



SECURING U.S. TERRITORIAL RIGHTS IN THE ARCTIC: NEW ACTIONS TO PROTECT AMERICA'S CONTINENTAL SHELF

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Executive summary

The United States has important entitlements to a wide swath of undersea territory in the Arctic and other regions that is rich in oil, natural gas, minerals, and sea life in an area known as the “extended continental shelf” (ECS). These unique maritime geographic features are defined and codified in international law and establishing rights will extend the United States’ subsea maritime reach well beyond the 200 nautical miles of the continental shelf to which all coastal states are entitled.

For the past two decades the U.S. government has been painstakingly researching and collecting data to establish the outer limits of this ECS including in the Arctic, Atlantic, and Pacific Oceans where U.S. territory has coastal features far offshore. This includes a significant portion of Arctic Ocean seabed that will give the U.S. important sovereign rights and entitlements to exploration alongside the four other Arctic states bordering the Arctic Ocean. After years of preparations across different U.S. administrations, this data is finally ready to be presented to the world, taking into account the legal framework and procedures described in the United Nations Convention on

the Law of the Sea (UNCLOS). Policymakers should carefully consider the options for securing the United States’ interests in these regions. Early and active diplomatic outreach, consultations with Congress, and attention from executive branch officials will be key to ensuring broad support for the description and extent of the maritime territory that will be contained in the U.S. government’s upcoming announcement regarding its ECS.

Introduction

The United States is on the cusp of taking long-awaited steps to secure its rights to huge swaths of undersea territory on its maritime continental shelf, including a large area north of Alaska. Although the rules the U.S. will follow to accomplish this are relatively obscure to most Americans, even for those who follow Arctic affairs fairly closely, the coming actions are a necessary part of protecting fundamental U.S. territorial and economic interests. These steps are consistent with and in parallel to similar actions taken by the other Arctic countries with continental shelves — Russia, Canada, Denmark (via Greenland), and Norway — to help secure their rights.

As discussed herein, after years of preparation under a series of U.S. administrations, the United States will soon be in a position to declare precisely its entitlements to an “extended continental shelf” — the area of seabed and subsoil that extend beyond a coastal state’s 200-nautical mile exclusive economic zone (EEZ). Unlike the EEZ, where a coastal state enjoys certain rights and jurisdiction over the natural resources of the seabed, subsoil, and water column, the extended continental shelf provides a more limited, yet important, right to natural resources found only in the seabed and subsoil, as explained more thoroughly later.

Although the U.S. will follow provisions found in the U.N. Convention on the Law of the Sea,¹ as these are customary law the U.S. not being party to UNCLOS is not a barrier to it taking these steps. In this way, the U.S. will demonstrate its entitlement to ocean floor resources beyond its 200-nautical mile EEZ for a rapidly approaching future in which technologies will make such areas more accessible. How it chooses to present this subsea territory to the rest of the world remains an open question and one that may require significant diplomatic effort in the coming years.

Although territory and maritime boundaries and claims in the Arctic are largely known, the main remaining open piece relates to ECS areas, with the five states surrounding the Arctic Ocean looking to define their rights to seabed areas beyond their existing EEZs. Demonstrating these rights will help prevent future disagreements over commercial rights and access, and show which areas are subject to domestic jurisdiction rather than international regulation through the International Seabed Authority (ISA).² Some of the ECS areas of Arctic coastal states will overlap, leading to negotiations over how to divide these areas by establishing maritime boundaries. The coming actions by the United States are a key step in the governance and economic future of the Arctic.

The United States announcing its intended way forward regarding its ECS is a first, though essential, step. Other states, and the expert Commission on the Limits on the Continental Shelf (CLCS) formed

under UNCLOS’s auspices, will want to consider and evaluate the U.S. ECS limits to ensure their acceptability. At this crucial stage, it is important to raise awareness about these developments in Congress, in U.S. policy circles, and with a range of foreign countries.

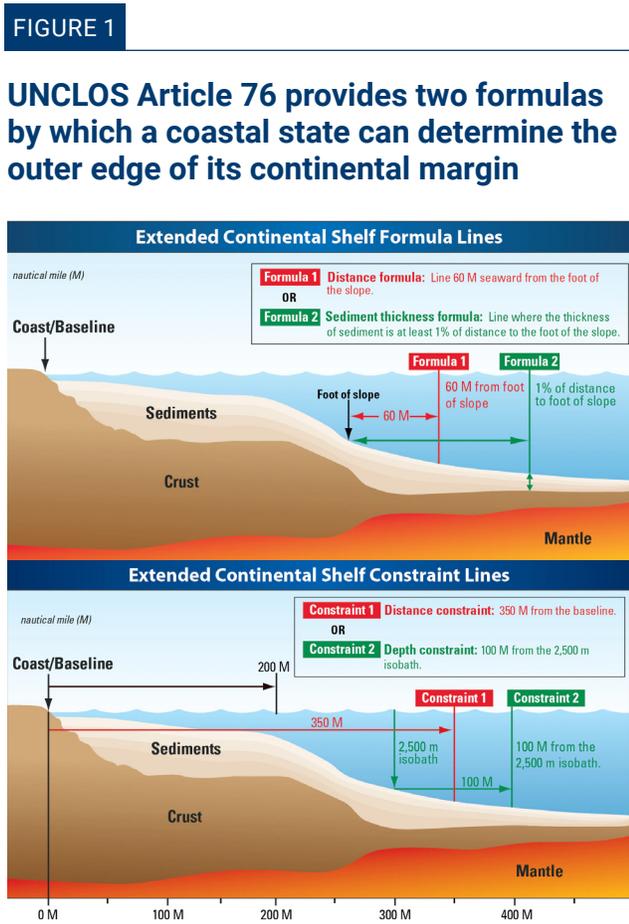
What is the extended continental shelf?

International law, as codified in UNCLOS, provides a complex juridical (politically negotiated) definition of the continental shelf that a geologist would not recognize. Article 76 provides that the continental shelf of a coastal state “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”³ In layman’s terms, this means that every coastal state is entitled to certain rights and interests in the portion of its seabed that extends off of its land territory up to a minimum of 200 nautical miles offshore. If the seabed and subsoil meet certain characteristics (shape, depth, composition), then coastal states are entitled to rights and interests in more seabed, further offshore. For the purposes of this article, and in most scholarly writings, this part of the shelf beyond 200 nautical miles is known as the “extended continental shelf.” Article 76 never actually uses the term “extended continental shelf,” but this reference provides a helpful distinction for the purposes of understanding the complexity of determining the outer limits of this undersea area.

Determining whether a country has an ECS requires the collection and analysis of large amounts of scientific data pertaining to the seabed and subsoil. To explain the entire data collection system and subsequent analysis in detail would require significantly more space than this policy brief will allow, but

a general description will suffice for most readers. Those seeking a more thorough explanation from geographers and marine scientists can find a good primer in the Canadian government’s ECS submission information page.⁴

UNCLOS Article 76 provides two formulas by which a coastal state can determine the outer edge of its continental margin. These formulas, which can be used in any combination, are also constrained by two lines defined in the convention. If the formula lines extend past the constraint lines, a coastal state can use any combination of those two constraint lines to maximize its ECS. A helpful graphic from the U.S. State Department (Figure 1) illustrates these formulas and constraints:



SOURCE: Extended Continental Shelf Project, U.S. Department of State⁵

Application of these formula and constraint lines requires large amounts of seabed and subsoil data that is expensive and time-consuming to collect. Once research vessels have collected the necessary data using sonar and other equipment, the data must then be processed and analyzed by experts. Suffice it to say, determining the outer limits of the continental shelf is a massive undertaking for any coastal state, let alone one with as much coastline as the United States. But more than 75 coastal states have already done this and submitted packages for review by the CLCS since 2001.⁶

The purpose and workings of the CLCS

Once coastal states have assembled this information and are in a position to provide their data and calculations demonstrating the extent of their ECS entitlements, it falls to the Commission on the Limits of the Continental Shelf, formed under Article 76 of UNCLOS, to provide scientific and technical review.

The CLCS is made up of 21 members “who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals, having due regard to the need to ensure equitable geographic representation, who shall serve in their personal capacities.”⁷ The commission’s purpose is to make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelf. Article 76 provides that, if the coastal state establishes its limits on the basis of the CLCS’s recommendations, those limits are “final and binding.”⁸

Having a procedure that results in limits that are “final and binding” establishes certainty for the coastal state and other states. That certainty will be essential to spur private economic investment in expensive extraction equipment to confront the hazards and risks of the far offshore environment. Such certainty can also help neighboring coastal states negotiate fair and equitable maritime boundaries dividing their overlapping ECS areas. In short,

the CLCS's seal of approval on a state's outer limits will ensure widespread recognition of territorial rights within the rules-based international order.

The United States is not a state party to UNCLOS. Over the decades since its initial negotiation, some U.S. policymakers (notably in the U.S. Senate) have been skeptical of provisions in the convention that may limit U.S. rights or require payment of royalties. Though most U.S. military and ocean policy experts⁹ have tended to support U.S. accession, there has been resistance among a sufficiently large number of senators such that a two-thirds majority for advice and consent has not been achievable. This does not mean, however, that UNCLOS's procedures for review of continental shelf limits, including the procedures of the CLCS, are out of reach for the United States. In the relevant sections of UNCLOS that discuss the work of the CLCS – Article 76 and Annex II – the drafters used the term “Coastal State” when referring to submissions of their outer limits. This means that all states with the possibility of having an ECS were meant to utilize the services of the CLCS. The drafters carefully chose when to use the term “States Parties,” usually when discussing the right to nominate commission members or other governance issues. Additionally, having the CLCS provide recommendations also gives greater clarification on the extent of the international seabed area that the ISA manages. Excluding non-parties would not be helpful in identifying the extent of the “Area,” as it is known in UNCLOS.

And more generally, a coastal state has rights under customary international law to its ECS; the absence of a determination from the CLCS does not deny it those rights. Scholars have examined these concepts thoroughly¹⁰ and while some may disagree, this basic point about ECS being a customary law right is sound and convincing.

U.S. efforts to define its ECS outer limits

The U.S. government has been actively collecting the necessary data to define the outer limits of the U.S. ECS since 2003.¹¹ The U.S. Extended Continental Shelf Project is an interagency group of experts, guided by a task force of senior policymakers, focused on gathering and analyzing data to determine these outer limits. The project is led by the State Department and staffed heavily by scientific and technical experts from the National Oceanic and Atmospheric Administration (NOAA) and U.S. Geological Survey (USGS). In 2014, a ECS project office was established at NOAA's National Centers for Environmental Information in Boulder, Colorado, where a dedicated staff of experts are completing the necessary analysis and documentation of the U.S. outer limits.¹²

Their goal is to accurately define the extent of what may be one of the largest extended continental shelves in the world. The United States has ECS across multiple geographic areas: the Arctic Ocean north of Alaska, the Atlantic Ocean off the East Coast, the Pacific Ocean off the West Coast, the Gulf of Mexico, the Bering Sea between Alaska and Russia, and off the Mariana Islands in the western Pacific. According to the U.S. Extended Continental Shelf Project, preliminary studies have indicated that the U.S. ECS is nearly one million square kilometers – an area more than twice the size of California or nearly half the size of the Louisiana Purchase.¹³ The largest and possibly most consequential U.S. ECS area is in the Arctic, where the U.S. outer limits may overlap with Russia's and Canada's, making the publication of this data a policy priority for a constantly evolving Arctic region. Figure 2 shows the regions in which the U.S. has ECS, although not the precise extent of ECS areas, which the U.S. has yet to announce.

FIGURE 2



SOURCE: U.S. Extended Continental Shelf Project

The Arctic and ECS

Much has been made about a race for resources in the Arctic and how conflict might arise as non-Arctic states vie for a piece of the seabed and its potential for critical minerals and oil.¹⁴ In reality, the vast majority of the Arctic seabed is within the national jurisdiction of one of the five Arctic states with Arctic

Ocean coasts, and rights to ECS are being addressed in an orderly manner through the procedures previously discussed. As shown in a map from the IBRU Centre for Borders Research at Britain's Durham University, only a small section of Arctic seabed will likely be "international seabed," governed by the provisions of the ISA, an international organization charged with managing the resources of the seabed and subsoil in areas beyond national jurisdiction.

Continental shelf submissions in the Central Arctic Ocean



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|---|-------------------------|---|
| Canada continental shelf beyond 200 M (see note 2) | Other continental shelf | Agreed boundary |
| Denmark continental shelf beyond 200 M (note 3) | All other waters | Median line |
| Norway continental shelf beyond 200 M (note 4) | Land | Unresolved maritime boundary |
| Russia continental shelf beyond 200 M (note 5) | North Pole | Area where all three countries' submissions overlap |
| Potential USA continental shelf beyond 200 M (note 7) | | |

SOURCE: IBRU Centre for Borders Research¹⁵

Each of the four other Arctic Ocean states have filed at least one submission to the CLCS. The U.S. ECS is marked in the Durham University map as “potential,” reflecting the fact that the United States has not announced its outer limits in any public way or made a submission to the CLCS. Russia has been especially active in defining the outer limits of its ECS, making the first submission to the CLCS of any country, in 2001.¹⁶ Since then, it has submitted two further revisions, most recently in 2021. Other Arctic coastal states may also file revised limits in the future.

U.S. interests

It is certainly the case that the United States is entitled to a large area of ECS north of Alaska. How large (as well as the northernmost reach, such as how far the entitlement reaches toward the North Pole, where Russia ceremoniously planted a flag in 2007¹⁷) depends on the seabed data collected and analyzed by U.S. government agencies over the past two decades, and this will not be known publicly until the U.S. publishes at least a summary of its conclusions. The general outcomes (although not necessarily the exact limits) will already be well-known to the other four Arctic Ocean littoral states – Canada, Denmark, Norway, and Russia. Those five countries had been, at least prior to the Russian full-scale invasion of Ukraine, discussing their respective efforts during regular meetings of experts.

The Arctic ECS areas of opposite and adjacent states will in some cases overlap, resulting in the need for the states with overlaps to enter into negotiations to delimit their sovereign rights to those shelf areas. As shown in the Durham University map, it is likely that a large area of the U.S. ECS does not overlap with the shelf areas of any Arctic neighbors.

The rights of a coastal state in its ECS are significant. It exercises sovereign rights to explore or exploit the natural resources on the shelf, and no one else can do so absent that state’s permission. The resources consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species.

The United States has a general interest in knowing the extent of its maritime territorial interests. That is especially true when the size of the area in question is quite large. In this case, these sovereign rights include the right to explore for and exploit minerals, oil and natural gas, as well as to benthic sea life, such as crab and other sedentary species. Much of this exploitation may at this time not be technologically or economically feasible, but the rights exist forever and thus should be secured now for the future.

Even if hydrocarbons in the ECS could be exploited, climate change concerns and factors related to economic viability may dictate that they not be. Similarly, if trawling or other seafloor contacts are determined to be too invasive and would do harm to the undersea environment, the U.S. can choose not to allow these. Nevertheless, these are future policy decisions that need not be taken now, and it would be prudent for the United States to establish the limits of its ECS in the Arctic, as in other regions, as other countries are doing with respect to their ECS areas.

Next steps

This is an important time for the United States to act. So far, the U.S. has been left behind in this key aspect of Arctic governance. While other Arctic states have moved forward with securing their ECS rights via their formal announcements, the U.S. has been undertaking more than two decades of relatively unpublicized preparations, including conducting nearly 40 surveys totaling tens of millions of dollars and convening an interagency office under State Department leadership. Now that the groundwork has been nearly completed, it is time for a persuasive case to be made to the international community.

Making that case could take the form of a submission by the United States to the CLCS. The use of the services of the CLCS has the advantage of being widely recognized by the rest of the world and part of an established process that is well regarded.

There are persuasive arguments that, per the text and intent of UNCLOS, the United States can do this even though it is not a party to the convention. Even so, it can be expected that some states, notably those who are strategic rivals to the U.S., may argue that only parties can avail themselves of these procedures. There is a risk of being perceived, by allies and rivals alike, as trying to enjoy the “benefits” without the obligations of treaty commitment. Given the possibility, or even likelihood, of disagreement on this, it will be important for the U.S. to pave the way for its action by diplomatic outreach to countries that are active in law of the sea matters. This diplomatic outreach needs to occur soon and often, with basic information on the U.S. ECS outer limits made widely known to the rest of the world.

Another option would be for the U.S., having reached the end point of its internal ECS analysis, to simply announce its determination (without making a submission to the CLCS), thus putting others on notice of where its ECS limits are located in the Arctic Ocean and elsewhere. Even if the U.S. follows the path of a formal submission, the CLCS is so backlogged that it would be unlikely to review the U.S. materials for decades. This path may appeal to those in policy circles who recognize the importance of publicizing the U.S. ECS limits, but are concerned that some states may react negatively to a submission to the CLCS, given the U.S. status as a non-party to UNCLOS. Such objections might create a harmful, but incorrect, impression that the United States has no ECS because it has not joined UNCLOS. While this option has downsides previously discussed (i.e. lack of international review by independent experts), a complete submission could be made later if policy decisions change about utilizing the CLCS’ services or if the United States acceded to UNCLOS.

Past administrations had the wisdom to support the underlying scientific work and legal analysis to take the steps necessary for the United States to protect its ECS rights, and with that work concluded, the time has come for the U.S. to declare the geographic extent of its rights, with the goal of ensuring general recognition of the extent of its ECS in the Arctic and elsewhere. To ensure maximum acceptance by the international community of the U.S. outer limits, the U.S. announcement will need support from senior officials, including through diplomatic outreach. Given the importance these steps will have in increasing the maritime territorial reach of the United States, the administration should keep Congress and the public informed of these important developments. Regardless of the path that this administration may take, the importance of moving forward with the publication of the United States’ ECS data is a critical part of securing America’s maritime and economic future in the Arctic.

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