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Binding force of extended continental shelf limits: investigating whether Article 76 (8) of UNCLOS constitutes customary international law

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International custom is considered to be the oldest and the original source of public international law. However, because it is unwritten, the identification of international custom has always been a controversial issue in the context of international law. Article 76(8) of the United Nations Convention on the Law of the Sea (UNCLOS) is the core article of the international system of laws governing the continental shelf. It stipulates the basic procedure for identifying the rights of coastal states to the continental shelf beyond 200 nautical miles (extended continental shelf, ECS) The issue of whether this paragraph constitutes customary international law is actually the question of whether the binding force of the limits of the ECS, which have been delineated based on recommendations of the Commission on the Limits of the Continental Shelf, can extend to non-parties to the UNCLOS. This study starts with the "two elements" theory of traditional customary international law and then considers its new interpretation according to modern theories. Following this, the authors provide a jurisprudential and practical exploration of whether Article 76(8) of the UNCLOS constitutes customary international law from the perspectives of how treaties are used to form customary international law, and the current delineation practices of coastal states on the ECS.

KEYWORDS

customary international law, United Nations Convention on the Law of the Sea, extended continental shelf, International Court of Justice, Commission on the Limits of the Continental Shelf

1 Introduction

Part VI and Annex II of the United Nations Convention on the Law of the Sea (UNCLOS) create the legal system for the continental shelf, and give coastal states the right to extend their delineation of the continental shelf beyond 200 nautical miles from the baseline of the territorial sea. Article 76(8) of the UNCLOS stipulates the basic procedure for the recognition of the rights of coastal states to the continental shelf according to

international law. According to this paragraph, the delineation by a coastal state of the outer limits of its extended continental shelf (ECS), based on recommendations by the Commission on the Limits of the Continental Shelf (CLCS), has binding force in international law. However, the UNCLOS does not make any provision on the effective object of this limit: That is, which countries are bound by the outer limits of the ECS as delineated by the coastal state on the basis of the recommendations of the CLCS? The rights of coastal states to the ECS are related to their vital national interests. Because some countries, especially the United States (US), have not yet ratified the UNCLOS, whether the binding force of limits on the ECS established under Article 76 (8) can extend to non-parties to the convention is an important issue in the practice of international maritime delineation that cannot be ignored. In accordance with provisions of the Statute of the International Court of Justice on the sources of international law (UN, 1945), and the Vienna Convention on the Law of Treaties regarding the rules contained in treaties that become binding on third countries due to international custom (UN, 1969b), the binding force of the delineation of outer limits of the ECS may extend to all non-contracting states *if* Article 76(8) of the UNCLOS can be recognized as an international custom as a source of international law (McDorman, 2002). By examining the theoretical development of customary international law and the international practice of delineation of the ECS, the authors of this study argue that Article 76(8) of the UNCLOS does not constitute customary international law for the time being, but it has the potential to develop into customary international law in the future, particularly in light of the absence of objections by third States, notably the US. The results of this research provide a better understanding and means of application of Article 76(8) of the UNCLOS for the delineation of the ECS, and can provide guidance regarding the implications of the settlement of future disputes concerning the ECS, especially when the dispute involve states that are non-parties to the UNCLOS.

2 Theoretical connection between whether Article 76(8) of the UNCLOS constitutes customary international law and the binding force of limits to the ECS

2.1 Binding force of Article 76(8) of the UNCLOS from the perspective of international treaty law

According to Article 76(8) of the UNCLOS, the legal procedure for delineating limits to the ECS that are final and binding can be summarized into three steps. First, the coastal state makes a submission to the CLCS. Second, the CLCS gives recommendations on the submission. Third, the coastal state delineates the outer limits of the ECS based on the CLCS's recommendations. This shows that the limits to the ECS delineated by the coastal state are not considered to be final and binding without the condition that the coastal state making the submission agrees to be bound by the recommendations of the CLCS, and will naturally not have any legal effect on any other state. Although it is motivated by considerations of protecting the rights of coastal states to the continental shelf from encroachment by other countries, the main legislative purpose of the system of the continental shelf as formulated in the UNCLOS is to protect the interests of the international community by preventing coastal states from unreasonably expanding the scope of their ECS. Therefore, if the limits to the ECS are to have a binding effect on other countries, the coastal state that makes the submission should take the limits provided in the recommendations of the CLCS very seriously. If the coastal state disagrees with the CLCS's recommendations, it needs to submit a revised or a new submission, and should not delineate limits to the ECS that are not grounded in these recommendations. If the coastal state has agreed to the CLCS's recommendations and delineated the limits to its ECS through domestic procedures that are founded on them, it should not arbitrarily change or expand the determined limits. This is not only a requirement for fulfilling the obligations of the UNCLOS, but is also the basis for maintaining the authority of the legal system of the continental shelf and avoiding disputes over the delineation of the ECS.

The final and binding limits delineated by the coastal state in accordance with Article 76(8) of the UNCLOS not only have the binding effect of international law on the coastal state, but also on all parties to the UNCLOS at the very least. First, the principles of international treaty law state that during the period of validity of a legally concluded treaty, the contracting parties have the obligation to adhere to it in good faith, which is one of the most important basic principles of treaty law (Li, 1987). As the most important legal source of contemporary international law, international treaties must be abided by, where this is also the basic international legal obligation of all contracting parties. Because Article 76(8) of the UNCLOS stipulates that the limits of the ECS delineated by coastal states based on the CLCS's recommendations should be final and binding in international law, this certainty and binding force must be applied to all parties to the convention. This is an uncontroversial issue in the theory of international law. In some cases, even if a certain country refuses to be bound by certain international conventions in practice, it will likely never claim to reject the principle that treaties must be abided by, and instead will seek other reasons while accepting this principle. Second, if the ECS limits are valid only against the delineating coastal state itself and is not binding on any other state, how do we ensure that the rights to the continental shelf enjoyed by the coastal state in accordance with the UNCLOS are not violated by other countries? Creating obligations for coastal states without guaranteeing the protection of their rights clearly violates the basic spirit and purpose of the regime of continental shelf of the UNCLOS.

2.2 Are non-parties to the UNCLOS bound by limits to the ECS?

Whether the binding force of limits to the ECS established on the basis of Article 76(8) extend to non-parties to the UNCLOS remains controversial. According to the general provisions of the

Vienna Convention on the Law of Treaties concerning third-party countries, a treaty does not create either obligations or rights for a third country without its consent (UN, 1969a). Based on this provision, if the limits of the ECS delineated by the coastal state can be final and binding against a third country that is not party to the UNCLOS, it in essence creates an international legal obligation for the third country. If the third country provides its consent, it is then bound by this obligation. However, if it does not provide its consent, then the principles and rules of international treaty law imply that the limits of the ECS established by a coastal state in accordance with Article 76(8) of the UNCLOS do not apply to the third country at all.

The UNCLOS is universally regarded as a codification of international customary maritime law, and further develops the law of the sea on this basis. There is evidence that the rules for delineating the outer limits of the ECS detailed in Article 76 may reflect customary international law (McDorman, 2002). Non-party states to the UNCLOS have also stated that they consider paragraphs 1 through 7 of Article 76 to reflect customary international law.[1] However, the status of paragraph 8 is less clear than that of paragraphs 1–7. Although paragraph 8 is mainly a procedural rule for delineating the ECS, the use of the phrase "final and binding" in its text implies that this paragraph has de facto effect (Yin, 2018). This means that this procedure is important for establishing the legitimacy of the claims of coastal states to the ECS, and at least has a substantial impact on the practice of ECS-related rules within the treaty. In this way, rules governing the ECS that are based on paragraphs that can be recognized as customary international law, and rules concerning it that are valid only within the scope of the relevant treaties appear to lead to the formation of two sets of parallel systems with different practices. States that are party to the UNCLOS may insist on the treaty's provisions, while non-party states may invoke customary international law. This may lead in turn to conflicting claims that could escalate into diplomatic tensions and even territorial disputes. Such disharmony can complicate mechanisms of dispute resolution and put some regions in legal limbo. As negotiations on the Biological Diversity of Areas Beyond National Jurisdiction(BBNJ) Agreement are completed and resource development in international seabed areas is gradually implemented, the lack of unified norms may also hinder global action to protect marine biodiversity.

In accordance with the Statute of the International Court of Justice on the sources of international law and the Vienna Convention on the Law of Treaties, if Article 76(8) of the UNCLOS can be recognized as an international custom, then the binding force of the outer limits of the ECS delineated in accordance with this paragraph may extend to all non-party states. Also, so long as the US and other coastal states remain non-parties to the UNCLOS, they must rely on customary international law to determine their continental shelf limits. Although it has been argued that Article 76(8) is not part of customary international law and that this view is consistent with the opinions of ICJ judges in past cases (Kevin, 2017). However, customary rules in the maritime sphere is still under development. "Final and binding" in Article 76(8) offers the potential for the theoretical generation of rules of customary international law. It may indicate the existence of some collective interest on the part of the international community in ensuring the standardization, clarity, and stability of delineation of the ECS. The procedural nature of paragraph 8 does not necessarily preclude its potential normative force, especially given its practical importance in legitimizing claims to the ECS.

3 Theoretical exploration of whether Article 76(8) of the UNCLOS constitutes customary international law

3.1 Two-element theory of traditional customary international law

As far as the identification of customary international law is concerned, Article 38(1) of the Statute of the International Court of Justice defines international custom as "evidence of a general practice accepted as law." Although this expression of an authoritative definition of customary international law has been criticized by many scholars, it is still widely regarded as embodying the essence of customary international law. Its greatest value lies in the clarification of the two major constituents of the formation of international custom: One is state practice, which mainly refers to common practices by the state in similar situations (Zhao, 1988). The second, *opinio juris*, is a subjective element that is also known as the subjective will of legal obligations. It emphasizes the belief accompanying the above-mentioned common state practice, and refers to the mutual psychological convictions of countries. This element requires that relevant countries act in the above-mentioned manner out of a sense of legal obligation (Jiang, 2009).

Identifying and weighing the two elements of "state practice" and "*opinio juris*" are classic theoretical issues in customary international law. In practice, the formal identification or recognition of customary international law relies on evidentiary proof of these two elements. The attitudes of customary international law in the judgments of the International Court of Justice (ICJ) represents a certain authoritative and formal recognition. Therefore, the ICJ's determination of the application of customary international law often means its development and eventual creation. Although the ICJ has repeatedly emphasized the need to firmly implement the above two-element theory when examining whether customary international law has been established, which in turn requires specific and careful analysis of the evidence for the two elements of state practice and *opinio juris* (Libyan Arab Jamahiriya, 1985), the court has rarely explained, for individual cases, the method by which it determines the existence, content, and scope of the rules of customary international law to which the theory applies (Alvarez, 1949). The ICJ has been

1 Frequently Asked Questions – U.S. Extended Continental Shelf Project - United States Department of State https://www.state.gov/frequently-asked-questions-u-s-extended-continental-shelf-project/ [Accessed on 3 June 2023].

criticized in many cases because the reasons that it has adopted when identifying customary international law have not involved an inspection of specific state practices or materials related to *opinio juris*, and it has even deviated from the two-element theory in some cases. For example, the ICJ's approach in the 1986 Nicaragua v. Honduras case led some researchers to believe that it actually regarded state practice as a secondary factor in the formation of customary international law, and relied to a greater extent on United Nations resolutions and international treaties to determine customary rules, rather than examining state practice in the traditional sense (Wood, 1989). In many cases, the ICJ has only mentioned the two elements, and has not undertaken their examination or analysis. It has even directly identified certain rules of the Vienna Convention on the Law of Treaties as customary international law, or has simply stated that the nature of the relevant rules as customary international law is recognized by resolutions of the United Nations General Assembly (Deng, 2020). In short, although there exist the relevant legal provisions and judicial precedents in traditional international law, they do not provide a specific and clear explanation of how customary international law is formed. It thus remains difficult to identify the two elements of state practice and proof of *opinio juris* in practice. The ICJ has also failed to conduct specific empirical tests on a case-by-case basis in its judicial precedents. Identifying a rule of customary international law comes at a high cost, and there are difficulties involved in obtaining the requisite evidence because "customary practices are often not formally recorded" (Bederman, 2010). From a practical point of view, the ICJ appears to empirically decide how to identify international custom, including whether and the extent to which state practice needs to be examined. Its patterns of decision-making in this context are therefore elusive. This has led to doubts and criticisms concerning the two-element theory. Some researchers have thus tried to update the traditional theory of the constituent elements of customary international law by building a convenient bridge between multilateral treaties and customary international law.

3.2 Disputes over the creation of international custom from treaties or soft law

With the development of modern international law from the late 1960s to the early 1970s, the relationships among emerging treaties, international soft law, and traditional customary international law have stimulated the interest of researchers in the area, especially with growing international multilateral cooperation and evolving mechanisms of international organization. The series of novel, and even revolutionary, case opinions of the ICJ have laid the theoretical foundation for rethinking the traditional constituents of customary international law. This has given rise to two classifications of research on customary international law: "old customs based on practice," and "new and radical customs" (Simma and Alston, 1988; Roberts, 2001). Modern customary international law is interpreted as having different characteristics from traditional customs, and has led to the deconstruction of the classic two-element theory. Compared with traditional customary international law, which emphasizes the development of international custom from repeated practices by specific countries after induction into the international community, modern customary international law usually starts with a general description of such rules as statements, manifestoes, and declarations, and gradually evolves into the final formation of international custom. In contrast with traditional theories of international law, modern theories generally place a greater emphasis on *opinio juris*, that is, the beliefs and psychological factors of the states involved (Roberts, 2001).

A more radical view is the "instant" international customary law (Cheng, 1965) and the direct generation of customary rules from multilateral treaties (D'Amato, 1988). "Instant" international custom holds that the identification and determination of customary international law is rooted only in the existence of the *opinio juris*. General state practice is not important in this regard, and insufficient state practice does not affect the formation of customary international law. As a result, multilateral consensuses as reflected in treaties, resolutions of international organizations, and declarations of international forums that reflect the common will of states can directly and rapidly develop into customary international law that has universal force (Cheng, 1965). Supporters of the theory that "treaties directly generate customary rules" believe that if a widely adopted multilateral treaty represents the consensus of states on the rules contained in it, these rules can become part of customary international law based on this alone (D'Amato, 1988). Although this new theory reflects a trend in the development of customary international law under modern conditions, critics have argued that this reinterpretation seeks to remove the two elements of customary international law from its methodology based on an examination of state practice. This attempt to create shortcuts to the creation of international law by belittling state practice threatens the entire concept of customary international law (Hoof, 1983). However, the close connection between the process of formation of customary international law and treaty rules has gradually transformed the relevant disputes into the issue of the extent of the contribution of treaties rules to the content of rules constituting customary international law (Scott and Carr, 1996). There is no consensus on the "formal" role of treaties in the emergence of international custom. Many scholars believe that treaties that have the potential to create customs are an element of state practice (Michael, 1976; Meijers, 1978). Others hold that a treaty is an expression of the *opinio juris* of the relevant parties (D'Amato, 1970). Others still claim that only the existence of *opinio juris* needs to be proven for a treaty to create custom. Treaties, like other norms, must be accompanied by *opinio juris* in order to create customary law (Michael, 1976).

The International Law Commission (ILC) adopted concluding observations on the identification of customary international law during its 70th session in 2018. The Draft Conclusions aim to clarify the process of identifying customary international law by offering a set of guidelines that elucidate the roles of state practice and *opinio juris*, among other things. Even though the Draft Conclusions themselves do not constitute binding law, they are highly influential in both academic discourse and practical legal work related to international law. The ILC directly expressed its

disapproval of theories other than the two-element theory, stating that there is no instant customary international law (United Nations International Law Commission, 2023). Although "modern" theories on ways to identify customary international law are largely not accepted by authoritative organizations, the above-mentioned controversies and new theoretical explorations reflect the demand for "hard law" in emerging international issues: Form new legally binding rules or enhance the binding scope of existing rules.

3.3 Theoretical elements needed for treaty rules to generate customary international law

Is it possible for Article 76(8) of the UNCLOS to constitute a new rule of customary international law? To answer this question, we need to consider the traditional theory of what constitutes customary international law, as well as the opportunities created by the ongoing interaction between treaty law and international custom. A holistic consideration of the consensus within the jurisprudence of the ICJ, prevalent academic opinions, and the Draft Conclusions of the ILC lead us to believe that treaty rules may indeed form customary rules under certain conditions. There is considerable overlap in the contents of treaties and international custom in contemporary international law, and both are often simultaneously used as sources of international law on a certain subject. Treaties and customs influence each other at the same time, and alternately play major roles to form a substantial cause-and-effect chain (Gamble, 1981). Therefore, the two should not be viewed in isolation. The history of international rules related to the ECS is a good example of this interaction. U.S. President Truman issued a proclamation in 1945 declaring the United States' jurisdiction and control over the continental shelf beyond its territorial waters. Other coastal states quickly followed by claiming sovereignty over their respective continental shelves. Even landlocked countries accepted this norm through practical forms, such as bilateral or regional agreements (Scharf, 2013). The accumulation of the relevant practices eventually led to the birth of the Convention on the Continental Shelf in 1958. The widespread practice of this convention led to a continuation of the formulation of rules regarding the ECS in the UNCLOS in 1982. Since then, treaties have continued to shape customs. UNCLOS, which has a large number of party states, will continue to practice ever-more relevant rules, and instances of such practice may theoretically become evidence to identify customary international law.

In its 2018 conclusions, the ILC acknowledged that the rules stipulated in treaties may reflect existing rules of customary international law, or they may further generate a new rule of customary international law (United Nations International Law Commission, 2023). But the ILC also repeatedly warned that the transformation of a treaty into customary law "is a process that is not lightly to be regarded as having occurred." It reiterated what the ICJ stated in the North Sea Continental Shelf case, regarding the following necessary conditions for the rules set out in a treaty to give rise to rules of customary international law: (1) A fundamentally norm-creating character. However, neither the ICJ nor the ILC has defined this term. Judging from the use of this word along with the expression "general rule of law, ", "norm" should have a certain universal applicability. This rule is generally applicable regardless of whether a state is a contracting state. (2) Broad acceptability and representativeness of the parties to the treaty. The ICJ has pointed out that the fact that a treaty has been joined by a broad and representative group of states may be considered sufficient for the development of rules of customary law, provided that the parties to the treaty include those whose interests are particularly affected. The ILC mentioned in its conclusion that particularly affected countries refer to countries that are particularly able to participate in the relevant activities, or are most likely to pay attention to the purported rules. For example, maritime countries will have more realistic interests in the ocean than landlocked countries, and thus will pay more attention to the formation of maritime rules and be more active participants in applying them. (3) State practice and *opinio juris*. In spite of the above two requirements, the ICJ emphasized that the practice of states, including states whose interests are particularly affected, must be conducted in accordance with the purpose and intent of the rules invoked, and to the extent that they are both broad and substantially consistent. The practices must also be shown to take place in circumstances that are generally recognized as falling under the ambit of rules involving a legal obligation. This shows that the rules created by treaties need to undergo a process before they can be transformed into customary law and become law in the true sense. Otherwise, they will essentially remain conventional law owing to the general principle that "treaties have no benefit or loss to third parties" (Jia, 2010).

The ILC's conclusions affirm the value of a treaty as evidence for the identification of customary international law. Facts relating to a treaty and the content of the treaty may, in different scenarios, serve as evidence in support of state practice or *opinio juris*. The act of concluding the treaty is classified as one of the forms of state practice, while the content of the treaty is included as a form of evidence of *opinio juris*. Identifying the existence and content of the rules of customary international law is likely to involve a consideration of their process of development. Although the ILC has mentioned the formation of rules of customary international law in many occasions, it has not systematically discussed how these rules are generated, changed, or terminated. It should be noted the ILC has only said that treaty rules "may reflect rules of customary international law", its purpose here is to draw attention to the fact that treaties by themselves cannot create rules of customary international law or absolutely prove their existence and content (ILC, 2018a). This means that we need to be very cautious when making a conclusion similar to one whereby "a certain treaty has formed customary international law." The issue of whether customary international law has formed will thus ultimately return to an examination of state practice and *opinio juris*. As mentioned above, neither the ICJ nor the ILC has explained what happens between treaty rules and the formation of customary rules. No precise standard for this is available in two-element theory either, and its invocation relies on subjective experience and the authority of the ICJ. In short, customary international law is still a difficult concept to use for those who wish to empirically research the process of transformation from treaty to customary law.

4 Empirical examination of whether Article 76(8) of UNCLOS constitutes customary international law

4.1 Broad acceptability and representativeness of parties to the treaty in the context of Article 76(8)

The "broad acceptability and representativeness" standard is a key aspect in which treaty provisions can become rules of customary international law. The analysis of Article 76(8) of the UNCLOS requires a consideration of complex and delicate contracting scenarios. As of September 2023, the UNCLOS has been ratified by 168 parties, including 167 countries and the European Union. This represents a far-reaching consensus among most government entities in the international community. The signatories to the treaty include not only major global powers, but also small island states with substantive concerns about oceans. The claims of its broad acceptability and representativeness are thus well founded. However, the mere numerical advantage of the parties to the treaty does not fully satisfy the criterion mentioned in the jurisprudence of the ICJ. The court held that contracting parties must include states whose interests are particularly affected. In the context of maritime law, such countries are often coastal countries with extensive coastal zones or those that rely heavily on maritime trade and resources, and may also include countries with ongoing disputes involving maritime boundaries or resources. Although the parties to the UNCLOS cover the vast majority of coastal countries in the world, coastal countries that engage in maritime trade and resource extraction, such as the United States, Iran, and Colombia are absent from this list. Considering the influence of these non-party states on maritime politics, the economy, and even military affairs, their non-participation calls into question the premise that the UNCLOS represents universal maritime interests.

In addition to maritime countries, landlocked countries pose interesting challenges to the criteria of analysis. Despite a lack of direct maritime interests, the landlocked countries that signed the UNCLOS add a multidimensional perspective to the interpretation of "broad acceptability and representativeness." Their participation shows that the treaty transcends the geographical boundaries of the ocean to encompass global maritime legal expectations. In addition, such geopolitical blocs as the European Union, the African Union, and the Association of Southeast Asian Nations (ASEAN) further complicate this criterion. These groups often share common maritime interests and concerns. When they ratify the UNCLOS or recognize its binding force, they add a layer of institutional gravitas to the treaty. Their collective endorsement of provisions of the UNCLOS, including Article 76(8), can be seen as satisfying the above criterion, albeit in a multifaceted and complex way.

Finally, reservations and exceptions to the treaties deserve consideration. The ILC's concluding observations state that allowing reservations to a certain treaty provision may indicate that the provision does not reflect customary international law (McDorman, 2002), but this is not necessarily conclusive (ILC, 2014). The nature of the UNCLOS as a "package agreement" and the prohibition of reservations in the convention itself exclude the possibility of its selective application by the contracting parties (Gao, 2019). No country has yet made a reservation to Article 76(8) of the UNCLOS. Therefore, reservations to a treaty do not affect the nature of the consensus on and the prospects of the rules under consideration here as part of customary international law under the above standard.

4.2 Norm-creating nature of Article 76(8) of UNCLOS

4.2.1 Potential of Article 76(8) of UNCLOS to "create norms"

To understand the "fundamental norm-creating nature" of any provision in a treaty, it is necessary to examine the nature and purpose of the norm itself, its interpretation in legal discourse, and its impact on state behavior. Neither the ICJ nor the ILC has clearly defined the term "fundamental norm-creating nature" which creates room for interpretation. Although its scope is uncertain, its analysis can be grounded in the broader intent of the provision: By standardizing the process of delineating the limits of the ECS, a norm can be proposed that can be applied universally. Article 76(8) sets out guidelines for dispute resolution and scientific assessment to provide a structure that goes beyond a specific situation to deal with a wide range of similar scenarios. Both land boundaries and continental shelf boundaries necessarily involve elements of stability and permanence(ICJ, 1978).In this sense, this provision has the potential to generate rules of general application, where this fundamentally meets a normative requirement.

As a framework convention, the UNCLOS is a milestone in the regulation of the law of the sea. It adopts a broad and multilateral approach to ocean governance, continuously updates the text of binding agreements, and promotes the relevant practices. This broad scope enhances the potential of its individual provisions (including Article 76(8)) to generate universal norms through linkage with other provisions or rules. For example, the BBNJ Agreement concluded in 2023 will lead to more specific international obligations on countries for the ecological protection of the high seas, including waters overlying the ECS. With advances in rules related to deep-sea mining, the boundary between the ECS and the international seabed may face challenges from emerging mining activities. Furthermore, Article 76(8) is intricately linked to other international obligations and frameworks. For example, the obligations under the United Nations Framework Convention on Climate Change (UNFCCC) or the Convention on Biological Diversity (CBD) may intersect with the effectiveness of limits to the ECS. The UNFCCC addresses climate change and its impacts, rising sea levels due to melting polar glaciers, and warming and expanding ocean waters. The rise in sea level changes the coastal baselines, which are the starting points for measuring ocean areas, including continental shelves(Chen, 2022). The delineation of the ECS may also be affected if baselines shift due to a rise in sea level. The system of environmental impact assessment and protected marine areas included in the CBD will interact with the international obligations and outer limits of the ECS. The mutual influence of these treaties highlights the

fragmented nature and interconnectedness of international law. From this perspective, the interconnected points pave the way for the norm-creating potential of Article 76(8) because they enable it to function within the larger ecosystem of international legal norms.

4.2.2 Restrictive elements of Article 76(8) of UNCLOS to "create norms"

With regard to the "CLCS recommendations" referred to in Article 76(8), the discretion afforded to the CLCS in assessing submissions for the ECS inevitably introduces subjective elements. While the CLCS follows scientific principles when assessing ECS submissions, the complexity and uniqueness of each case means that it exercises some degree of discretion in its assessments. Although there are certain criteria for what constitutes an ECS based on geological and geomorphological factors, the CLCS can interpret these criteria on the basis of the specific circumstances of each case. In addition, it may be influenced by political or diplomatic factors (McDorman, 2002). Members of the CLCS are nominated by state parties to the UNCLOS, and although they are supposed to perform their duties on their own behalf, and not as representatives of their respective countries, it is conceivable that political or diplomatic factors may influence the body's recommendations. In summary, the exercise of discretion and the potential impact of external factors create an element of uncertainty in the CLCS's recommendations. This uncertainty may affect the basic normative nature of the article, which is crucial for its transition into a rule of customary international law.

Furthermore, the availability of alternative mechanisms of dispute resolution in the UNCLOS, such as arbitration or judicial settlement, raises the question of whether Article 76(8) is self-contained or part of an interdependent normative system. This distinction is important because self-contained rules tend to more easily satisfy the criteria that create norms. The procedural nature of Article 76(8) and its role as part of a comprehensive normative system suggest that it may be better suited as a cog in an interrelated normative machine, rather than as a stand-alone and fundamentally norm-creating rule.

4.3 State practice and *opinio juris* relevant to Article 76(8)

State practice and *opinio juris* are the cornerstones on which customary international law is built. Article 76(8) outlines the procedural framework for coastal states to delineate the limits of their ECSs. Making submissions to the CLCS for recommendation is the principal constitutive act of state practice in this regard. Furthermore, *opinio juris* is reflected in the recognition by states of their fundamental legal obligation to comply with these procedures. These elements together constitute the touchstone of the customary nature of the provisions contained therein.

The procedural character of Article 76(8) complicates the assessment of state practice. Procedural rules often have an inherent flexibility that allows states to adapt their practices to specific circumstances. Therefore, differences in state practice do not necessarily negate the formation of customary international law. However, this flexibility prevents the identification of consistent and uniform state practice—a fundamental prerequisite of customary international law. It is worth noting that the 2010 judgment of the ICJ give"environmental impact assessment",a procedural norm, the status of customary international law in the case concerning Pulp Mills on the River Uruguay (Song, 2019). At the same time, the ICJ emphasized the procedurally obligatory nature of environmental impact assessment, stating that it is for each country to determine the specific content of the environmental impact assessment required in each case in its domestic legislation or procedures for project authorization (ICJ, 2010). This judgment demonstrates the transformative potential of procedural norms evolving into international custom when they are consistent with international obligations.

The complex interplay between treaty obligations and customary norms adds an additional layer of complexity to *opinio juris*. The "negotiation, conclusion, and execution of treaties" can be regarded as the form of state practice required to identify a rule of customary international law, and the "treaty provisions" can be interpreted as the form of evidence of *opinio juris* (ILC, 2018b). However, in the context of identifying international law, practice for the purpose of fulfilling treaty obligations cannot by itself be used to infer the existence of a rule of customary international law. A state party may claim that it is acting in accordance with treaty obligations, thereby masking the underlying customary nature of its actions. In case of Article 76(8), it is difficult to prove whether the relevant obligations would have been fulfilled if the treaty had not existed. In a sense, the treaty is both an promoter and an obstacle: It is an promoter because it formalizes a set of rules that states agree to abide by, but is also an obstacle because such formalization may mean that states do not consider the rules to be mandatory beyond the scope of the treaty. As Judge ad hoc Mensah noted in his declaration, paragraph 8 as a "treaty obligation" that "cannot be considered as imposing mandatory obligations on all States under customary international law"(ICJ, 2012a).

More valuable evidence for the final identification of customary international law than the above is the attitude of the non-parties, that is, whether a rule of customary law has been established depends largely on how non-parties to a given agreement practice it (Jia, 2010). As among the largest marine powers in the world, the US is the most notable among the countries that have not yet ratified the UNCLOS. Although it has not expressed explicit support for this system of delineation of the ECS, the authors of this study believe that the US at least has no objection to it. This is evident from the following two examples: First, senior officials of the US government, including the secretary of state, have repeatedly noted that the fact that the country is not a party to the UNCLOS prevents it from using the procedures stipulated in the convention to claim rights to the ECS (Us Department of State, 2012). Second, it appears from contents of the diplomatic notes issued by the US in response to the submissions of other countries that it has no intention to express objections to limits of the ECS determined on the basis of the CLCS's recommendations. Consider Russia's submission regarding the Arctic Ocean as an example: The US raised a large number of substantive scientific and technical issues in its diplomatic note as a counter to scientific evidence provided by

Russia and listed in its submission (UN, 2002). If the US did not approve the legal regime for delineating the ECS, it should have opposed the fundamental legitimacy of submitting a submission to the CLCS through the framework of the UNCLOS to obtain rights to the ECS, rather than contest the contents of the submission to the body. However, the US did not question the legitimacy of the UNCLOS or the CLCS within its ambit, but instead put forward a variety of scientific claims purportedly based on evidence in response to Russia's submission. This reflects the US' affirmation of the ECS system under the UNCLOS, and shows that it objected in this case only to the scientific evidence presented by Russia. Another example concerns Russia's 2001 submission concerning the ECS in the Bering Sea. Russia chose to use the Bering Sea boundary agreement between Russia and the US in 1990, which had been unfavorable to Russia, as the basis for the delineation. The US welcomed the content of the plan for delineation in a diplomatic note (UN, 2002). Therefore, although the US has not made a submission to the CLCS itself, and there is no active practice of non-contracting parties making submissions, the above-mentioned diplomatic notes indicate that the US has participated in the system, and in turn suggests that it at least has no objection to it.

No clear evidence of the practice of Article 76(8) by non-parties is currently available, mainly due to the close association of the body involved in the procedure (CLCS) with the UNCLOS. Article 76 (8)"institutes a specific procedure which is not accessible to non-member States" (ICJ, 2012b). It is difficult to imagine a scenario in which a non-party state to the UNCLOS proactively seeks recommendations from the CLCS. However, state practice and *opinio juris* are multifaceted in the context of this provision. The procedural nature of the rules, the special interests of certain coastal states, and the vague standards for broad state involvement combine to create complexity and uncertainty. Although the practice of asserting the ECS is not limited to contracting states, different procedures give these practices different legal meanings. It is difficult at this stage to reduce these differentiated practices into a routine or procedure. The interaction between treaty obligations and customary obligations also makes it difficult for *opinio juris* to exist apart from the treaty itself. Therefore, although Article 76(8) has the theoretical potential to shape or further generate customary international law through practice, it cannot satisfy the classic two-element constitutive condition of customary international law at this stage.

5 Conclusions

We have shown that whether a certain rule of the UNCLOS constitutes customary international law should depend on the specific analysis of the particular issues at hand. We should take a highly cautious attitude toward the view that the UNCLOS already satisfies the conditions for a treaty as a whole to become customary international law, that the boundary between treaty law and customary law has blurred (Wu, 2011), and that all current provisions of the UNCLOS have the status of international custom. Otherwise, there is no need for the United Nations General Assembly to continue to call on countries to join the UNCLOS (Harrison, 2011). To sum up, whether a certain provision of the UNCLOS has the status of customary law cannot be arbitrarily decided (Wang, 2003), but should depend on whether it has the constituent elements of international custom.

Current investigations of state practice and international law theory lead us to conclude that the issue of whether Article 76(8) of the UNCLOS constitutes customary international law remains undetermined. A considerable amount of uncertainty surrounds the interpretation of the two-element theory. So the key is to find clues in the actual practice of the ICJ in determining customary international law (ICJ, 1969). In the Nicaragua v. Colombia case in 2012, the ICJ refused to comment on whether paragraphs other than Article 76(1) of the UNCLOS have the status of customary law (ICJ, 2012c). On the one hand, this attitude can be interpreted as reflective of the belief by the ICJ that there is no consensus on whether these paragraphs, including Article 76(8), constitute customary international law at present. On the other hand, it can be read as meaning that the ICJ considers these paragraphs to be customary international law in the making, which means that they may develop into rules of international custom in the future. We conclude that Article 76(8) of the UNCLOS does not constitute customary international law for the time being, but we should nonetheless be optimistic about the possibility of it developing into a rule of international custom with universal binding force in the future.

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ZM: Writing – original draft, Writing – review & editing. XL: Writing – original draft. HL: Supervision, Writing – review & editing. ZZ: Supervision, Writing – original draft, Writing – review & editing.

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Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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