLCS 6th Session Report*, *supra* note 244, at ¶ 9 (stating that Commission adopted annexes II, III and IV of Guidelines).

[282] The Guidelines are occasionally discussed at scientific conferences organized by governments and research institutes, and experts attending these meetings sometimes question or challenge aspects of the Guidelines. *See*

response to complaints that states aired at SPLOS meetings, particularly those regarding state participation in the sub-commission process, the Commission faced no requirement to respond to state pressure.[283]

The Guidelines and Rules, therefore, are an important part of the Commission's work that touch on areas where accountability should be a concern—states' rights and how the Commission functions. Unfortunately, the CLCS has developed and amended both the Guidelines and Rules in ways that lack consistency and transparency, as well as restrict state participation. There are a few accountability mechanisms in the current CLCS framework—elections and resubmission—but each has significant limitations. Similarly, SPLOS meetings, open meetings and externally organized conferences provide only an informal, ad-hoc channel for communicating with Commissioners.

These accountability gaps highlight potentially serious problems with the CLCS. Without participatory opportunities, transparency, clearly explained decision-making and external review, there is no way for states to ensure that the CLCS is accurately and consistently interpreting article 76 and adhering to its UNCLOS mandate. Despite the fact that the Commission's power implicates states' rights, there are no significant checks on its exercise of that power. Further, an unchecked CLCS is likely to be a less effective institution—states are unlikely to trust determinations made in a black box. Therefore, it is urgently necessary to increase the CLCS's accountability to UNCLOS Parties. The following sections suggest some mechanisms that could facilitate this transformation.

IV. New Accountability Mechanisms for the CLCS

Following the lead of global administrative law literature, this section will examine how mechanisms modeled on domestic administrative regimes could be used to increase the CLCS's accountability to UNCLOS Parties. Focusing on participatory opportunities, transparency, reasoned decision-making requirements and review, it will propose reforms to the CLCS's structure and procedures that could help check the Commission's role in interpreting and applying article 76 and increase respect for and faith in its decisions. Before jumping into these proposals, however, it is necessary to briefly consider the concerns that have led the CLCS to function as secretly as it does. Doing so will help illuminate the potential limits of reform and ensure that proposals take into account legitimate concerns about the affects of increased Commission accountability.

A. Limitations to Reform

The CLCS's closed approach to its substantive work is not without reason. As the Commission is supposed to be an unbiased review body, it is understandably concerned that

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Antunes & Pimentel, *supra* note 55 at 7, 13–14 (describing two such incidents). It is possible that these discussions inform or shape the Commission's interpretation of the Guidelines and article 76 in general. *See id*. at 7 (describing how one exchange apparently caused Commission to rewrite portion of Guidelines prior to adoption). This entire process is ad-hoc, however, and there is no guarantee that the Commission will react to criticisms nor any record of how it has dealt with past discussions. Further, attending a conference is expensive and many UNCLOS Parties, particularly developing countries, may not be able to participate.

[283] *See CLCS 16th Session Report*, *supra* note 251, ¶¶ 39–47 (discussing the Commission's decision to amend the Rules to permit states to attend sub-commission meetings the Commission deemed relevant); *CLCS 17th Session Report*, *supra* note 176, at ¶¶ 31–45 (describing Commission's decision to introduce the late-stage meeting between the sub-commission and submitting states and the final state presentation).

opening up could interfere with candid, independent decision-making.[284] If states could attend meetings or read transcripts of deliberations, they may be able to pinpoint Commissioners who disagree with them and pressure them to shift positions. This worry is particularly acute because States Parties nominate and elect the Commissioners, who might fear losing their positions if they openly criticized a state's proposal.[285] Pressure would most likely come from those states that have nominated Commissioners. Their influence is mitigated only somewhat by the fact that submitting-state Commissioners do not participate in the sub-committee for their nominating state—they still participate in the full Committee review, where the recommendations are amended and receive final approval, and they can still advocate for their states with Commission colleagues.[286] Other Parties could also pressure Commissioners by threatening to not vote for them during elections or to mount an alternative candidate.[287] Such concerns about bias and improper influence are valid; if permitting greater state participation undermines Commissioners' independence, then UNCLOS Parties may start to question the legitimacy of the review process and the limits the Commission approves So, while reforms must open up the Commission's processes, they must maintaining its independence.

Though intended to improve trust in the Commission, the introduction of accountability mechanisms could have the opposite effect, weakening the Commission and fueling disputes. Lifting confidentiality and increasing access to submissions and recommendations, for instance, could result in other Parties picking fights with submitting states, rather than learning to rely on the integrity of the review process. It might also discourage submitting states from providing full information for fear that it will go public, undermining the quality of submissions and the Commission's ability to conduct review. Further, giving submitting states too much information about deliberations or creating an external review mechanism could encourage them to challenge the Commission rather than work with it to create mutually acceptable boundaries. This would interfere with UNCLOS's ping-pong review process. This article, therefore, seeks to identify subtle reforms that increase responsiveness without sacrificing the balance UNCLOS negotiators struck.

B. Reform Proposals

1. *Composition and Financing of Commission*

In order to increase the role of UNCLOS Parties in areas like submission review, it is first crucial to reduce some of the power they—or at least some of them—already wield. If Commissioners' positions hinge on the nomination and support of their sponsoring states, they will be nervous about criticizing or opposing that state in more transparent proceedings.[288] Therefore, UNCLOS Parties should amend or otherwise reach agreement on changing the

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[284] *See* McDorman, *supra* note 100, at 311–13 (describing importance of Commission's independence from states); Macnab, *supra* note 35 at 11 (discussing need for "objective" CLCS); *CLCS 16th Session Report*, *supra* note 252, at ¶ 42 (stating that some Commissioners objected to allowing greater state participation in sub-commission process because it could endanger Commission's impartiality).

[285] *See* Francis, *supra* note 106, at 144 (discussing potential for State pressure to bias Commissioners' decision-making); *CLCS 16th Session Report*, *supra* note 252251, at ¶ 42.

[286] *See Rules of Procedure*, *supra* note 156, at rule 42(1) (defining eligibility for membership on sub-commissions).

[287] *See supra* notes 238–46 and accompanying text (discussing accountability issues arising from CLCS election process).

[288] *See* Francis, *supra* note 106, at 144 (observing the dangerous influence of states' financial support of Commissioners).

CLCS's nomination and financing procedures.[289] First, the UN Division on Oceans Affairs and the Law of the Sea (DOALOS), an administrative branch responsible for oceans issues, including the continental shelf,[290] should be responsible for drawing up a list of Commission candidates, taking into account the same geographic requirements currently imposed on state nominations. UNCLOS Parties could then vote on these candidates in line with current procedure. As a specialized administrative body that works closely with UN Members, DOALOS has expertise in article 76 issues and understands the concerns of UNCLOS Parties.[291] Given this, it could provide an informed, but more independent, list of candidates. Nomination through DOALOS could help relieve some of the pressure on Commissioners, as their positions will not depend on continued political support from their home countries.

Once elected, Commissioners should be supported through either general UN funds or an UNCLOS funding mechanism that mandates contributions from all Parties.[292] In addition to increasing independence, relieving countries of the requirement to finance Commissioners could result in a more balanced Commission with more representatives from developing countries. As discussed, UNCLOS Parties have long recognized the need to establish a funding mechanism to aid developing countries that an interest in nominating Commissioners, but lack the funds to do so.[293] While there are certainly a greater number of qualified experts in developed countries, current and potential Commissioners from developing countries may not be able to participate if the costs of sponsorship are too high.[294]

2. *The Commission's Role in Legal Interpretation*

As article 76 has a mixed legal-technical pedigree, Commissioners are often confronted with competing legal claims, even though they have only technical expertise.[295] The Commissioners can seek outside legal assistance to help them interpret difficult issues.[296]

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[289] UNCLOS lays out procedures for amendments in Articles 312 and 313. *See*, UNCLOS, *supra* note 4, at art. 312–13. UNCLOS Parties have also used less formal procedures for "re-interpreting" the Convention's terms, however, and it is possible that a similar approach could be used here. *See, e.g., 11th SPLOS*, *supra* note 154 (reinterpreting UNCLOS to extend time limits).

[290] *See* UN Div. for Ocean Affairs and the Law of the Sea, *The Division for Ocean Affairs and the Law of the Sea, its Functions and Activities*, http://www.un.org/Depts/los/doalos_activities/about_doalos.htm (last visited Dec. 26, 2008) (describing history and functions of DOALOS).

[291] *See id.*.

[292] Reform along these lines is already under discussion amongst UNCLOS Parties. *See CLCS 17th Session Report*, *supra* note 176, at Annex (recommending adoption of resolution providing funding for CLCS from UN). As the number of submissions has increased, Commissioners have had to spend more time in New York and the costs of sponsoring a Commissioner have skyrocketed. *See id.* Given this, many Commissioners have called Parties to switch to a different funding scheme, in order to ensure participation of experts from the developing world. *See id.*; *CLCS 20th Session Report*, *supra* note 258257, at ¶ 51 (reporting that Commission reiterated to states importance of draft resolution discussed at 17th session).

[293] *See, e.g., 10th SPLOS Trust Fund Decision*, *supra* note 245 (revealing the States Parties recommended the UN General Assembly establish a voluntary trust fund to enable developing states to participate).

[294] *See CLCS 14th Session Report*, *supra* note 170169, at ¶ 54 (discussing Commissioners' concerns that costs might make it impossible for some Commissioners to participate in sub-commission process).

[295] *See* Antunes & Pimentel, *supra* note 54, at 9 (explaining that CLCS must deal with technical and legal questions and noting that it would be helpful if the Commission included legal experts).

[296] In its early years, the Commission faced many preliminary legal questions regarding article 76, including confidentiality of submissions and how to deal with disputes between states. *See 2nd Session Report*, *supra* note 276, at ¶ 12 (stating that Commission forwarded several questions to States Parties for discussion at SPLOS); *CLCS 3rd Session Report*, *supra* note 257, at ¶ 5 (discussing Commission's decision to forward to SPLOS question of submission where there was dispute between states); *CLCS 5th Session Report*, *supra* note 280, at ¶ 5 (stating that

Neither article 76 nor the Rules require them to do so, however, and the Commission does not appear to have articulated any general principles on when it will or will not seek legal advice.[297] Further, when advice is obtained, Commissioners simply apply it to the case at hand—the Commission does not publish any of the advice it receives, meaning there is no way for states to know what areas of article 76 require interpretation and how legal experts are interpreting them.[298] Therefore, there is no immediate check on how the Commission is dealing with legal questions. It could easily be overstepping its mandate or just getting the law plain wrong. And while recommendations may give submitting states some post-hoc insights on legal interpretation, the Commission is not building a publicly available body of legal precedent that other states can use to prepare their submissions.[299]

To deal with these problems, the CLCS should create a Legal Counsel's office staffed by lawyers who specialize in the law of the sea.[300] The Legal Counsel should review submissions in order to advise the Commission and the submitting state on what areas involve legal, as well as technical, questions. The Counsel's office should provide the Commission with legal interpretations for any unclear issues, seeking outside assistance when necessary. The Commissioners would be responsible for integrating this advice into the final recommendations, but the Counsel's office should also review those recommendations to ensure basic legal soundness. The Commission and the Legal Counsel should also publish regular updates for all UNCLOS Parties that explain the legal issues that have arisen in submissions and how they have been interpreted. This will help guarantee that Commissioners are obtaining legal advice whenever necessary, provide a means through which states can check interpretations, and help build precedent to facilitate the article 76 process.

3. *Increasing Participation of Submitting State in Submission Process*

Enhancing participatory opportunities for submitting states would provide a check on the Commission and improve understanding of the process and the recommendations it produces. The late-stage meeting between the state and sub-commission is an important step towards enhanced participation, but more can be done to increase transparency. Further reforms,

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Commission requested and received a legal opinion from U.N. Legal Counsel on issue of confidentiality of submissions and Commission deliberations). In more recent years, the CLCS has continued to see the Legal Counsel's advice on broad article 76 questions. *See* Comm'n on the Limits of the Continental Shelf, *Statement of the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, ¶ 13, U.N. Doc. CLCS/44 (May 3, 2005) (stating that Commission forwarded to Legal Counsel question of whether states could provide additional information to Commission after making initial submission). The Commission is also permitted to seek outside legal advice for questions that arise while reviewing submissions, but it is not entirely clear where it obtains this advice, as records of sub-commission meetings are non-existent or confidential. *See Rules of Procedure*, *supra* note 156, at rule 57 (stating that Commission can seek advice of outside specialists); Annex II, ¶ 4(1) (declaring that the deliberations of sub-commissions must remain confidential).

[297] The Rules of Procedure permit the Commission to seek outside advice from specialists to the extent that doing so is "necessary" or "useful," presumably including legal advice. *See Rules of Procedure*, *supra* note 156, at rule 57, Annex III, Part IV, ¶ 10(2) (allowing sub-commission members to request advice from outside experts on behalf of the Commission). The Commission has complete discretion to decide when to seek advice, however, and the Rules provide no guidelines on when or how it should do so. *See id*.

[298] *See id.* at Annex II, ¶ 4 (imposing obligation to maintain confidentiality of all details discussed during deliberations).

[299] *See* Prows, *supra* note 97, at 276 (noting CLCS confidentiality policies prevent states from learning from the submissions process of other states).

[300] A number of experts have criticized or questioned the absence of lawyers on the Commission. *See, e.g.*, Antunes & Pimentel, *supra* note 54, at 9 (calling Commission's lack of legal expertise "surprising").

however, cannot be permitted to interfere with the independence and technical precision of the review process. Nomination and financing reforms will mitigate pressure but not eliminate it; Commissioners may still feel inhibited by intense, in-person scrutiny. Active state participation could well turn review into an adversarial process that sacrifices technical virtuosity for politics. Considering this, the Commission does not need to open all meetings to submitting states, but rather continue to ratchet up interaction with the state at all stages of the review process.

First, the Commission should require a sub-commission to hold at least three meetings with the state during its review, at which it presents the status of its deliberations and the state has the opportunity to comment and ask questions. These meetings could occur after the preliminary review, in the middle of the technical review, and, as already happens, late in the process[301]. At the moment, the Commission has informally agreed to hold such meetings with states, but only the final meeting is formally required in the Rules, meaning earlier interaction may not happen consistently and could change when new Commissioners are elected.[302] Further, many meetings between the sub-commission and submitting state involve the Commissioners questioning the state, not responding to concerns.[303] While meetings could be combined for convenience, the Commission must increase formal opportunities for the submitting state to learn about and question the progress of its submission.

Second, at the late-stage meeting the sub-commission should be required to provide the submitting state with a draft of written recommendations, rather than having the discretion to discuss only those areas of its work it wishes. The state should be given a uniform period of time to review and comment on the recommendations. The sub-commission should be required to consider these comments and incorporate them, as appropriate, into their final recommendations.

Finally, the Commission should permit states to attend, as observers, the meeting at which the full Commission considers recommendations. This would provide an overview of how the sub-commission dealt with different issues and reveal how the Commission, as a whole, views or interprets elements of article 76. At this stage, however, the sub-commission will have hammered out most of the most contentious and difficult issues and so there is less concern that the state will be able to unfairly influence the process. Overall, the reforms presented here would increase transparency and participation without interfering with the flow of sub-commission discussions or exposing Commissioners to undue pressure.

4. *Increasing Access of Other UNCLOS Parties to the Submission Process*

Enhancing accountability to submitting states will address only one side of the article 76 equation; those nations have no motivation to ensure that the Commission restricts excessive claims. Other UNCLOS Parties must, therefore, be given greater access to the submission process; this will also improve their understanding of and trust in limits set.[304] To achieve such access, the Commission must rework confidentiality requirements so that more data is made public. Though the Commission appears to believe that UNCLOS or other UN rules require it to give expansive protection to submitting states, it is not at all clear where this impression comes

[301] *See Rules of Procedure*, *supra* note 156, at Annex III, Part IV, ¶ 10(3).
[302] *See id.*
[303] *See id.*, at Annex III, Part VI, ¶ 15(1 bis.) (stating that the coastal state may present its views relating to the submission, but the Commission will not enter a dialogue).
[304] *See* Macnab, *supra* note 34, at 14 ("Allowing third parties an opportunity to evaluate the factors that prompted the approval or rejection of a given submission . . . should help promote broad acceptance of outer limits that survive the scrutiny of the CLCS.").

from.[305] UNCLOS itself makes no mention of confidentiality with regards to article 76 and there are no free-standing UN agreements that obligate the CLCS to respect state requests for confidentiality.[306] Further, as governments research and substantiate claims, they are uncovering vast amounts of new information about the ocean floor; one could argue that they are obligated to make this information—and thus their claims—public under UNCLOS provisions on marine scientific research.[307]

One UN legal officer has stated that states have proprietary rights in their submissions because of the substantial time, effort, and money they invest in completing them.[308] It is, therefore, the states' prerogative to decide when and with whom to share data, not the Commission's.[309] It is certainly true that many countries recognize proprietary rights in the fruits of physical, creative, and financial effort, also known as *intellectual property*.[310] Such rights, however, do not spring whole cloth from some mysterious universal or natural source—they are created by domestic and international statutes and treaties that confer on creators exclusive ownership in certain types of innovative or intellectual endeavors.[311] Neither UNCLOS nor any other international treaty grants states proprietary rights in the fruits of their seabed mapping. In other words, states have no legally mandated *right* to secrecy—the Commission's decision to grant confidentiality is a policy choice.

Moreover, regardless of whether ownership is accorded as a matter of law or policy, it does not necessarily go hand-in-hand with complete control over the owned product. Intellectual property rules frequently require authors and inventors to make their work publicly available in exchange for legal protection.[312] Many international and domestic patent laws, for example, attempt to spur innovation by requiring the patent holder to release sufficient information about her invention to allow others to copy it.[313] Similarly, copyrights are usually only available for

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[305] *See* Prows, *supra* note 97, at 275–76 & n.232 (questioning why Commission believes it must maintain complete confidentiality).
[306] *See id.*
[307] *See id.*; UNCLOS, *supra* note 4, at art. 244 (requiring states to make public all information gathered through marine scientific research).
[308] *See* Zinchenko, *supra* note 125123, at 227–28.
[309] *Id*. at 228.
[310] *See generally* Wenwei Guan, *The Poverty of Intellectual Property Philosophy*, 38 HONG KONG L.J. 359, 359–60 (2008) (providing a brief history of intellectual property law). The World Intellectual Property Organization (WIPO) maintains a comprehensive database of the intellectual property laws of more than 180 countries. *See* World Intellectual Property Organization, *Member States*, http://www.wipo.int/members/en/ (last visited Dec. 29, 2008).
[311] For example, the United States Congress has passed several statutes granting intellectual property rights: the Copyright Act, which gives authors rights to their "original works of authorship fixed in any tangible medium of expression" 17 U.S.C. § 102 (2007); the Lanham Act, which confers exclusive usage rights to any "word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods," also known as trademarks, 15 U.S.C. § 1127 (2007); and the U.S. Patent Act, which grants ownership to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter," 35 U.S.C. § 101 (2007). The World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) requires WTO Members, of which there are currently 153, to implement similar laws. *See* Trade-Related Aspects of Intellectual Property Rights art. 41(1), Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter TRIPS].
[312] *See, e.g.*, 35 U.S.C. § 122(b)(1) (2007) ("[E]ach application for a patent shall be published . . . promptly after the expiration of a period of 18 months from the earliest filing date . . . ."); *see generally* Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1076–77 (2007) (describing public function of intellectual property law as promoting creation and information dissemination).
[313] *See, e.g.*, TRIPS, *supra* note 310, at art. 29 (requiring WTO Members to restrict patents to those who disclose invention such that "a person skilled in the art" could carry it out).

published works.[314] Even if states did have rights to their article 76 submissions, therefore, the Commission could still require them to make data public in order to participate in the submission process. The policy reasons for doing so—greater accountability, enhanced respect for states' rights, and a more effective CLCS—are as meaningful to the continental shelf regime as increased innovation and creativity are to the intellectual property system.

Ideally, the Commission should require states to give all UNCLOS Parties unrestricted access to their submissions. As discussed, however, states are clearly sensitive about the data they submit and eliminating confidentiality may be politically infeasible.[315] If so, the Commission must still restrict it to only the most sensitive data. Determining exactly what this would encompass requires experience with and an in-depth understanding of the evidence that states submit and, thus, is beyond the scope of this article. The CLCS, however, must engage in this inquiry as soon as possible, and quickly produce amended confidentiality rules. In doing so, it should encourage states to submit written comments on the types of data they most want to protect, and it should consider these comments and incorporate them into the rules, as appropriate. Along with the amended rules, the Commission should produce a written report explaining its decision-making process and responding to states' comments; this will enhance transparency and help guarantee that the Commission is responsive to legitimate state concerns.

Having reduced confidentiality protections, the Commission should require that submitting states release redacted versions of their submissions to all UNCLOS Parties, rather than just Executive Summaries. The Commission should require that sub-commissions consider all comments Parties provide on these submissions, not just those from states with possible boundary disputes. Finally, when the sub-commission provides its preliminary recommendations to the submitting state for comments, it should also release them—redacted if necessary—to all Parties, permit them to submit comments, and consider these comments before the final drafting. Final recommendations—with confidential information removed—should also be made public. Reducing confidentiality will give all Parties a voice in review, help check excessive claims, and guarantee that the Commission takes into account the concerns of non-wide-margin states.

5. *Requiring Reasoned Explanations and Justifications for Decisions*

Requiring the CLCS to produce detailed, reasoned, and public explanations of its decisions is perhaps the most direct way to track how it is interpreting article 76 and carrying out its mandate. Publishing justifications subject to open scrutiny will encourage the Commission to be diligent and precise during reviews. A written record of deliberations will give states a base from which to study the Commission's decisions and critique them or push for changes if necessary. The Commission should prepare the following three types of written explanations.

First, along with recommendations, submitting states should receive a detailed report on the sub-commission's and Commission's deliberations. The report can protect the anonymity of Commissioners by redacting their names, but it should provide an in-depth explanation of how they dealt with each aspect of the state's claim, including how they interpreted each element of article 76. The report should also explain how the sub-commission dealt with comments the state submitted when it reviewed the recommendations. The Commission should release a similar, though less detailed, report to all Parties which should include explanations of how the Commission considered and incorporated any comments submitted when the Parties reviewed

[314] *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Work art 2, Sept. 9, 1886, as revised at Paris on July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (limiting copyright protection to published works).
[315] *See supra* Part II.

the draft recommendations. Similarly, the Commission should send a written explanation, in addition to a general report, to each state that submitted an initial comment on the submission (before the Commission began the review), explaining how it incorporated the state's position into the recommendations or why it did not do so.

Finally, every two years the Commission should produce a "lessons learned" report that discusses the major problems it has run into during review and how it has dealt with them, as well as whether and how it's understanding of article 76 has evolved. The Commission has already produced one such report for internal use.[316] Making this a regular requirement and releasing it to Parties would encourage the Commission to reflect more deeply on its work and its role in the continental shelf regime, as well as increase public understanding of the review process.

6. *Increasing Interaction Between Commission and Parties on Other Substantive Areas*

The reforms proposed thus far mostly relate to the submission process. As discussed, however, the Commission also makes important procedural and substantive decisions about article 76 through the Guidelines and Rules of Procedure.[317] Accountability in these areas must also be improved. The Commission has already put a great deal of time and effort into writing the Guidelines and Rules and it would be counter-productive to scrap them. Rather, the Commission should set up procedures to regularly review and update both documents, with input from states.

Given the lack of clarity around many of its terms and procedures, interpreting and applying article 76 is a dynamic process—understanding of what it means and how it works will undoubtedly grow and shift through the development and review of claims. As the Guidelines are the main tool for interpreting the article, they should be treated as a living document that evolves along with that understanding.[318] In recognition of this, the Commission should hold an open conference every two years to review and amend the Guidelines based upon states', as well as its own, experiences. Such a conference would provide an opportunity for states and Commissioners to openly discuss interpretation difficulties and, hopefully, develop a common understanding of the article's meaning. The Commission should run the conference and have final drafting authority, but should be required to take states' comments into account when updating the document and produce a Conference report that summarizes debate and explains all changes.

As the Rules of Procedure are, in fact, mostly procedural, the Commission does not really have a duty to amend them at the behest of states.[319] Nonetheless, greater responsiveness to state's concerns is important, as it is likely to increase trust in the Commissioners and the process. As such, at SPLOS each year, the Commission should conduct an open meeting with

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[316] *See* Comm'n on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Continental Shelf on the Progress of Work in the Commission,* ¶ 8, U.N. Doc. CLCS/39 (Apr. 30, 2004) [hereinafter *CLCS 13th Session Report*] (introducing document addressing lessons learned based on experience with Russia's submission).

[317] *See supra* Part II.

[318] *See CLCS Guidelines, supra* note 84, at ¶ 1.1 (noting the Guidelines "form the basis" of CLCS to prepare its recommendations).

[319] Indeed, the Rules actually discourage Commissioners from becoming too responsive to any entity outside the Commission. *See Rules of Procedure, supra* note 156, at rule 11 (stating that Commissioners must refrain from "seek[ing] or receiv[ing] instructions" from external actors).

states to discuss any procedural concerns. The Commission should discuss these concerns at its next meeting and amend the Rules, if necessary. The Chair's annual report should provide a detailed explanation of this debate and the Commission's final decisions.

C. Potential Criticisms of the Proposed Reforms

The reforms just presented should greatly enhance the CLCS's accountability to the states that created it and whose rights its work affects. Changing nominating and financing procedures should increase Commissioners' independence from the Parties. Adding legal experts will help guarantee that the Commission is not misinterpreting article 76's legal provisions or overstepping its mandate. Increasing participatory opportunities for submitting states and other Parties will improve transparency, give states a chance to check the Commission's work, and likely increase buy-in and respect for its recommendations. Requiring the CLCS to provide written explanations of its decisions makes it easier to analyze how it is interpreting article 76; it should also make Commissioners more conscientious and precise in their own analyses. Finally, giving states a role in the Guidelines and Rules of Procedure will ensure that there is accountability in all of the CLCS's major substantive responsibilities, and improve trust in the CLCS as an institution.

While the mechanisms proposed represent a fairly full reform agenda, some may note that one seemingly important and obvious proposal is missing: an independent panel to which states can appeal adverse CLCS decisions. There are several reasons why this article does not propose independent review, at least for the time being. An independent appellate body would greatly interfere with the ping-pong review process that UNCLOS Parties so carefully constructed. While all of the reforms laid out here increase accountability, none disrupt article 76's basic flow—states still submit proposals to the CLCS, the CLCS still reviews them and issues recommendations, and the state still has the right to accept them or resubmit.[320] Reforms simply guarantee that the slow narrowing-down of the difference between states and CLCS understanding of the article is informed, takes account of the interests of all Parties, and respects states' rights.

Giving states a chance to step outside of the existing review process and demand external review, on the other hand, would create an adversarial process at odds with the existing intent of article 76.[321] There is, of course, no reason that UNCLOS Parties could not amend UNCLOS to permit an appellate body. Doing so, however, could have significant downsides. While this article has emphasized article 76's legal nature, its scientific and technical components are equally—if not more—important, complex, and subject to competing interpretation.[322] Cooperation between the submitting state and the Commission is essential to applying these aspects of the formula—the Commission must work with the state to ensure that it has complete information, understands the data submitted, and is aware of the techniques the state used to devise limits.[323] States may be less willing to cooperate if they know they will have another opportunity to make their case if they disagree with the Commission's recommendations.

[320] *See supra* Part II.B (discussing article 76 review process).
[321] *See* Zinchenko, *supra* note 123, at 225 (stating that Commission was never intended to be court of law); Nelson, *supra* note 80, at 1250 (stating that Commission does not have authority to submit recommendations to an outside legal body for review); McDorman, *supra* note 100, at 306 (discussing importance of ping-pong review procedure).
[322] *See generally* Antunes & Pimentel, *supra* note 54 (discussing technical and legal difficulties that arise when interpreting article 76); Macnab, *supra* note 34 (describing problems arising from interpretation of article 76).
[323] *See* McDorman, *supra* note 100, at 311 (noting Rules contemplated a "collaborative" working relationship between CLCS and states).

Moreover, the iterative process of submission-resubmission gives states and the Commission time to work through the article's significant complexities, which could be cut prematurely short by an outside appeal. Finally, because of article 76's dual personality, existing international legal bodies, such as the ICJ and ITLOS, are probably not well suited to review Commission decisions—the Commissioners may not be lawyers, but neither are the judges scientists. An appellate body capable of thoroughly evaluating of the Commission's decisions would require creating, essentially, a second Commission. This would be difficult and costly, and it is not clear why the second Commission's interpretation would take precedence.

All of this is not to say, however, that an appellate body is absolutely out of the question. Independent review is a key tool for creating accountability. Further, an article 76 appeals process would not necessarily require another complete review of a state's submission. Along the lines of some domestic administrative law regimes, states could be permitted to appeal Commission's decisions to the ICJ or ITLOS for a reasonableness review—the court would uphold the Commission's recommendations, provided it sufficiently articulated a reasonable, well-founded rationale for them.[324] This article does not endorse such a step because of the potential negative impacts discussed above. If, however, the more subtle reforms proposed here do not result in a sufficiently transparent and accountable CLCS, it may be necessary to revisit the issue in the years to come.

One could also criticize the proposed reforms on another ground—they are modeled on Western notions of administrative law, and thus are either not applicable to the international arena or will be unacceptable to non-Western countries. There are several responses to this argument. First, while administrative law structures focused on transparency, reason-giving, participation and review may have first arisen in places like the U.S. and Europe, they are now also found in a wide-variety of non-Western countries, including those in the developing world.[325] Over the past decade, government officials, academics, and other experts have realized that strong institutions play a central role in promoting economic growth, leading to a new interest in institutional development, including well-functioning and transparent administrative agencies.[326] Reforms to facilitate trade, investment, and the management of aid money have led many countries to adopt regulatory procedures such as notice-and-comment and judicial review.[327] All of this suggests that familiarity and comfort with administrative-law reforms—

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[324] *See generally* Claudia Tobler, Note, *The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action*, 22 B.C. INT'L & COMP. L. REV. 213 (1999) (discussing how reasonableness standard functions in E.U. and U.S. administrative law).

[325] The World Bank, *Administrative and Civil Service Reform*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTADMINISTRATIVEANDCIVILSERVICEREFORM/0,,contentMDK:20132482~menuPK:1828771~pagePK:148956~piPK:216618~theSitePK:286367,00.html (last visited April 14, 2008) (documenting a huge variety of administrative law reforms taking place in developing countries)

[326] *Id*.

[327] *See* Kingsbury et. al, *supra* note 36, at 37 (discussing how reforms promoted by World Bank and International Monetary Fund have led many countries to adopt domestic administrative law reforms or regulations); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBS. 1, 3–9 (1998) (discussing movement for legal reform, including administrative law reform, to promote economic development); Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD QUARTERLY 21, 30–32 (2001) (discussing how administrative law reforms in a variety of countries have been successful in promoting development). *See, e.g.*, World Bank, *supra* note 325324; North America Free Trade Agreement, U.S.-Can.-Mex., Part VII, art. 1802–05, Dec. 8, 1993, 32 I.L.M. 289 (requiring all NAFTA Parties to put in place notice-and-comment rulemaking and judicial review of administrative decisions); Free Trade Agreement between the United States of America and the Republic of Korea, U.S.-S. Korea, Chp. XXI, art. 21.1–21.4, June 30, 2007, pending

and understanding of the need for them—will be more wide-spread among UNCLOS Parties than their Western-roots might initially indicate.

Second, in terms of the applicability of such reforms internationally, a variety of international organizations with diverse memberships have been adopting or at least discussing administrative-law-type reforms aimed at enhancing accountability.[328] These reforms have not taken place in response to the rise of global administrative law as an academic discipline nor solely, or even, at the behest of Europeans or Americans—government officials, citizen groups, and organization representatives from many different countries have developed, pushed for, and implemented changes.[329] Further, organizations that apply administrative law mechanisms specialize in a variety of issues from financial regulation to environmental protection to development financing.[330] There is no reason, therefore, that similar concepts could not be applicable to the continental shelf.

The fact that accountability reforms are becoming more prevalent internationally illuminates an important point—transparency, reasoned decision-making, participation and review can benefit many countries, not just those who have embraced them domestically. Many states have a great deal at stake when it comes to shelf and deep seabed limits. If the Commission is permitted to make decisions in a black-box—without meaningful interaction with or participation from UNCLOS Parties—then none of these countries will be able to check its decisions. A secretive Commission also does not necessarily mean a completely independent one. The CLCS could well be subject to informal pressure from individual states that may result in biased decision-making. In all likelihood, this pressure would come from larger, more powerful countries, such as the U.S. and members of the EU, who have the most political muscle at the UN. Reforming the CLCS to increase its formal accountability to all UNCLOS Parties could help mitigate the power of bigger or wealthier countries to unfairly influence the delineation process. Therefore, if the ideas provided here can provide greater accountability, they ought to garner the support of countries from many cultural and political traditions. In addition, there is no reason that these reforms have to be the only ones the CLCS undertakes. This article's most important contribution to the CLCS literature is the idea that the Commission should be accountable to UNCLOS Parties and that its current procedures are full of accountability gaps. If academics, shelf experts, or government officials from other administrative law backgrounds can propose alternative or additional reforms that would also

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Congressional approval, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/asset_upload_file503_12720.pdf (mandating notice-and-comment rulemaking and judicial review).

[328] *See* Kingsbury et al., *supra* note 36, at 37–41 (describing measures implemented in a wide variety of international institutions); David Zaring, *Informal Procedure, Hard and Soft, in International Administration* (NYU Law Sch. Inst. for Int'l L. and Justice, Working Paper No. 6, 2004), *available at* www.iilj.org/publications/2004-6Zaring.asp.

[329] *See*, Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 L. & CONTEMP. PROBS. 323 (2005) (describing different actors who have pushed for administrative law reforms); DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark et al. eds., 2003) (describing international advocacy campaign that led World Bank to adopt its Inspection Panel, which provides a complaint and review process for individuals and communities affected by Bank projects); FOOD AND AGRIC. ORG. & WORLD HEALTH ORG. Codex Alimentarius Comm'n, *Report of the Fifty-First (Extraordinary) Session of the Executive Committee of the Codex Alimentarius Commission*, ¶¶ 24–25, ALINORM 03/24/2 (Feb. 13–15, 2003).

[330] *See* GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, AND ISSUES 67–76, 129–32 (Sabino Cassese et al. eds., Institute for International Law and Justice 2ed 2008) (2006) (discussing how administrative law mechanisms work in organizations that work in each of these areas).

improve the Commission's accountability, then they should not hesitate to throw their ideas into the mix.[331]

V. Conclusion

This article has presented a number of reforms to the CLCS which, if adopted, could greatly enhance the institution's accountability to the nations that created it. In doing so, it has articulated several strong reasons why such accountability is important. Through its work, the CLCS is helping shape both the meaning of a treaty provision and the limits of states' rights under it. Greater accountability to those states is thus normatively appropriate, and necessary to ensure that the Commission's interpretation of article 76 is technically and legally sound. Further, if article 76 is going to result in accurate boundaries that respect the rights of all UNCLOS Parties, the CLCS must properly carry out its mandate and have the trust and respect of both negotiating blocs. Giving states some ability to participate to the Commission's most important work and enhancing transparency throughout its procedures will help achieve both of these goals.

Of course, after proposing a reform agenda, the question always becomes—is anyone actually going to do any of this? Significant political will is necessary to achieve any of the reforms detailed here. UNCLOS Parties will need to adopt the small changes to article 76 proposed and pressure the Commission to rethink its procedures. The Commissioners, in turn, will need to come together to formally adopt the changes to the submission process and other reforms. While there is certainly no guarantee that any of this will happen, the Commission's escalating activity has increased interest in how it functions, both among States Parties and among the Commissioners themselves. States' demands for increased participatory rights only arose in the past three years, but the Commission has already shown some willingness to respond to the concerns raised.

As more states begin submitting claims, it is likely that interest in and discussion over the CLCS process will intensify. Within the Commission, discussion is focused on how to maintain the integrity of the review process in the face of increasing submissions and demands on the Commissioners' time and resources. While this does not necessarily pertain to increased accountability, it does show that the Commission is interested in reviewing and improving how it functions as it carries out its work. The reasons for reform presented in this article—the impact of the CLCS on states' rights and the need for it to be maximally effective in carrying out its work—are of interest to both states and Commissioners. If the reforms proposed are framed around these arguments, then it may be possible to harness rising interest and energy to push for meaningful change in the CLCS. This would be a significant achievement, not only because it would mark a victory for accountability in the international realm, but also because it would avoid the need to revert to titanium flags, submarines, and 15th century land grabs as the world goes about dividing up the ocean floor.

[331] Richard Stewart, one of the originators of the discipline of global administrative law, has also made this point. Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, 68 LAW & CONTEMP. PROBS 63,65–66(2005) (discussing international regulatory cooperation).