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The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate

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Abstract
The Commission on the Limits of the Continental Shelf is neither fish nor fowl. Its primary purpose is to consider coastal states' proposed limits of the outer continental shelf and to make recommendations thereto. Albeit the establishment of the outer limits is an act within the sole discretion of a state, the role of the Commission in the establishment of such limits is of pivotal importance. Due to its mandate, it can reasonably be argued that the Commission is, by way of implication, deemed to be vested with rights that cannot be seen to be limited to a technical review *stricto sensu*. This paper seeks to determine the exact terms of reference of the Commission and to what extent it comprises powers to undertake legal interpretations of the Convention. It will be concluded that a fair balance governs the operations of the Commission, although they, at times, comprise tasks that are essentially of a legal nature.

Key words
Commission on the Limits of the Continental Shelf; *Kompetenz-Kompetenz*; terms of reference; treaty interpretation

1. Introduction

The establishment of the outer limits of the continental shelf is a discretionary act of a coastal state but, in order to be opposable to third states, it must be done in accordance with international law. The breadth of the continental shelf is defined by the UN Convention on the Law of the Sea[1] ('the Convention'), in accordance with which coastal states have sovereign rights to the continental shelf to the outer edge of the continental margin, or to a distance of 200 nautical miles (M) from the baselines from which the breadth of the territorial sea is measured (baselines) where the outer edge of the continental margin does not extend up to that distance. Those coastal states that intend to establish the outer limits of the continental shelf beyond 200 M shall, pursuant to Article 76(8) of the Convention, submit relevant information on the outer limits of the continental shelf to the Commission on the Limits of the Continental Shelf ('the Commission'). The Commission is a treaty body composed of scientists, from which lawyers are excluded, and is mandated 'to make recommendations to coastal States on matters related to the establishment of the

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1 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396 (hereafter, 'Convention').

outer limits of their continental shelf'.[2] It plays a pivotal role in the establishment of the outer limits,[3] as demonstrated by the fact that the outer limits of the continental shelf established on the basis of the recommendations of the Commission are, pursuant to Article 76(8) of the Convention, final and binding.[4] Yet, it is plain that coastal states may establish outer limits otherwise than on the basis of the recommendations of the Commission. To quote Oxman, a submitting coastal state 'is not denied the right to reject the Commission's approach'.[5] Leaving aside the question whether and, in the affirmative, which third states would be seen as being vested with *locus standi* to challenge the validity of such outer limits, it is clear that, notwithstanding the wording of Article 76(8), the final and binding characteristics of outer limits, which are established on the basis of the recommendations of the Commission, are subject to the requirement that the recommendations of the Commission themselves must conform to the Convention. According to the terms of reference of the Commission, under Article 3(1)(a) of Annex II to the Convention, the Commission shall make recommendations 'in accordance with Article 76' of the Convention. At first sight, this might not seem extraordinary. However, Article 76 includes scientific concepts that are subject to autonomous legal definitions 'which at times depart significantly from accepted scientific definitions and terminology'[6]: such departures arise as a consequence of the fact that the 'continental shelf is a legal concept'.[7] Thus, the Commission, it is argued, performs a treaty obligation that, as a result of a lack of authoritative legal guidance, necessarily requires some degree of treaty interpretation. In this regard, it should be noted that Judge Wolfrum argues that a 'competence not referred to in the [Convention] which, nevertheless, is being fulfilled by the Commission is the interpretation, or at least giving guidance, to the interpretation of Article 76 of the Convention'.[8] This competence may be supported by scrutinizing the primary functions of the Commission. In other words, given the legal definition of the continental shelf, contained in Article 76 of the Convention

2 Convention, Art. 76(8).

3 See, inter alia, the statement of the former Legal Counsel of the United Nations, Hans Corell, in the opening statement at the first session of the Commission, CLCS/1, 3. Further, De Marffy Mantuano has noted that the establishment of the Commission was necessary to bridge the gap between the broad-shelf states and those who wanted to limit the further seaward extension of national claims to the detriment of the Area: see A. De Marffy Mantuano, 'La fixation des dernières limites maritimes: Le rôle de la Commission des Limites du Plateau Continental', in V. Coussirat-Coustère et al. (eds.), *La mer et son droit: Mélanges offerts à Laurent Lucchini et Jean Pierre Quénedec* (2003), 415.

4 On the 'final and binding' wording in Art. 76(8), McDorman implies that it does not 'remove from other states their capacity to reject (protest and thus not accept) a state's continental shelf outer limit . . . . States are not deprived of their legal right to disagree with another's [*sic*] state's established outer limit even if that outer limit delineation can be said to be on the basis of Commission recommendations'; see T. McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World', (2002) 17 *International Journal of Marine and Coastal Law* 301, at 315.

5 B. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)', (1981) 75 AJIL 211, at 230.

6 The Scientific and Technical Guidelines of the Commission on the Continental Shelf, UN Doc. CLCS/11 (13 May 1999), Point 1.3 (hereafter 'Guidelines').

7 *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Jurisdiction, Judgment of 19 December 1978, [1978] ICJ Rep. 3, para. 86 (hereafter, *Aegean Sea*).

8 R. Wolfrum, 'The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf', in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 24.

in conjunction with the Commission's mandate[9] to make recommendations in accordance with Article 76 of the Convention, the Commission to some extent needs to engage in treaty interpretations in order to fulfil its mandate.[10] Judge Treves has characterized this understanding of the Commission's competence as a matter of concern, given that 'legal matters should be treated according to legal procedures and with legal expertise'.[11] It has been advocated that the above-mentioned imbroglio can be avoided, given that the 'Commission may seek external advice'.[12] Yet, despite the exclusion of lawyers from its membership, the Commission is not vested with powers to seek an advisory opinion from, for example, one of the forums enumerated in Part XV of the Convention with regard to the interpretation of various legal concepts embedded in Article 76 of the Convention. Further, the advisory function of the International Court of Justice ('the Court'), pursuant to Article 96(2) of the Convention, is not open to the Commission.[13] Neither is the Commission vested with powers to make use of the advisory function of the International Tribunal of the Law of the Sea ('the Tribunal') because of its lack of treaty powers.[14] Finally, it seems clear that the Meeting of States Parties cannot be considered much help.[15] The inability of the Commission to seek such formal legal guidance is susceptible

9 Pursuant to Art. 3(1)(b) of Annex II to the Convention, the Commission shall also, if required, provide scientific and technical advice to coastal states that intend to submit data and material in support of outer limits to the Commission.

10 Oude Elferink has noted that the Commission 'is an organ that has been assigned specific functions under the [Convention], including the task of making an independent evaluation of the submission of the coastal State in respect of the outer limits of the continental shelf . . . . This includes the question of whether the information that has been submitted to the Commission proves that the conditions set out in Article 76 are actually met for the specific outer limit lines proposed by a coastal State. At times this may require interpretations of specific provisions of Article 76', A. Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Settlement', in A. Oude Elferink and D. Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Instruments* (2004), 112.

11 T. Treves, 'Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report', (2006) 21 *International Journal of Marine and Coastal Law* 363, at 367.

12 Wolfrum, *supra* note 8, at 23.

13 Pursuant to Art. 96(2) of the UN Charter, '[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'. The requesting body must be vested with competence to request such advisory opinion from the Court – a determination based on Art. 96 of the UN Charter. In the *Legality of Threat or Use of Nuclear Weapons* Advisory Opinion, the Court determined that: '[f]or the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be authorized by or in accordance with the Charter of the United Nations to make such a "request"'; see *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226, para. 11.

14 Art. 20(2) of Annex VI to the Convention is considered to extend jurisdiction to non-state actors, including entities that are not vested with capacity to conclude treaties. Boyle argues that 'Article 20(2) [of the ITLOS Statute] uses the word "agreement" without further qualification, suggesting not only that it need not be a treaty, but that the parties to it do not have to have the capacity to conclude treaties'; see A. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', (1997) 46 ICLQ 37, at 53. By contrast, pursuant to Rule 138(1) of the Rules of the Tribunal, it 'may give an advisory opinion on a legal question if an *international agreement* related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion' (emphasis added). Given the language that stands in contrast to Art. 20(2) of Annex VI to the Convention, it is clear that the bodies requesting the advisory opinion must be vested with powers to conclude a treaty.

15 States parties to the Convention agree to disagree on whether the Meeting has powers to discuss matters of substance. For recent debate, see the Report of the Nineteenth Meeting of States Parties, UN Doc. SPLOS/203 (24 July 2009), paras. 11–14. Eiriksson has also argued that 'from the point of view of form, I don't think, for example, that the Commission need feel bound to channel any questions of a legal nature it might have through the States Parties, which might have their own reasons not to want an answer'; see G. Eiriksson, 'The

to raise concern given, as noted by Judge Nelson, that 'one of the cardinal functions of the Commission must necessarily be to interpret or apply the relevant provisions of the Convention – an essentially legal task'.[16]

This paper seeks to determine the scope of the terms of reference of the Commission. It begins from the premise that the Commission is a technical treaty body, but then considers the Commission's mandate in a holistic manner, pursuant to which the Commission cannot make recommendations in clinical isolation from legal concepts that are inherent to the legal regime applicable to the continental shelf. Finally, it will be concluded that the Commission must, in the absence of authoritative legal guidance, be seen to be vested with powers to determine the extent of its own mandate.

2. The exercise of a normative treaty obligation

In the *North Sea* cases, the Court held that the determination of the fringe of an area the subject of a dispute requires that 'it must first be clearly established what features do in fact constitute such extensions'.[17] The normative characteristics that may be conferred on the actions of the Commission are a corollary to its role as a 'canary in the mineshaft',[18] the significance of which cannot be underestimated given that outer limits, which are based on the recommendations of the Commission, are, in principle, opposable *erga omnes*. Prior to examining the normative aspects of the actions taken by the Commission, this chapter will first look into the obligation of states to submit outer limits to the Commission, and the main characteristics that flow from the Commission's recommendations, which together are requisites to introduce conclusive assertions as to the mandate of the Commission.

2.1. The scope of a special legal act

Coastal states' rights to the continental shelf exist *ipso facto* and *ab initio*.[19] To echo the words of the Court:

> The 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 *ipso facto* and *ab initio*, by virtue of its sovereignty over the land . . . . In short, there is here an inherent right.[20]

Case of Disagreement between a Coastal State and the Commission on the Limits of the Continental Shelf', in M. Nordquist, J. Moore and T. Heiðar (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (2004), 256.

16 L. Nelson, 'The Continental Shelf: Interplay of Law and Science', in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda*, Vol. 2 (2002), 1238.

17 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, para. 96 (hereafter, *North Sea Continental Shelf Cases*).

18 P. Croker, 'The Commission on the Limits of the Continental Shelf: Progress to Date and Future Challenges', in M. Nordquist et al. (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (2004), 221.

19 Art. 77(3) of the Convention provides that the rights to the continental shelf 'do not depend on occupation, effective or notional, or on any express proclamation'.

20 *North Sea Continental Shelf Cases*, *supra* note 17, at para. 19.

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It is because of the sovereign title to land that the rights of the coastal state to the continental shelf exist *ipso facto* and *ab initio*. In the *North Sea* cases, the Court thereafter held that the inherent nature of such rights to the continental shelf was reflected in the mere fact that 'no special legal process has to be gone through, nor have any special legal acts to be performed'.[21] Yet, notwithstanding coastal states' inherent rights to the continental shelf, those coastal states that intend to establish its outer limits shall 'submit particulars of such limits to the Commission'[22] within a certain time frame. This implies that the clause on inherent rights in 'Article 77 paragraph 3, . . . does not remove from the coastal State the burden of demonstrating its entitlement'[23] to the outer continental shelf, although, as mentioned earlier, not being deprived of the right to 'reject the Commission's approach'.[24]

Not only does the definition of the legal continental shelf in the Convention materially differ from the definition in the 1958 Convention on the Continental Shelf,[25] but it also includes a distinctive constitutive procedure incumbent on those states that intend to establish the outer limits of the continental shelf. The establishment of the outer limits of the continental shelf in disregard of the obligation to submit particulars of such limits to the Commission is an internationally wrongful act of that state and *ipso jure* non-opposable to other states. It should in this context also be noted that the Court commented in an *obiter dictum* in *Territorial and Maritime Dispute between Nicaragua and Honduras* that 'any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of [the Convention] and reviewed by the Commission on the Limits of the Continental Shelf established thereunder'.[26] One could question whether the Court's use of the term 'review' is unfortunate given that, according to Article 76(8) of the Convention, the Commission 'shall make recommendations'[27] on matters related to the establishment of the outer limits of the continental shelf. To 'review' would seem to imply a power to impose one's opinion,[28] whereas the Commission does not have powers to impose its view upon states; the latter being, as mentioned earlier, in principle, free to disregard the recommendations of the Commission. Be that as it may, the essential point is that, even though in international law there is only a single continental shelf,[29] it is safe

21 Ibid.
22 Excerpt from Art. 4 of Annex II to the Convention.
23 Eiriksson, *supra* note 15, at 258.
24 Oxman, *supra* note 5, at 230.
25 1958 Convention on the Continental Shelf, 499 UNTS 311. Art. 1(a) of that Convention confines the continental shelf 'to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.
26 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep. 659, para. 319.
27 Excerpt from Art. 76(8) of the Convention.
28 According to the *Oxford English Dictionary*, the definition of 'review' is as follows: 'a new examination of something, with the possibility or intention of changing it if this is considered desirable or necessary'. J. Crowther (ed.), *Oxford Advanced Learner's Dictionary of Current English* (1995), 1007.
29 In *Barbados v. Trinidad & Tobago*, Award of 11 April 2006, para. 213, an arbitral tribunal constituted pursuant to Art. 287 and in accordance with Annex VII of the Convention held that 'there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf'. A copy of the Award is available at www.pca-cpa.org/upload/files/Final%20Award.pdf.

to assert that, in order to establish the outer limits, a 'special legal process has to be gone through' that constitutes a 'special legal [act] to be performed'.[30]

Article 7 of Annex II to the Convention provides that the establishment of the outer limits shall be done in conformity with the provisions of Article 76(8) of the Convention. This is not equivalent to saying that the outer limits shall be based on the recommendations of the Commission. Article 76(8) of the Convention provides only that the limits are final and binding where they are established on the basis of its recommendations. Yet, what is of interest for the purposes of this paper is that it would seem evident that the opposability that flows from the presumption of validity of the recommendations of the Commission presupposes the conformity of the recommendations with the text of Article 76 of the Convention, hence rendering any conclusions arising from the above distinctive wordings in Articles 76(8) and 7 to Annex II to the Convention to some extent a game of words. Nevertheless, that distinction accentuates the postulate that the recommendations of the Commission do have normative characteristics, because they are presumed to be made in accordance with Article 76, from which the final and binding characteristics of the outer limits arise. Further, whereas the Secretary-General 'shall give due publicity' to the information 'permanently describing the outer limits',[31] the question has been raised whether the Secretary-General will, pursuant to Article 76(9) of the Convention, give publicity to outer limits that are established otherwise than in conformity with the recommendations of the Commission. As observed by Judge Wolfrum, where the outer limits are established otherwise than in conformity with the recommendations of the Commission, the Secretary-General 'would be unable to accept them and to give them the publicity as provided for under Article 76, paragraph 9, of the Convention'.[32] This would corroborate the fact that a presumption of validity accompanies the recommendations of the Commission and, as a consequence, the outer limits that are established otherwise than on the basis of such recommendations may be presumed contrary to Article 76 of the Convention. In other words, notwithstanding the fact that a boundary 'represent[s] . . . a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*',[33] the outer limits established otherwise than on the basis of recommendations of the Commission would not, in principle, be binding on third states. For these reasons, it may be held that, notwithstanding the fact that coastal states may reject the recommendations of the Commission and establish their outer limits otherwise than on the basis of the recommendations, such limits would not easily be enforceable: 'they may be challenged in practice and to undertake or license economic activities

30 *North Sea Continental Shelf Cases*, *supra* note 17, para. 19.

31 Excerpt from Art. 76(9) of the Convention.

32 Wolfrum, *supra* note 8, at 25. Pursuant to Art. 6(3) of Annex II to the Convention, as reflected in Rule 53(3) of the Rules of Procedure of the Commission, its recommendations are to be produced in two copies, one of which is submitted to the submitting coastal state and the other to the Secretary-General, the latter thus being vested with the possibility of cross-checking the consistency of the outer limits, deposited pursuant to Art. 76(9), with the recommendations.

33 *Government of the State of Eritrea v. Government of the Republic of Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)*, Award of the Arbitral Tribunal of 9 October 1998, (1999) 114 ILR 48, para. 153.

on such part of the shelf may be difficult in practice.'[34] Further, it could be held that third states would, pursuant to Article 137(3)[35] of the Convention, be under an international legal obligation not to recognize[36] outer limits that are not established on the basis of the recommendations of the Commission, because these would normally, given the presumption of validity that accompanies the recommendations of the Commission, be assumed contrary to Article 76 of the Convention and as appropriate an encroachment of the Area.[37] The now famous finding of the Court with regard to the validity of unilateral delineations, in the *Fisheries Jurisdiction* case,[38] would hence apply equally to the establishment of the outer limits of the continental shelf, in which the recommendations of the Commission would, it must be recognized, have a central importance in the determination of whether such limits are opposable to third states, provided that the treaty obligation incumbent upon the Commission, to make recommendations in accordance with Article 76 of the Convention, is duly fulfilled. Any non-fulfilment of that obligation, namely where the recommendations are not in accordance with Article 76 of the Convention, must be seen as a circumstance to challenge the opposability of such outer limits.[39] In other words, it does not follow from the assumption of validity of the recommendations that its conformity with Article 76 may not be challenged. The contrary would be tantamount to determining that the recommendations are immune from review,[40] which would seem nonsensical given the overall importance that Part XI of the Convention maintains. Yet, the Commission cannot be party to contentious proceedings,[41] and as such, the presumption of validity of its recommendations would not transfer the *onus probandi* onto the discontented submitting coastal state, which would have disregarded the recommendations of the Commission.[42] Hence,

34 Wolfrum, *supra* note 8, at 25.

35 Art. 137(3) reads as follows: 'No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.'

36 This assumption applies only to outer limits that would extend further seaward than recommended by the Commission.

37 Pursuant to Art. 136 of the Convention, '[t]he Area and its resources are the common heritage of mankind'.

38 *Anglo-Norwegian Fisheries Case (UK v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, at 132. On the validity of unilateral delimitations, see also *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, para. 87 (hereafter, *Gulf of Maine*); *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, [1982] ICJ Rep. 18, para. 87.

39 On this issue, see also McDorman, who advocates that the 'final and binding' wording does not remove from other states their capacity to reject the validity of outer limits being based on the recommendations of the Commission. McDorman, *supra* note 4, at 315.

40 See B. Kunoy 'Legal Problems Relating to Differences Arising between Recommendations of the CLCS and the Submission of a Particular State', in C. Symmons (ed.), *Current Problematic Issues in the Law of the Sea* (2011), 305–38.

41 As noted by Judge Rangel, 'the alternative of an agreement between the Commission and the discontented coastal state for this purpose could be considered. It shall be discarded, however, because this hypothetical agreement would go against the Commission's very nature and *raison d'être*'; see V. Rangel, 'Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals', (2006) 21 *International Journal of Marine and Coastal Law* 347, at 359.

42 Seaward demarcation of the continental shelf is not one of the optional exceptions to compulsory dispute settlement mechanisms under Part XV, Section 2, allowed under Part XV, Section 3. See Eiriksson, *supra* note 15, at 258.

it would be for State A[43] – challenging the validity of the outer limits claimed by State B, which were established otherwise than on the basis of the recommendations of the Commission – to bear the *onus probandi* to challenge the invalidity of State B's proposed outer limits, a priori, as appropriate, according to the mere fact that they were not established on the basis of the recommendations of the Commission and therefore are not in accordance with Article 76 of the Convention.

2.2. Normative actions

The Commission has not been vested with powers to adopt legal instruments that would be binding upon states parties to the Convention and the Scientific and Technical Guidelines[44] ('the Guidelines') are, per se, not legally binding on states parties. It is true that subsequent agreements may 'have a bearing on the juridical situation of the parties and on the rights that each one of [the states parties] could properly claim'.[45] Yet, only agreements 'between the parties'[46] may constitute subsequent agreements within the meaning of Article 31(3)(a)[47] of the Vienna Convention on the Law of Treaties ('the Vienna Convention').[48] The Commission cannot, for evident reasons, be a state party to the Convention and therefore the Guidelines can not constitute a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention. That is not equivalent to saying that the practice based on the Guidelines could not instigate a 'subsequent practice', within the meaning of Article 31(3)(b) of the Vienna Convention[49] between the states parties. Given the legitimacy that its endorsement confers to submitting coastal states' outlined outer limits, the practice of the Commission could prompt states parties to align their reasoning and interpretation of the Convention with that of the Commission.[50] Hence, it could be argued that the Guidelines are susceptible to be a legal source for submitting coastal states and, to the extent that states align their reasoning with that of the Commission, these could constitute a source of subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention. Further, according to the Guidelines, their purpose is not only to clarify to submitting coastal states the required 'scope

43 It is not the purpose of this paper to analyse which states would be vested with *locus standi* to challenge the validity of outer limits that are not established on the basis of the recommendations of the Commission. On this issue, see J. Noyes, 'Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf', (2009) 42 Vand. JTL 1211.

44 Guidelines, *supra* note 6.

45 *Air Services Agreement of 27 March 1946 (United States of America v. France)*, (1978) 18 *Reports of International Arbitral Awards* 415.

46 Excerpt from Art. 31(3)(a) of the Vienna Convention.

47 Pursuant to Art. 31(3)(a) of the Vienna Convention, the interpreter of a treaty shall take into account, in addition to the context, 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

48 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (hereafter,'Vienna Convention').

49 Pursuant to Art. 31(3)(b) of the Vienna Convention, the interpreter of a treaty shall take into account, in addition to the context, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties to its application'.

50 Such practice would need to be consistently, and in a uniform manner, practised by states parties to constitute a 'subsequent practice'; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1970] ICJ Rep. 22, para. 22. On this issue, see also A. Aust, *Modern Treaty Law and Practice* (2000), 193.

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and depth of admissible scientific and technical evidence',[51] but also to 'clarify its *interpretation* of scientific, technical and *legal* terms contained' in the Convention.[52] That *raison d'être* is due to the Commission's understanding that 'clarification is needed, because various terms in the Convention might be left open to several possible and equally acceptable interpretations'.[53] In other words, because of the lack of precision in Article 76 of the Convention, the Commission feels it necessary to 'clarify its interpretation' of Article 76 of the Convention. In a now famous finding of the Permanent Court of International Justice ('the Permanent Court'), interpretation was held to mean 'to give a precise definition of the meaning and scope'[54] of a legal document. The question whether, or to what extent, the clarification provided by the Commission is an interpretation of the Convention may accordingly be addressed by determining whether the Commission seeks to confer a 'precise definition of the meaning and scope'[55] of Article 76 of the Convention.

The Guidelines address a range of issues, one of which concerns the application of the depth constraint in paragraph 5 of Article 76 of the Convention. Chapter 4 of the Guidelines provides a list of criteria governing the selection of valid depth constraints for the purpose of constructing depth-constraint lines. Yet, it is noteworthy that Article 76(5) of the Convention refers solely to 'the 2,500 metre isobath'[56] without a qualification where, for example, there are multiple 2500-m isobaths, the application of which may have great significance with regard to the extent of the outer limits. Pursuant to Point 4.4.2 of the Guidelines,[57] the qualification of isobaths would occur subject to the criteria of whether the isobaths are, on the one hand, simple or whether they are, on the other hand, complex or repeated in multiples. Where isobaths are simple, the identification of the applicable isobaths would be straightforward. On the other hand, where they are complex or repeated in multiples:

> unless there is evidence to the contrary, the Commission may recommend the use of the first 2,500 m isobath from the baselines from which the breadth of the territorial sea is measured that conforms to the general configuration of the continental margin.[58]

Thus, according to the Commission, the selection of the most salient points along the 2500-m isobaths for the purpose of constructing the depth-constraint line is primarily subject to a bifurcation between isobaths that are simple and isobaths

51 Guidelines, *supra* note 6, Point 1.2.
52 Ibid., Point 1.3 (emphasis added).
53 Ibid.
54 *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment of 16 December 1927, PCIJ Rep., (1927) Series A No. 13, at 10 (the French version was authoritative).
55 Ibid.
56 Excerpt from Art. 76(5) of the Convention.
57 Guidelines, *supra* note 6, Point 4.4.2 reads as follows: 'The selection of the most salient points along the 2,500 m isobath for the purpose of delineating the 100 M limit may be straightforward when isobaths are simple. However, when isobaths are complex or repeated in multiples, the selection of points along the 2,500 m isobath becomes difficult. Such situations arise as a result of geological and tectonic processes shaping the present continental margins. They can create multiple repetitions of the 2,500 m isobath, for example, by faulting, folding and thrusting along continental margins. Unless there is evidence to the contrary, the Commission may recommend the use of the first 2,500 m isobath from the baselines from which the breadth of the territorial sea is measured that conforms to the general configuration of the continental margin.'
58 Guidelines, *supra* note 6, Point 4.4.2.

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that are complex or repeated in multiples. Only in the latter case would the choice of the applicable isobaths become subject to considerations related to, for example, the general configuration of the continental margin in accordance with which the Commission identifies, to paraphrase the Commission in its summary of recommendations to Norway,[59] '*valid* depth constraint'[60] points for the purpose of constructing depth-constraint lines. Yet, according to the now established practice of the Commission, all isobaths that are within the common envelope of the foot of the continental slope are valid isobaths for the purpose of constructing depth-constraint lines, not only ignoring whether these are simple or are complex or repeated in multiples, but also to some extent ignoring the qualification of whether the seafloor high on which the margin is located is a natural component of the continental margin.[61] Notwithstanding the correctness of the above, the author of this paper is of the view that the qualification of 'the 2,500 metre isobath'[62] to a 'valid depth constraint' according to various cumulative criteria is a precise definition of the meaning and scope of the relevant treaty provision and hence constitutes a legal interpretation by the Commission of Article 76 of the Convention.

Pursuant to a plain reading of paragraphs 5 and 6 of Article 76 of the Convention, the 2500-m isobath may only be applied on 'seafloor highs', which are submarine elevations that are natural components of the continental margin:

> [n]otwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines . . . . This paragraph does not apply to submarine elevations that are natural components of the continental margin.[63]

In other words, where the seafloor high is a submarine elevation that is a natural component of the continental margin, the delineation of the outer limits may be constrained either by the 350-m distance constraint line or by the 2500-m isobath depth constraint. The Commission has recognized this understanding in its Guidelines: '[s]ubmarine ridges constitute a special case which is subject to the rules of entitlement given in paragraph 4 (a) (i) and (ii), but it is also subject to the more stringent constraint provided by paragraph 6.'[64] Thus, the

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59 Only excerpts of the recommendations are publicly available. Rule 11(3) of Annex III to the Rules of Procedure of the Commission reads as follows: 'The recommendations prepared by the sub-commission shall include a summary thereof, and such summary shall not contain information which might be of a confidential nature and/or which might violate the proprietary rights of the coastal State over the data and information provided in the submission. The Secretary-General shall make public the summary of the recommendations upon their approval by the Commission.'

60 Commission on the Continental Shelf, Summary of Recommendations of the Commission in regard to the submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, Adopted by the Commission on 27 March 2009, para. 77 (emphasis added), available online at www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (hereafter, 'Norway Summary Recommendations').

61 For a critical view on the approach of the Commission with regard to applicable 2500-m depth points in relation to the construction of depth-constraint lines, see B. Kunoy, M. V. Heinesen, and F. Mørk, 'Appraisal of Applicable 2,500m Depth Constraint Lines for the Purpose of the Delineation of the Outer Limits of the Continental Shelf', (2010) 41(4) *Ocean Development & International Law* 357.

62 Excerpt from Art. 76(5) of the Convention.

63 Excerpt from Art. 76(6) of the Convention.

64 Guidelines, *supra* note 6, Point 2.1.10.

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classification of a seafloor high as a submarine ridge or a submarine elevation serves the purpose of not only distinguishing it from an oceanic ridge, within the meaning of Article 76(3) of the Convention, but also determining whether the 2500-m isobaths may be utilized as a basis for the depth constraint line for the purpose of establishing the outer limits of the continental shelf. The above is exemplified in the Commission's recommendations to Norway on 27 March 2009, in which it held that the 'application of the depth constraint involves the examination of whether the seafloor highs ... may be considered natural components of the continental margin'.[65]

The criteria according to which classifications of a seafloor high are conducted, and hence eligible as a basis for the application of the 2500-m isobaths, are thus of great importance. In order, it must be assumed, to duly fulfil its mandate, the Commission has, it will be demonstrated, adopted its own criteria that govern the classification of seafloor highs, despite the fact that Article 76 is silent as to the constitutive criteria for a seafloor high to be classified a submarine elevation that is a natural component of the continental margin. In its Guidelines, the Commission has expressed the view that geological considerations determine, in addition to geomorphological elements, whether a seafloor high is a submarine elevation that is a natural component of the continental margin:

> The phrase 'such as' [in the second phrase of Article 76(6)] implies that the list is not complete. Common to all these elevations is that they are natural components of the continental margin. This makes it relevant to consider the processes that form the continental margins and how continents grow. The growth of the present continents is and/or was primarily caused by *geological processes* along the continental margins.[66]

Hence, the Commission seems to base the classification of a seafloor high as a natural component of the continental margin on whether there is geological continuity. This approach is further echoed in a paper published by two Commission members, who argue that:

> a submarine elevation that, along its entire length, shares geological characteristics and origin with the landmass of the coastal State, and that forms an integral part of the continental margin based on the foot of the continental slope may be categorised as being an elevation that is a natural component of the continental margin of that State.[67]

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65 Norway Summary Recommendations, *supra* note 60, para. 68. See also recommendations of the Commission to New Zealand in which the Commission accepts that the Kermadec and Colville Ridge system, as well as the Three Kings Ridge with the Fantail Terrace, are submarine elevations that are natural components of the continental margin and therefore the application of the depth constraint may be applied from these elevations as submitted by New Zealand, 'Summary of Recommendations of the Commission in Regard to the Submission Made by New Zealand on 19 April 2006, Adopted by the Commission on 22 August 2008', para. 145. The same reasoning underlies the acceptance for the application of the depth constraint of the Challenger Plateau and Lord Howe Rise, Point 192, available online at www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf.

66 Guidelines, *supra* note 6, Point 7.3.1 (emphasis added).

67 H. Brekke and P. Symonds, 'The Ridge Provisions of Article 76 of the UN Convention on the Law of the Sea', in Nordquist, Moore, and Heiðar, *supra* note 15, at 189.

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The same line of reasoning flows from other authors arguing that '[t]he use of the term natural components in article 76.6 suggests that the features must be physically part of the margin and may be taken to imply a geomorphic and/or geologic definition of what is a *natural* component'.[68] It is also of interest to observe that Oxman has noted that, during the eighth session of the UN Third Conference on the Law of the Sea, prior to the compromise proposal of paragraphs 3 and 5 *bis* (which became paragraph 6) during the ninth session, the Russian proposal to limit the seaward extension of jurisdiction over the continental shelf to 300 M, where the continental margin extended the 200-M limit, was met with opposition from delegations because this formula 'ignores the *geological* basis of the continental shelf doctrine . . . and it might stimulate demands for a universal 300-mile zone, *irrespective of geology*'.[69] It is not the purpose to decide conclusively on the correctness of these considerations. Yet, what is of importance is that the above, in the view of the author of this paper, is not limited to a technical view *stricto sensu*. On the contrary, it seeks to give a precise definition of the meaning and scope of Article 76(6) of the Convention and constitutes, as appropriate, a treaty interpretation that is undertaken by the Commission. Further, in various recommendations, the Commission has on geological grounds either disqualified or qualified the classification of a seafloor high as a submarine elevation that is a natural component of the continental margin, which has a bearing on the extent of seaward limits of the relevant coastal state. In its recommendations to Australia, the Commission dismissed the application of the depth constraint with regard to the Williams Ridge 'since the nature of the submarine high with regard to Article 76, paragraph 6, is not considered proven'.[70] In other words, because of the absence of geological processes, the classification of the Williams Ridge as a submarine elevation that is a natural component of the continental margin was not accepted. Further, it seems that Australia also argued that Joey Rise was a submarine elevation that is a natural component of the continental margin 'on morphology only'.[71] Despite recognizing that Joey Rise was part of the submerged prolongation of the land mass of Australia, the Commission did not accept the view that it was a submarine elevation that is a natural component of the continental margin on the basis of the submitted data concerning the origin of Joey Rise, which were considered 'too sparse to be conclusive'.[72] By contrast, on the basis of geological considerations, the Central Kerguelen Plateau, Southern Kerguelen Plateau and the Elan Bank were 'considered natural components of the continental margin of the Heard and MacDonald Islands' and therefore 'subject to the application of the depth

68 P. A. Symonds, M. F. Coffin, G. Taft, and H. Kagami, 'Ridge Issues', in P. J. Cook and C. M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface* (2000), 301 (emphasis added).

69 B. H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)', (1979) 73 AJIL 21 (emphasis added).

70 Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Australia on 15 November 2004, Recommendations adopted by the Commission on 9 April 2008, para. 51, available online at www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf.

71 Ibid., para. 138.

72 Ibid.

criterion constraint'.[73] The above-mentioned findings of the Commission are likely to have major implications for the extent of the submitting coastal states' outer limits, given that, failing an appropriate classification, only the 350-M distance constraint is applicable[74] and that states are, to some extent, inclined to subject their reasoning to the understanding of the Commission, in order to avoid establishing their outer limits otherwise than on the basis of the recommendations of the Commission.

To sum, it is fair to say that, in fulfilling its mandate, the Commission is not limiting its work to a mere technical assessment of technical data, but seeks to confer precise definitions of the meaning and scope of various provisions in Article 76 of the Convention. The above is a task that it necessarily undertakes in order to fulfil its mandate, which is to make recommendations in accordance with Article 76 of the Convention.

3. Extent of the Commission's mandate

As demonstrated above, it may be assumed that some of the tasks of the Commission include those that normally would be carried out in accordance with the rules of treaty interpretation. This might be considered unfortunate, the simple reason being that, while a 'tribunal of international law . . . is deemed to know what [the] law is',[75] the Commission cannot, to paraphrase the Permanent Court, be expected to know what the law is. The question may be raised whether the mandate of the Commission may require it to overrule legal interpretations of submitting coastal states upon consideration of the latter's submissions. In other words, is the Commission vested with *Kompetenz-Kompetenz*? This section responds positively to the above question and concludes that this outcome is no anomaly, given that, notwithstanding the normative characteristics that appertain to the recommendations of the Commission, they still remain recommendations.

3.1. Competence of the Commission to determine its own mandate

According to a general rule of law, any body possessing jurisdictional powers is vested with powers to determine the extent of its jurisdiction.[76] It is a fundamental principle of international law that the jurisdiction of an international court or international adjudicative body to make decisions in a dispute to which a state is a party is subject to the state's consent. In the *Mavrommatis Palestine Concessions* case, the Permanent Court held that '[i]ts jurisdiction is limited . . . and only exists in so far as this consent has been given' and that the Court will, before giving judgment

73 Ibid., para. 49.

74 In this regard, reference may be made to the submission of the government of the Kingdom of Denmark together with the government of the Faroes on 2 December 2010 with regard to the Faroe Rockall Plateau Region, the proposed outer limits of which extend approximately 820 M from the baselines, and the submission of Iceland on 29 April 2009 with regard to the Eastern Reykjanes Ridge, the outer limits of which extend approximately 750 M from the baselines, available online at www.un.org/depts/los.

75 *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)*, Judgment of 12 July 1929, PCIJ Rep., (1929) Series A No. 21, at 124.

76 *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion of 28 August 1928, PCIJ Rep., (1928) Series B No. 16, at 20.

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on the merits of the case, 'satisfy itself that the suit before it, in the form in which it has been submitted',[77] falls within its jurisdiction. Yet, it is well established that international judicial forums may be vested with incidental jurisdictional powers as recognized in the maxim *accessorium sequitur principale*. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court held that 'the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction'.[78]

The Commission is not an adjudicative body and is thus not vested with judicial powers and, as such, any reasoning by way of analogy to rules and practice from arbitral law should only be used with caution. It can readily be held that the determination of which conditions need to be fulfilled in order to comply with, for example, the constitutive criteria in paragraphs 5 and 6 of Article 76 of the Convention are not incidental to a qualitative assessment of technical data. However, the determination of whether the Commission may be seen to have been entrusted with a task that implies adopting a rationale on which the technical assessment is performed should, ideally, not be considered in terms of whether it would be incidental to its competence. Not only is the Commission not a judicial body, which would disqualify the application *mutatis mutandis* of judicial principles, but the mandate of the Commission also requires the Commission to take an approach in which it is capable, as appropriate, of rejecting per se a coastal state's claim to the outer continental shelf. That exercise is not necessarily incidental to a technical assessment; but it is a task that, where relevant and appropriate, is a necessary step that must be taken in order for the Commission to comply with its mandate.[79]

It has been argued that the Commission:

> is an organ that has been assigned specific functions under the LOS Convention, including the task of making an independent evaluation of the submission of the coastal states in respect of the outer limits of the continental shelf. The CLCS has to be presumed to have the competence that is required to carry out these functions.[80]

The central question is whether the Commission is vested with the competence to determine the extent of its mandate, which is a pertinent question in situations in which, for instance, there are disagreements of fundamental importance between

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77 *Mavrommatis Palestine Concessions (Greece v. UK)*, Judgment on Jurisdiction of 30 August 1924, PCIJ Rep., (1924) Series A No. 2, at 16.

78 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925 (Preliminary Objections), PCIJ Rep., (1925) Series A No. 6, at 18. On incidental powers, see also *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras. 20–22, available online at www.icty.org/x/cases/tadic/acdec/en/51002.htm.

79 See, e.g., Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008, Adopted by the Commission on 15 April 2010, para. 8, available online at www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf (hereafter, 'Recommendations regarding Ascension Island'), in which the Commission states that it 'makes these Recommendations to the United Kingdom in fulfillment of its mandate as contained in Article 76, paragraph 8, and articles 3 and 5 of Annex II to the Convention'; see also para. 8 of the Summary of Recommendations of the Commission in regard to the Joint Submission made by Mauritius and Seychelles concerning the Mascarene Plateau Region on 1 December 2008, adopted by the Commission on 30 March 2011.

80 Oude Elferink, *supra* note 10, at 112.

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the Commission and submitting coastal states as to the interpretation of Article 76 of the Convention. In contrast to the institutions established by the Convention, the International Seabed Authority,[81] and the International Tribunal on the Law of the Sea (Tribunal),[82] the Commission does not possess international legal personality. The Commission is only a treaty body. However, the fact that the Commission is only a treaty body does not necessarily mean it is deprived of *Kompetenz-Kompetenz* with regard to the determination of the scope of its mandate.[83] In this regard, it is of interest to refer to the recent *Abyei Arbitration* award.[84] In that dispute between the government of Sudan and the Sudan People's Liberation Movement/Army, the Permanent Court of Arbitration (PCA) held that the fact that the ABC Expert Commission was composed of experts in history, geography, and African culture, to the exclusion of lawyers, in conjunction with the fact that it was to reach its decision on the basis of 'scientific analysis and research' and therefore is not 'an adjudicative body *strictu sensu*,[85] does not mean that it lacked *Kompetenz-Kompetenz*'.[86] The PCA held that the ABC Expert Commission was held to be 'vested with the competence to interpret, and thus necessarily determine the bounds of, its own mandate'.[87] In contrast to the ABC Expert Commission, which was entrusted with the adoption of a report that would be 'final and binding on the Parties',[88] the Commission solely makes recommendations, which, by their very nature, are not binding. As such, this would distinguish the Commission from the ABC Expert Commission on the basis of an important aspect of its powers. By the same token, it has been observed that it is 'the nature of the act which reflects the nature of the organ taking the decision'.[89] De Marffy Mantuano has argued that the Commission:

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81 Art. 176 of the Convention reads: 'The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

82 Golitsyn argues that, given that the Tribunal has concluded a relationship agreement with the UN, '[i]t may be assumed that the Meeting of States Parties has acquiesced to the fact that the Tribunal has its own legal personality'. V. Golitsyn, 'Interrelation of the Institutions under the Law of the Sea Convention with Other International Institutions', in D. Vidas and W. Østreng (eds.), *Order for the Oceans at the Turn of the Century* (1999), 140.

83 In its first judgment in the *Nottebohm* case dealing with Guatemala's jurisdictional objections, the Court affirmed the *Kompetenz-Kompetenz* principle as a principle of international law: 'Since the *Alabama* case, it has been generally recognised, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction'. *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objection, Judgment of 18 November 1953, [1953] ICJ Rep. 111, at 119.

84 *The Government of Sudan v. The Sudan People's Liberation Movement/Army*, Final Award, 22 July 2009, available online at www.pca-cpa.org/showpage.asp?pag_id = 1306 (hereafter, 'Abyei Arbitration Award').

85 The Abyei Appendix was attached to the Abyei Protocol, signed on 26 May 2004, pursuant to which the ABC Expert Commission was required 'to listen to representatives of the people of Abyei Area and their neighbours, [as well as to] listen to presentations of the two Parties' (Abyei Appendix, Section 3), and to 'consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research' (Abyei Appendix, Section 4); see the Protocol between the government of the Sudan and the Sudan People's Liberation Movement/Army on the Resolution of Abyei Conflict, 26 May 2004, available online at www.sudantribune.com/IMG/pdf/20040527_abyei_protocol.pdf.

86 Abyei Arbitration Award, *supra* note 84, para. 502.

87 Ibid., para. 503.

88 Abyei Appendix, *supra* note 85, Section 5.

89 K. Kaikobad, *The International Court of Justice and Judicial Review* (2000), 34.

> adopte des recommendations et non des décisions. Parler de jurisprudence n'est donc pas appropriée dans ce contexte puisque la Commission n'est pas un organe établi pour juger mais pour analyser et évaluer les données présentées par l'Etat demander afin de s'assurer qu'elles sont conformés aux critères contenus à l'Article 76.[90]

Yet, this does not necessarily entail that it would be inapposite to transpose the legal reasoning of the PCA in the *Abyei Arbitration* to the determination of whether the Commission can be seen to be vested with *Kompetenz-Kompetenz*. It would seem that the qualifying element determining whether the Commission is vested with *Kompetenz-Kompetenz* would be whether, or to what extent, the Commission is, in the absence of authoritative legal guidance, vested with powers to interpret the Convention as a requisite to fulfil its mandate. As mentioned above, the Commission itself perceives its competence to include powers to interpret non-clarified terms in Article 76 of the Convention. It has also been demonstrated earlier that the Commission may to some extent need to impose its view as to the application of Article 76 of the Convention vis-à-vis submitting coastal states. That approach has been characterized as an interpretation of the provisions of Article 76 that the Commission, as appropriate, may be compelled to undertake in order to comply with its mandate, from which it follows that the Commission necessarily is vested with *Kompetenz-Kompetenz*. Further, the above contention transpires from the recommendations of the Commission to the United Kingdom of Great Britain and Northern Ireland with regard to the Ascension Island submission.[91] From those recommendations, it is clear that the Commission, in practice, seeks to enforce its own consideration as to the limits of its competence, despite disagreement with the submitting state on issues of fundamental importance on this particular point.[92] As a matter of fact, the Commission seems to explicitly spell out its own perception of whether it is vested with *Kompetenz-Kompetenz* in its consideration of the Ascension Island submission. The United Kingdom, according to the summary of recommendations, seems to have argued that paragraph 4 of Article 76 only becomes operative once the outer edge of the continental margin has been established on the basis of paragraph 3 of Article 76. On that approach, the view of the Commission would, it seems, necessarily be limited to ensuring that the submitted data would support the proposed outer limits, without considering whether the test of appurtenance is fulfilled or without seeking to impose its view as to the applicable criteria dictating the classification of the seafloor high from which the outer edge of the continental margin stems, with a view to determining the applicable constraints.[93] The latter would fall within the domain of the submitting coastal state. It follows from the Statement by the Chairperson of the Commission that the United Kingdom recognized the terms of reference of the Commission and the obligations that flowed from them. However, it appears that the United Kingdom deemed that, by disagreeing with the United

90 De Marffy Mantuano, *supra* note 3, at 403.

91 Recommendations regarding Ascension Island, *supra* note 79.

92 See the note communicated by the Permanent Mission of the United Kingdom addressed to the Secretariat of the United Nations on 11 January 2011, available online at www.un.org/Depts/los/clcs_new/submissions_files/submission_gbr.htm.

93 Recommendations regarding Ascension Island, *supra* note 79, paras. 19–20.

Kingdom as to the relevance of paragraphs 1–3 of Article 76 of the Convention, for the fulfilment of its mandate, the exercise of technical expertise by the Commission could prejudice the rights of states parties to the Convention. The United Kingdom argued that:

> where there are fundamental questions over the interpretation of the Convention the rights of State Parties have to be borne in mind, to ensure that the role of the Commission in applying its technical expertise is carried out within a proper legal framework.[94]

This would seem, by way of extension, to imply that the Commission should not endeavour *proprio motu* to determine whether, for example, the outer edge of the continental margin stems from an oceanic ridge, submarine ridge, or submarine elevation.[95] In other words, the Commission is not vested with powers to interpret the Convention. Instead, the Commission should, it would seem according to the arguments made by the United Kingdom, subject itself to a technical verification of the data to the exclusion of questioning, for example, the submitting state's classification of the seafloor high – at least 'where there are fundamental questions over the interpretation of the Convention'.[96] By contrast, were the Commission to act otherwise – that is, not actively to enforce its mandate, as spelled out in its terms of reference – it would to some extent endorse submitting coastal states' various and contradictory interpretations of the Convention, given that the outer limits that would be based on such recommendations would, although not irrebuttable, in principle, be final and binding within the meaning of Article 76(8) of the Convention. One could rephrase the formula as follows: were the Commission, in the absence of any authoritative legal guidance, to analyse inter alia paragraphs 4–6 of Article 76 of the Convention in isolation from its paragraphs 1 and 3, the Commission would not fulfil the role incumbent on it pursuant to Article 3(1)(a) of Annex II to the Convention. The Commission did not follow the reasoning of the United Kingdom, to the discontentment of the latter,[97] with regard to its alleged circumscribed mandate to examine paragraph 4 of Article 76 in isolation from paragraphs 1 and 3 of Article 76. In the words of the Commission, the entitlement 'to establish outer limits to their continental shelves beyond 200 M depends on the location of the base and the FOS within the *submerged prolongation*' of the land mass.[98] The Commission disagreed with the rationale and methodology that the United Kingdom utilized to delineate

94 Statement by the Chairperson of the Commission on the Progress of Work in the Commission, UN Doc. CLCS/66 (30 April 2010), Item 5, para. 17.

95 Pursuant to Art. 76(3)(5)–(6) of the Convention, oceanic ridges do not generate entitlement beyond 200 m, while the outer edge of the continental margin that stems from a submarine ridge may be delineated by the 350-m constraint distance line, while the outer edge of the continental margin that stems from a submarine elevation may be delineated either by the 350-m constraint distance line or the 2500-m depth constraint + 100 m.

96 Reproduced in the Statement by the Chairperson of the Commission on the Progress of Work in the Commission, *supra* note 94, Item 5, para. 17.

97 See the note from the United Kingdom communicated to the United Nations Secretary General on 11 January 2011 in which it is held that the 'United Kingdom has already expressed doubts as to whether the approach of the Commission to the United Kingdom submission is entirely consistent with the provisions of the Convention', *supra* note 92.

98 Recommendations regarding Ascension Island, *supra* note 79, para. 44 (emphasis added).

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the outer edge of the continental margin, one of which, and most importantly, was the definition of the continental margin itself,[99] consistent with which the Commission held that the '[s]ubmission in respect of Ascension Island does not satisfy the test of appurtenance'.[100] Therefore, the Commission recommended 'that, in the area around Ascension Island, the United Kingdom does not establish outer limits of its continental shelf beyond 200 M',[101] despite there being 'fundamental questions over the interpretation of the Convention' with which the United Kingdom, it would seem, did not agree.[102]

The Commission has given a clear articulation of its own understanding of the scope and nature of the treaty obligations incumbent upon it, one of which is the *Kompetenz-Kompetenz* to determine the boundaries of its own mandate. Its terms of reference require the Commission to adopt an approach consistent with which it shall make recommendations that are in accordance with Article 76 of the Convention, even in the presence of a clear disagreement with the submitting coastal state. It is of interest to note that Judge Wolfrum has taken a view that would seem to stand in contrast to the approach undertaken by the Commission in its consideration of the Ascension Island submission, when he argued that:

> the Commission ... is not meant to replace the judgment of the coastal State by its own. It instead tries, without infringing upon the sovereign rights of a State in this respect, to direct the State to come to a delimitation of the outer continental shelf which conforms to Article 76 of the Convention.[103]

That statement stands in clear contrast to the Commission's consideration of the Ascension Island submission in which the view of the United Kingdom in the recommendations of the Commission was supplanted by that of the Commission.[104] Further, it would also seem to stand in contrast to the Commission's approach undertaken in the consideration of the submission of Australia in which, as mentioned earlier, it disagreed with the classifications of William's Ridge and Joey Rise as submarine elevations that are natural components of the continental margin, and hence dismissed the application of the depth constraint on the basis of those features.

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99 The Commission held that it 'recognises that islands surmounting discrete morphological features (including ridges) rising from this deep ocean floor are entitled to a "continental margin" and "continental shelf" (Article 76, paragraphs 1 and 3) .... Whether such islands are entitled to establish outer limits to their continental shelves beyond 200 M depends on the location of the base and the FOS within the submerged prolongation of those islands. ... For this to be the case for a small oceanic island like Ascension, it would have to surmount a discrete seafloor high, that itself rises above the average "ruggedness" of the deep ocean floor .... The United Kingdom regards the rift valley of the spreading axis and the deeps of associated fracture zones as parts of the continental slope of Ascension Island. However, in the view of the Commission, ocean spreading structures, which are normally part of the deep ocean floor, can only form the continental slopes of island landmasses in cases where such structures form part of the discrete seafloor highs from which the island edifices rise. This is not the case for Ascension Island, as its edifice is not morphologically connected to any such discrete seafloor high'. Ibid., paras. 43–45.

100 Ibid., para. 50.

101 Ibid., para. 54.

102 Statement by the Chairperson of the Commission on the Progress of Work in the Commission, *supra* note 94, Item 5, para. 17.

103 Wolfrum, *supra* note 8, at 23.

104 In its note of 11 January 2011, *supra* note 92, the United Kingdom communicated to the UN Secretary-General that it 'will await with interest the outcomes of future submissions which raise similar issues of legal interpretation of the Convention, and in particular those submissions which relate to the entitlement of coastal states to continental shelf areas beyond 200 nautical miles on the basis of mid-ocean ridges'.

The approach adopted by the Commission is a corollary of its mandate as spelled out in Article 3(1)(a) of Annex II to the Convention and, as such, cannot be seen to exceed its competence. However, the point raised by the United Kingdom in its note of 11 January 2011 to the UN Secretary-General – that the Commission would have benefited from legal advice – would seem to have merit.[105] Nevertheless, it should not be ignored that, although susceptible to a rise in legal problems, nothing can prevent submitting coastal states that disagree with the Commission from ignoring the recommendations of the Commission to the extent that there is disagreement between the state and the Commission. While susceptible to raising legal problems, the above is the necessary corollary to the principle of fundamental importance that it is a matter for the state to establish the outer limits of its continental shelf.[106]

3.2. A legislative anomaly?

The above-mentioned powers of the Commission are significant and, to some extent, a result of its autonomy. In the words of Jarmache, the Commission 'dispose d'une compétence normative directe . . . parce que sa marge de manoeuvre, bien réelle, est fondée sur une absence de rattachement explicite à une autorité supérieure ou à une organisation déterminée'.[107] The same author observes that the Commission 'pourrait bien être un corps non susceptible de contrôle'.[108] However, that somehow provocative statement should be seen in light of the fact that the members of the Commission are elected by the Meeting of States Parties, the latter hence exerting some form of control over the former. On the one hand, there is certainly some truth in the view that the lack of institutional subordination is an autonomous attribute enabling the Commission to fulfil its mandate according to its best endeavour. On the other hand, the Meeting of States Parties would not unanimously share the view that the autonomous status of the Commission confers on it powers to undertake interpretations of the Convention. De Marffy Mantuano has in this regard highlighted that the Meeting of States Parties has 'clairement signifié à la Commission que son indépendence était uniquement liée à sa function et ajouta qu'en ce qui concerne l'interprétation de la Convention, seuls les Etats Parties ou l'assemblée générale ont compétence'.[109] That position finds support in the understanding that an interpretation of a treaty provision should be done according to the canons of treaty interpretation, the

105 The United Kingdom expressed in its note of 11 January 2011, ibid., 'that there are issues of legal interpretation upon which the Commission would have benefited from taking expert legal advice before concluding its deliberations'.

106 In accordance with Art. 8 of Annex II to the Convention, a coastal state shall, in the event of a disagreement with the Commission, make a revised or new submission to the Commission. That obligation must be seen to imply an obligation to seek on a reasonable basis to reach an agreement with the Commission without imposing a dialogue *à l'infini*. On this issue, see Kunoy, *supra* note 40.

107 E. Jarmache, 'A propos de la Commission des Limites du Plateau Continental', (2006) XI *Annuaire du droit de la mer* 55.

108 E. Jarmache, 'La pratique de la Commission des Limites du Plateau Continental', (2008) LV *Annuaire français de droit international* 432.

109 De Marffy Mantuano, *supra* note 3, at 399–419; see also, e.g., Report of the Nineteenth Meeting of States Parties, *supra* note 15, at para. 72, in which some delegations suggested that 'the Commission might provide the Meeting with a list of legal issues on which it required guidance'. Yet, other delegations expressed the view 'that the Commission did not have competence to identify issues of a legal nature in the examination of submissions'.

fulfilment of which the Commission cannot, consistently with international-law principles, necessarily be presumed to exercise. Judge Treves has noted that, when the Commission 'performs legal, judicial-like tasks, there are many requirements of judicial activities that it does not observe. In my view, this is a matter of concern. Legal matters should be treated according to legal procedures and with legal expertise'.[110]

The customary-law rules of treaty interpretation, as reflected in the Vienna Convention,[111] must be seen as the applicable law to determine an ordinary meaning of the provisions in Article 76 of the Convention. The question could legitimately be raised whether the Commission can be considered to be vested with the requisites, often at a highly technical level, to interpret Article 76 of the Convention pursuant to the canons of treaty interpretation. In other words, would the Commission, given the autonomous legal definition of the continental shelf as embraced in Article 76, be vested with the requisites to duly fulfil its mandate? The preliminary step in treaty interpretation would be that 'the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text'.[112] In certain circumstances, the treaty interpreter should, in accordance with customary treaty interpretation rules as reflected in Articles 31–2 of the Vienna Convention, have recourse to the *travaux préparatoires*;[113] or there could even be circumstances, for example, in which the treaty interpreter should not give an ordinary meaning to a treaty provision.[114] Arguably, the Commission could be considered not necessarily capable of fulfilling such a role in a manner consistent with the customary rules of treaty interpretation. However, conversely, it is clear that the Commission cannot take a standpoint – for example, when endorsing applicable 2500-m isobaths for the purpose of constructing depth constraint lines or determining constitutive criteria applicable to identify submarine elevations that are natural components of the continental margin – that would be variable in scope, depending upon subjective arguments set forward by submitting coastal states, and still 'make recommendations in accordance with Article 76' of the Convention.[115] This is not tantamount to saying that the Commission is vested with powers to undertake authoritative interpretations of the Convention, which would be a prerogative of states parties;[116]

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110 Treves, *supra* note 11, at 367.

111 Arts. 31 and 32 of the Vienna Convention reflect customary international law: see *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, [1994] ICJ Rep. 6, para. 41. The above was also confirmed by the World Trade Organization Appellate Body in its reports on *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996); and *Japan – Taxes on Alcoholic Beverages II*, WT/DS8/AB/R (4 October 1996).

112 International Law Commission, 'Commentaries on the Articles on the Law of the Treaties (1966)', (1966) 2 YILC 187, at 220.

113 According to the Court, recourse should only be made to supplementary means of interpretation if the provisions in a treaty are not clear: '[t]he Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the [PCIJ], according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself'; see *Admission of a State to the United Nations*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57, at 63.

114 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 September 1933, PCIJ Rep., (1933) Series A/B No. 53, at 49.

115 Excerpt from Art. 3(1)(a) of Annex II to the Convention.

116 It is of interest to note that former UN Legal Counsel Hans Corell has observed that the role of the UN Secretariat implies an engagement with 'the crucial task of assisting [the Commission] in interpreting the

this is nothing other than a fundamental principle of treaty law according to which only the legislators have the power to interpret the law, as written in the famous maxim of Roman law *ejus est interpretari, cujus est condere leges.*[117] However, as mentioned by Oxman, it should not be forgotten that it 'is the Convention, not the coastal state, that determines the maximum extent'[118] of the continental shelf and the Commission has been entrusted with a task that cannot be done in clinical isolation from legal considerations. These recommendations may, although they are not irrebuttable,[119] serve as verifications of title to the outer continental shelf where, for instance, several coastal states have overlapping claims to the relevant parts of the outer continental shelf. Finally, as has been mentioned earlier, submitting coastal states are not deprived of the right to disagree with the Commission, which, in principle, could imply that outer limits would be established otherwise than on the basis of the recommendations of the Commission. Various legal questions would be susceptible to arise were coastal states to establish the outer limits otherwise than on the basis of the recommendations of the Commission, the crucial point of which being that, notwithstanding the normative characteristics that appertain to such recommendations, these still remain recommendations and can hence not be considered an encroachment of states parties' right to establish the outer limits of the continental shelf otherwise than on the basis of the recommendations of the Commission.

4. Conclusion

The basis on which the Commission, in the absence of authoritative legal guidance, seems to address its technical assessment of submitting coastal states' proposed outer limits can be seen 'to give a precise definition of the meaning and scope' of various provisions in Article 76 of the Convention.[120] Despite the fact that the Commission is obliged to undertake interpretations of Article 76 of the Convention in order to fulfil its role, such understandings cannot be considered to constitute authoritative interpretations of the Convention. Nonetheless, by seeking to actively impose its views and, as appropriate, in detriment to the views of submitting coastal

relevant provisions of the Convention'; see H. Corell, 'Future Role of the United Nations in Oceans and Law of the Sea', in M. Nordquist and J. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* (1999), 19. However, the states parties would not seem to agree as to the interpretative role and functions of the UN Legal Counsel in that regard, at least with regard to Convention provisions of a substantive nature: see, e.g., Report of the Nineteenth Meeting of States Parties, *supra* note 15, para. 73, in which the consultative role of the UN Legal Counsel was debated – a discussion that clearly demonstrates that states parties are in disagreement as to and to what extent the Commission may request legal opinions on matters of substance from the UN Legal Counsel.

117 In *Question of Jaworzina*, the Permanent Court of International Justice held that 'the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it', *Delimitation of the Polish–Czechoslovakian Frontier (Question of Jaworzina)*, Advisory Opinion of 6 December 1923, PCIJ Rep., (1923) Series B No. 8, at 37.

118 B. Oxman, 'The Commission on the Limits of the Continental Shelf: Some Reflections on the Rights and Duties of Coastal States and Other States with Respect to the Limits of the Continental Shelf', presentation delivered at colloquium on 'Shared Borders and Dividing Lines: A Century of Canada–US Territorial and Boundary Disputes', held at the University of Montreal on 11 December 2009.

119 See Kunoy, *supra* note 40.

120 *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, *supra* note 54, at 10.

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states, it can readily be argued that its actions may have legal implications for the rights of states parties. States parties may be inclined to mould their interpretation of Article 76 of the Convention to that of the Commission, given that the final and binding characteristics follow outer limits of the continental shelf that are based on the recommendations of the Commission. In other words, coastal states may be inclined to align their reasoning with that of the Commission. Such actions of the Commission may accordingly generate subsequent practice, within the meaning of Article 31(3)(b) of the Vienna Convention, among the states parties. Such are the dynamics in international law. Yet, such subsequent practice can be seen as unfortunate, given that the Commission cannot, as mentioned earlier, be presumed as a matter of judicial principle to know what the law is; nor do its understandings of Article 76 of the Convention constitute authoritative interpretations of the Convention. In this regard, it is of interest to refer to an observation made by Jarmache: '[o]n peut regretter que le recours aux avis du service juridique n'ait pas été plus soutenu.'[121] One may agree or disagree on the correctness or the importance of the above suggestion, given that the Commission makes only recommendations. Yet, the recommendations do have normative characteristics, and it is recognized that the Commission cannot fulfil its role in clinical isolation from legal considerations. The author of this paper is of the view that the Commission could benefit from some legal assistance in order to fulfil its mandate to the satisfaction of all parties.

121 Jarmache, *supra* note 107, at 436.