The Delimitation of Outer Continental Shelf Areas: A Critical Analysis of Courts' and Tribunals' Heterogeneous Approaches

La délimitation de zones étendues du plateau continental: analyse critique des approches hétérogènes des cours et tribunaux

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Abstract

A number of maritime delimitation disputes, the resolution of which has been referred to international courts or tribunals, include overlapping outer continental shelf claims without relevant recommendations from the Commission on the Limits of the Continental Shelf (CLCS) in support of the claimed entitlements. The case law of courts and tribunals regarding the exercise of jurisdiction over such disputes has developed and appears now somewhat crystallized in a common understanding. Yet numerous uncertainties remain, which have arisen from the non-homogeneous approaches that underlie the decisions of courts and tribunals to exercise jurisdiction in the absence of recommendations from the CLCS. While courts and tribunals share the view that delimitation necessarily requires a prior determination of entitle-

Résumé

Certains différends relatifs à la délimitation maritime dont la résolution a été renvoyée aux cours et tribunaux internationaux comprennent des revendications de plateau continental étendu qui se chevauchent, mais sans recommandations de la Commission des limites du plateau continental (CLPC) à l'appui des droits revendiqués. La jurisprudence des cours et tribunaux concernant l'exercice de la compétence dans de tels litiges s'est développée et semble, dans une certaine mesure, avoir adopté une compréhension commune sur la question. Pourtant, de nombreuses incertitudes demeurent. Cela découle des approches non homogènes qui sous-tendent les décisions des cours et tribunaux d'exercer leur compétence en l'absence de recommandations de la CLPC. Alors que les cours et tribunaux conviennent que la délimitation nécessite une détermination préalable des droits des

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ment, differences appear in defining the threshold for ascertaining such a determination. In any event, treating submissions to delimit such claimed overlaps as admissible in the absence of recommendations from the CLCS may entail significant risks. Where a plea is considered admissible, a court or tribunal will not have unfettered discretion as to whether to exercise jurisdiction. This may result in unfortunate situations as it cannot be assumed that the CLCS will accept coastal states' proposed outer limits of the continental shelf.

parties dans les zones maritimes en question, des différences surgissent quant à la définition du seuil permettant d'établir une telle détermination. En tout état de cause, traiter de recevable une demande de délimitation du plateau continental étendu en l'absence de recommandations de la CLPC peut comporter des risques importants. Lorsqu'un plaidoyer est jugé recevable, une cour ou un tribunal n'a pas un pouvoir discrétionnaire absolu quant à l'exercice de sa compétence. Cela peut créer des situations difficiles puisqu'il n'est pas certain que la CLPC acceptera les limites extérieures du plateau continental proposées par les États côtiers.

Keywords: admissibility; Commission on the Limits of the Continental Shelf; continental shelf; entitlement to outer continental shelf; exercise of jurisdiction; law of the sea; maritime delimitation.

Mots-clés: Commission des limites du plateau continental; délimitation maritime; droit au plateau continental étendu; droit de la mer; exercice de la compétence; plateau continental; recevabilité.

Introduction

The rights of coastal states to the continental shelf are inherent and exist *ipso facto* and *ab initio*. This principle of fundamental importance in the regime of the continental shelf has its origins in the Truman Proclamation.[1] It appeared in the *Geneva Convention on the Continental Shelf*[2] and is included in almost identical terms in Article 77 of the *United Nations Convention on the Law of the Sea* (*UNCLOS*).[3] The International Court of Justice (ICJ) observed as early as the *North Sea* cases that the principle reflects customary international law.[4] Much has been said and written about the

[1] Proclamation No 2667, 10 Federal Register 12303, reprinted in Marjorie Whiteman, *Digest of International Law*, vol 4 (1965) at 756–76. On the Truman Proclamation, see Ann Hollick, "US Oceans Policy: The Truman Proclamations" (1976) 16 Va J Intl L 23.

[2] *United Nations Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

[3] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*].

[4] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at para 19.

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inherency doctrine.[5] Yet there still remains much to say on this issue, as manifested in the recent judgment of the ICJ in a maritime delimitation dispute between Somalia and Kenya.[6] This appears particularly to be the case with respect to the outer continental shelf in so far as concerns the role, if any, to be attributed to the Commission on the Limits of the Continental Shelf (CLCS) in the determination of entitlement to, and, consequently, the delimitation of overlaps of, the outer continental shelf.[7]

Coastal states that intend to establish limits of the outer continental shelf "shall submit particulars of such limits to" the CLCS.[8] There is a presumption in favour of interpreting the apparently compulsory verb "shall" to imply an obligation.[9] Yet, while this need not always be the case,[10] there can be no doubt that those coastal states that intend to establish outer limits are obliged to submit data and other information to the CLCS.[11] While the obligation in question is referred to as a

[5] For an illustrative list, see Francis Aimé Vallat, "The Continental Shelf" (1946) 23 Br YB Intl L 317; Claud Humphrey Meredith Waldock, "The Legal Basis of Claims to the Continental Shelf" in *Transactions of the Grotius Society for the Year 1950* (London: Cambridge University Press, 1951) 115; Gilbert Gidel, "À propos des bases juridiques des prétentions des États riverains sur le plateau continental: les doctrines du 'droit inhérent'" (1958) 1–3 Zeitschrift für Ausländisches und Öffentliches Recht 81; René-Jean Dupuy, "The Sea under National Competence" in René-Jean Dupuy & Daniel Vignes, eds, *A Handbook on the New Law of the Sea* (Dordrecht: Martinus Nijhoff, 1991) 425; DN Hutchinson, "The Seaward Limit to Continental Shelf Jurisdiction in International Law" (1985) 56 Br YB Intl L 105; Robert Y Jennings, "The Principles Governing Marine Boundaries" in K Hailbronner, G Ress & T Stein, eds, *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* (Berlin: Springer-Verlag, 1989) 398.

[6] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Judgment of 12 October 2021, online: *ICJ* <www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf> [*Indian Ocean (Somalia v Kenya)*].

[7] *UNCLOS*, *supra* note 3, Annex II, art 9 provides: "The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts."

[8] *Ibid*, Annex II, art 4.

[9] See *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Preliminary Objections, [2018] ICJ Rep 292 at 321, para 92.

[10] On this issue, see *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objections, [1996] ICJ Rep 803 at 814, para 28.

[11] *UNCLOS*, *supra* note 3, art 76 and Annex II do not rely on the notion "states parties" but exclusively on "coastal states," which raises the question whether the obligation applies also to non-states parties, the response to which would depend on whether the provisions in question reflect customary international law. According to the International Court of Justice (ICJ), paragraph 1 of Article 76 reflects customary international law. *Territorial and Maritime Dispute (Nicaragua v Colombia)*, [2012] ICJ Rep 624 at 666, para 118 [*Maritime Dispute (Nicaragua v Colombia)*]. On this issue, see Kevin Baumert, "The Outer Limits of the Continental Shelf under Customary International Law" (2018) 114:4 Am J Intl L 827. Yet Judge ad hoc Cot noted in his declaration in *Maritime Dispute (Nicaragua v Colombia)* that

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"procedural requirement,"[12] the outcome of the consideration of a submission under Article 76 of *UNCLOS* has substantive characteristics. While Article 76 does not state in explicit terms that only such outer limits that are based on the recommendations of the CLCS become binding in international law, courts and tribunals have unequivocally interpreted Article 76(8) in this sense.[13] This appears in the judgment of the International Tribunal for the Law of the Sea (ITLOS) in *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)*[14] and, more recently, in the judgment on the merits in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, in which the ICJ observed that "[i]t is *only* after such recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves."[15]

A question that has been addressed in several recent delimitation cases is whether the presence of recommendations from the CLCS is a prerequisite for international courts and tribunals to exercise jurisdiction to delimit the overlap of outer continental shelf entitlements. ITLOS addressed this question in the negative in *Bay of Bengal (Bangladesh v Myanmar)*, an approach that was followed by the Annex VII arbitral tribunal in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*[16] and to some degree relied on by the ICJ in *Question of the*

"[i]t is difficult to regard paragraph 8 as an expression of customary law. The provision institutes a specific procedure which is not accessible to non-member States." *Maritime Dispute (Nicaragua v Colombia)*, *ibid* at 771, para 19. Similar reasoning appeared also in the Declaration of Judge ad hoc Mensah when observing that "the obligations under Article 76, paragraphs 8 and 9, are 'treaty obligations' that apply only as between States that have expressed their consent to be bound by the *UNCLOS* treaty. Those provisions cannot be considered as imposing mandatory obligations on all States under customary international law. As such they only apply where all the States concerned are parties to *UNCLOS*" (*ibid* at 765, para 8).

[12] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)*, [2012] ITLOS Rep 4 at 107, para 408 [*Bay of Bengal (Bangladesh v Myanmar)*]. On this case, see Robin Churchill, "The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation" (2012) 1 Cambridge J Intl & Comp L 137.

[13] The relevant part of *UNCLOS*, *supra* note 3, art 76(8) provides: "The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

[14] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at 107, para 407.

[15] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at para 188 [emphasis added].

[16] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)* (2014), Annex VII Arbitral Tribunal, PCA Case No 2010-16 [*Bay of Bengal (Bangladesh v India)*].

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Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia),[17] by the Special Chamber of ITLOS in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)*,[18] and also, but in different terms, by the ICJ in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*.[19] These decisions have in common the idea that the absence of recommendations from the CLCS does not inhibit the exercise of jurisdiction in respect of delimiting overlaps of outer continental shelf areas under dispute.

However, it is apparent that courts and tribunals differ significantly in the reasoning that forms the basis for their decisions to exercise jurisdiction in such cases. First, differences arise regarding whether the fulfillment of the procedural obligation in Article 76(8) to transmit a submission to the CLCS is a demonstration of entitlement or merely a claim. Second, there are varying understandings regarding what impact, if any, such a submission may have on the delimitation operation in so far as concerns the area beyond two hundred nautical miles from the baselines.[20] On the one hand, as there is only a single continental shelf in international law, reliance can be placed on the submissions' executive summaries[21] in order to determine the "relevant area"[22] for the purpose of delimitation in the absence of relevant

[17] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, [2016] ICJ Rep 100 [*Nicaraguan Coast (Nicaragua v Colombia)*].

[18] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)*, [2017] ITLOS Rep 4 (Special Chamber) [*Atlantic Ocean (Ghana v Côte d'Ivoire)*].

[19] *Indian Ocean (Somalia v Kenya)*, *supra* note 6.

[20] President Donoghue has observed in this respect that "[u]nlike the existence of an entitlement to continental shelf based on the distance criterion, the existence of continental shelf beyond 200 nautical miles is a question of fact that turns on geology and geomorphology." *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 752, para 4, Separate Opinion. See also the *Scientific and Technical Guidelines* of the Commission on the Limits of the Continental Shelf (CLCS), according to which "[t]he [CLCS] recognizes that the foot of the continental slope is an essential feature that serves as the basis for entitlement to the extended continental shelf and the delineation of its outer limits. According to paragraph 4(a)(i) and (ii), it is the reference baseline from which the breadths of the limits specified by formulae rules are measured." CLCS, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, Doc CLCS/11 (13 May 1999), point 5.1.1 [*CLCS Guidelines*].

[21] A submission under Article 76(8) of *UNCLOS*, *supra* note 3, shall contain three parts: (1) an executive summary; (2) a main body; and (3) supporting scientific and technical data. See *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Doc CLCS/40/Rev.1 (17 April 2008), Annex III, Rule I(1) [*Rules of Procedure of the CLCS*].

[22] It is firmly established in the relevant case law that the drawing of a "relevant area," where potential entitlements necessarily overlap, "has to be taken into account as part of the

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recommendations from the CLCS.[23] On the other hand, the inclusion of such areas within the relevant area for the purpose of delimitation appears to ignore the fact that "[s]ubmissions by States to the CLCS are unilateral assertions made with a view towards maximizing the area of continental shelf that the State can claim. It cannot be assumed that [the CLCS] will adopt any State's submission."[24] Further, the limits indicated in an executive summary are merely "*proposed* outer limits of the continental shelf."[25] This is very likely a reason for which international courts and tribunals in the majority of decisions, and, most recently, the ICJ in its judgment in *Indian Ocean (Somalia v Kenya)*, have omitted drawing a relevant area beyond the two hundred nautical mile distance line, notwithstanding the fact that the delimitation line extends beyond that line. Including proposed outer limits within the relevant area could obviously prejudice the work to be executed by the CLCS as such inclusion necessarily presumes that the relevant coastal states have entitlements to the areas in question. For these reasons, courts and tribunals content themselves with ascertaining only that entitlements extend beyond the two hundred nautical mile distance line but refraining from expressing any views on the limits of the seaward extent of those entitlements.[26]

A number of authors have already addressed the relationship between delimitation of the outer continental shelf and the making of recommendations by the CLCS.[27] This article will conduct a critical analysis of the

methodology of maritime delimitation." *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, [2009] ICJ Rep 61 at 99, para 100 [*Black Sea (Romania v Ukraine)*].

[23] Executive summaries are the only parts of a submission that are made public.

[24] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 2, para 8, Separate Opinion of President Joan Donoghue.

[25] *Rules of Procedure of the CLCS*, *supra* note 21, Rules 47(2), 50 [emphasis added].

[26] The ICJ notes in this regard: "Depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles *as it may be established in the future* on the basis of the Commission's recommendations." *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 69, para 197 [emphasis added].

[27] For an illustrative list of academic writings, see Xuexia Liao, "The Road Not Taken: Submission of Disputes Concerning Activities in Undelimited Maritime Areas to UNCLOS Compulsory Procedures" (2021) 52:3 Ocean Development & Intl L 297; Xuexia Liao, *The Continental Shelf Delimitation beyond 200 Nautical Miles: Towards a Common Approach to Maritime Boundary-Making* (Cambridge: Cambridge University Press, 2021) at 386; Helmut Turk, "Questions Relating to the Continental Shelf beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing" (2021) 98 Intl L Studies 232; Jianjun Gao, "The Delimitation Method for the Continental Shelf beyond 200 Nautical Miles: A Reflection on the Judicial and Arbitral Decisions" (2020) 51:2 Ocean Dev & Intl L 116; Massimo Lando, "Delimiting the Continental Shelf beyond 200 Nautical Miles at the International Court of Justice: The *Nicaragua v Colombia* Cases" (2017) 16:2 Chinese J Intl L 137; Joanna Mossup, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford: Oxford University Press, 2016) at 304; Bjørn Kunoy, "Le tracé d'une frontière dans la zone située

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reasoning of courts and tribunals in so far as concerns their justifications for seeking to delimit claimed outer continental shelf overlaps in the absence of an opposable understanding of the seaward extent of such entitlements. In so doing, the article will also develop judicial principles in regard to the exercise of jurisdiction that hitherto would not appear to have been addressed. The decisions of courts and tribunals to exercise jurisdiction in outer continental shelf delimitation disputes in the absence of recommendations from the CLCS will be carefully analyzed. Thereafter, the legal contours for determining the existence of entitlements will be discussed, including how the CLCS conceives this exercise and whether the understanding of the CLCS is consistent with the trends adopted by international courts and tribunals. It will be demonstrated that there is no single understanding among courts and tribunals on this question. Finally, it will be concluded that the apparent ease with which courts and tribunals, in the absence of recommendations from the CLCS, have determined outer continental shelf entitlements may entail significant risks that could prejudice the delimitation operation.

Practice of International Courts and Tribunals

In a now-famous *obiter dictum* from 2007, the ICJ observed that "any claim of continental shelf rights beyond 200 miles [by a state party to *UNCLOS*] must be in accordance with Article 76 of *UNCLOS* and *reviewed*" by the CLCS.[28] The view has been expressed that the above-mentioned *obiter dictum* suggested a "general abstention from delimitation" in the absence of recommendations from the CLCS.[29] In a legal order based on precedent, it is critical to distinguish the *res judicata* from the *obiter dictum* as only the former forms precedent. But in a legal order that does not rely on *stare decisis*, it would appear to be controversial that an *obiter dictum* in a judgment in regard to a dispute between State A and State B should dictate or support the reasoning of a court or tribunal in respect of a dispute between State C and

au-delà de 200 miles marins en l'absence de recommandations de la Commission des limites du plateau continental" (2015) 61 AFDI 35.

[28] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, [2007] ICJ Rep 659 at 759, para 319 [*Caribbean Sea (Nicaragua v Honduras)*] [emphasis added]. The *obiter dictum* was restated in *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at para 193. Yet it is noteworthy that, while the ICJ recalled in *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11, that it had in 2007 "stated" the above-mentioned *obiter dictum* (at para 126), in the judgment on the merits in *Indian Ocean (Somalia v Kenya)*, the ICJ expressed the view that the ICJ had in 2007 "expounded" the *obiter dictum* (at para 187).

[29] *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 758, para 25, Separate Opinion of Judge Donoghue.

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State D.[30] The above-mentioned *obiter dictum* has been re-endorsed in subsequent cases, which has resulted in controversy.[31] In any event, it is now well established that the above-mentioned *obiter dictum* was not intended to imply that the finalization of relevant recommendations by the CLCS is an admissibility criterion for consideration of an application to delimit overlapping outer continental shelf entitlements.[32] However, it is apparent that the understanding of courts and tribunals on this important question is not uniform and that different standards have been put forward. Further, the practice shows that there may even arise situations that result in abstentions from exercising jurisdiction, notwithstanding the relevant forum having jurisdiction to address a plea that is considered admissible, which does appear to stand at odds with a well-recognized judicial principle that an international court or tribunal exercising its competence is obligated to "exercise that jurisdiction to its full extent."[33] It remains to be seen what appropriate circumstances allow deviations therefrom.

HETEROGENEOUS JUSTIFICATIONS FOR THE EXERCISE OF JURISDICTION

The first delimitation dispute involving overlapping outer continental shelf entitlements referred to an international court and in which the forum exercised jurisdiction to establish a delimitation line in the area beyond two hundred nautical miles was *Bay of Bengal (Bangladesh v Myanmar)*. For these reasons, it appears logical to examine the analysis of ITLOS prior to examining the reasoning of other courts and tribunals. The particular case of the Bay of Bengal is unique due to the large amounts of sediment in the bay (a circumstance that, during the third Conference on the Law of the Sea, resulted in a particular rule for establishing the outer edge of the

[30] On this issue, see Robert Y Jennings, "The Judiciary, International and National, and the Development of International Law" (1996) 45:1 ICLQ 1; Hersch Lauterpacht, *The Development of International Law by the International Court*, 2nd ed (London: Stevens & Sons, 1958) at 61; *Interpretation of Judgments Nos 7 and 8 (Factory at Charzów)*, (1927), PCIJ (Ser A) No 13 at 24, Dissenting Opinion of Dionisio Anzilotti.

[31] See e.g. the Declaration of Judge ad hoc Mensah: "I do not consider that the reference to the Court's statement in the case of *Nicaragua v. Honduras*, to the effect that 'any claim to continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder', is either appropriate or necessary." *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 762, para 2, Declaration of Judge ad hoc Mensah.

[32] On the role of *obiter dicta* as precedents in international law, see Niccolò Ridi, "Mirages of an Intellectual Demand? *Ratio, Obiter* and the Textualization of International Precedent" (2019) 10 J Intl Dispute Settlement 361.

[33] *Continental Shelf (Libya v Malta)*, [1985] ICJ Rep 13 at 23, para 19 [*Continental Shelf (Libya v Malta)*].

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continental margin).[34] ITLOS noted "uncontested scientific evidence"[35] of both parties' entitlement to the area in question and decided to exercise jurisdiction notwithstanding the CLCS not having considered both parties' claims of entitlement. Yet ITLOS did stress that it "would have been hesitant to proceed with the delimitation of the area beyond 200 [nautical miles]" had it concluded that there was significant uncertainty about the existence of a continental margin in the area.[36] Accordingly, it alluded to an understanding that the delimitation of the outer continental shelf may in certain circumstances require the presence of CLCS recommendations notwithstanding the doctrine of a single continental shelf. This understanding arises since it would appear from the statement above that there may be circumstances that would require abstention from the exercise of jurisdiction or, possibly, a finding of inadmissibility. While it may appear difficult — judging from the terms employed — to accept the proposition that ITLOS had inadmissibility in mind, it can be difficult to explain the difference between jurisdiction and admissibility. This distinction can often be seen as a puzzle of procedural law. In essence, it means that, notwithstanding jurisdiction being established, a court or tribunal must refuse to hear a case if the application is not admissible. Yuval Shany has provided a functional definition of the difference between these terms according to which "jurisdictional rules define the legal powers of courts and … admissibility rules define their ability to refrain from exercising legal power."[37] A finding of inadmissibility will result in a dismissal of the claim on the merits but will not prevent a litigant from initiating new proceedings once the circumstances resulting in inadmissibility have been removed. It would not appear futile to seek a definitive answer to the question whether the lack of exercise of jurisdiction results from inadmissibility of the plea or whether it results from an international court's discretion to refrain from exercising jurisdiction. To do otherwise could be a hazardous undertaking.[38] Yet ITLOS did allude to the matter being one of the exercise of jurisdiction rather than admissibility.[39]

[34] *Final Act of the Third United Nations Conference on the Law of the Sea, Annex II: Statement of Understanding Concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin* (27 October 1982), Doc A/CONF.62/121 [*Final Act, Annex II*].

[35] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 446.

[36] *Ibid* at para 443.

[37] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge: Cambridge University Press, 2015) at 11.

[38] On this issue, see Edward Gorton, "Discretion to Decline to Exercise Jurisdiction" (1987) 81:1 Am J Intl L 129.

[39] In *Bay of Bengal (Bangladesh v Myanmar),* Myanmar did raise the argument that the submission to delimit possible outer continental shelf overlaps would be inadmissible until the CLCS had rendered its recommendations to both parties to the dispute. According to

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The question whether courts and tribunals may exercise jurisdiction in the absence of recommendations from the CLCS, and, in the affirmative, under what circumstances, was also addressed in *Territorial and Maritime Dispute (Nicaragua v Colombia)*.[40] A significant difference from *Bay of Bengal (Bangladesh v Myanmar)* is that the applicant in *Maritime Dispute (Nicaragua v Colombia)* had not transmitted a fully fledged submission to the CLCS but only preliminary information indicative of the shelf's outer limits.[41] Without explicitly mentioning whether the lack of full submissions triggered its decision, the ICJ limited itself to observing that Nicaragua "has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf."[42] Accordingly, the ICJ did not proceed further with the delimitation operation. Immediately prior to making that determination, the ICJ referred to the *obiter dictum* from the *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*.[43] Concerns were voiced with respect to that reference on the basis that it could be inferred therefrom

Myanmar, notwithstanding the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), it could "exercise this jurisdiction only after the [CLCS] had rendered recommendations to the States involved [as] it is only when such titles have been established and the claims of the States in question overlap that [ITLOS] can exercise the jurisdiction that it in principle possesses in such matters." *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12, Doc PV.11 (E) at 12, lines 11–19. Yet ITLOS contented itself with confirming that it had jurisdiction to resolve the claimed overlapping entitlements to the outer continental shelf without addressing the admissibility matter.

[40] *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11.

[41] At the eleventh Meeting of the States Parties to *UNCLOS*, *supra* note 3, it was agreed that the date of commencement of the ten-year time period for making submissions to the CLCS according to Article 4 of Annex II to *UNCLOS*, for states for which *UNCLOS* had entered into force prior to the date of adoption of the *CLCS Guidelines*, *supra* note 20, would be 13 May 1999. See *Decision Regarding the Date of Commencement of the Ten-year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set Out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea*, Decision SPLOS/72 (29 May 2001). At the eighteenth Meeting of the States Parties, Decision SPLOS/183 was adopted with regard to the ten-year time frame as amended seven years earlier by Doc SPLOS/72. Due account was given to the fact that developing countries continued to encounter problems due to a "lack of financial and technical resources and relevant capacity and expertise, or similar constraints," in light of which it was decided that the ten-year time frame and Decision SPLOS/72 may be satisfied by submitting only preliminary information indicative of the outer limits of the continental shelf beyond two hundred nautical miles within the time frame agreed on in Decision SPLOS/72. *Decision Regarding the Workload of the Commission on the Limits of the Continental Shelf and the Ability of States, Particularly Developing States, to Fulfill the Requirements of Article 4 of Annex II to the United Nations Convention on the Law of the Sea, as well as the Decision Contained in SPLOS/72, Paragraph (a)*, Doc SPLOS/183 (20 June 2008).

[42] *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 669, para 129.

[43] *Caribbean Sea (Nicaragua v Honduras)*, *supra* note 28.

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that not only a full submission but also recommendations by the CLCS would be required for admissibility purposes. Judge ad hoc Thomas Mensah expressed the concern that this sequence "might be interpreted to suggest that a court or tribunal should, in every case, automatically rule that it is not able to decide on a dispute relating to the delimitation of the continental shelf beyond 200 [nautical miles] whenever one of the Parties to the dispute has not followed …. the procedure set out in article 76 of *UNCLOS*."[44] The same concern appeared also in other opinions that stated that the rejection of Nicaragua's claim "suggest[s] that the Court will not delimit [the] continental shelf beyond 200 [nautical miles] of the coast of any State party to [*UNCLOS*] before the outer limits of such continental shelf have been established by that State in accordance with Article 76 of *UNCLOS*."[45] A curious fact is that the above-mentioned individual observations of the members of the ICJ in November 2012 were made despite the ruling of ITLOS in *Bay of Bengal (Bangladesh v Myanmar)* only eight months earlier.

The question whether the refusal of the ICJ to engage further with the delimitation operation in *Maritime Dispute (Nicaragua v Colombia)* was due to the lack of recommendations from the CLCS or merely due to the lack of a submission being transmitted to the CLCS under Article 76(8) of *UNCLOS* was addressed in the judgment on preliminary objections in *Nicaraguan Coast (Nicaragua v Colombia)*. The ICJ observed that the sole reason for which the ICJ could not uphold Nicaragua's claim in 2012 was because Nicaragua had not at that time submitted its proposed outer limits to the CLCS.[46] According to the ICJ, its finding in *Maritime Dispute (Nicaragua v Colombia)*, according to which the applicant had not established its entitlement to the outer continental shelf, implied that "Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 [nautical miles] by the Court."[47] The ICJ was resolute and unequivocal on the question whether CLCS recommendations were required to delimit overlapping claims. According to the ICJ, the making of recommendations by the CLCS "is not a prerequisite that needs to be satisfied by a State party to *UNCLOS* before it can ask the Court to settle a dispute with another State over such a delimitation."[48] It should be recalled that, subsequent to the reading of the judgment in *Maritime Dispute (Nicaragua v Colombia)* and prior to the application in *Nicaraguan Coast (Nicaragua v Colombia)* being lodged with the ICJ, the applicant had transmitted a full submission to the CLCS.

[44] *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 766, para 12, Declaration of Judge Mensah.

[45] *Ibid* at 751, para 2, Separate Opinion of Judge Donoghue.

[46] *Nicaraguan Coast (Nicaragua v Colombia)*, *supra* note 17 at 132, para 84.

[47] *Ibid* at 136, para 105.

[48] *Ibid* at 137, para 114.

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Accordingly, the ICJ concluded that "the preliminary objection to the admissibility of Nicaragua's First Request must be rejected."[49] Consequently, where a submission to the CLCS is made in accordance with Article 76(8) of *UNCLOS*, a submission to the ICJ to delimit an overlap of outer continental shelf areas is, it appears, admissible notwithstanding the absence of recommendations from the CLCS.[50] Accordingly, "the condition imposed by [the ICJ] in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua … has been fulfilled in the present case."[51] Upon this basis, the ICJ concluded that "the delimitation of the continental shelf beyond 200 [nautical miles] can be undertaken independently of a recommendation from the CLCS [and, therefore,] the latter is not a prerequisite that needs to be satisfied by a State party to *UNCLOS* before it can ask the Court to settle a dispute with another State over such a delimitation."[52]

There are evident deviations in this ruling from the understanding of ITLOS as expressed in *Bay of Bengal (Bangladesh v Myanmar)*. First, in *Nicaraguan Coast (Nicaragua v Colombia)*, the ICJ appeared to approach the question systemically, whereas, in *Bay of Bengal*, ITLOS emphasized that the exercise of jurisdiction calls for a casuistic determination. According to ITLOS, the "determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."[53] Accordingly, ITLOS considered that the question whether to exercise jurisdiction is not necessarily contingent upon the transmission of submissions to the CLCS, whereas the ICJ understood this matter differently in *Nicaraguan Coast*. Second, while the ICJ viewed the matter as one of admissibility, ITLOS was not explicit on this particular question, leaving aside whether any refusal to exercise jurisdiction would result from its discretionary powers to decide accordingly or whether it would be a matter of admissibility.

While it is apparent that ITLOS and the ICJ have embraced different understandings, yet another deviation is apparent in the award of the arbitral tribunal in *Bay of Bengal (Bangladesh v India)*. In rather bold terms, the arbitral tribunal in that case highlighted that there is only a single continental shelf and only the coastal configuration is relevant for the purposes of delimiting overlapping entitlements, including in areas beyond the two hundred nautical mile distance line. Consequently, according to the

[49] *Ibid* at 137, para 115.

[50] On admissibility, see Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–54: Questions of Jurisdiction, Competence and Procedure" (1958) 34 Br YB Intl L 8; Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005*, vol 2: *Jurisdiction* (Leiden: Brill, 2006) at 523.

[51] *Nicaraguan Coast (Nicaragua v Colombia)*, *supra* note 17 at 132, para 87.

[52] *Ibid* at 137, para 114.

[53] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 384.

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arbitral tribunal, "[i]n keeping with its view that there is a single continental shelf … this Tribunal sees no basis for distinguishing between projections within 200 [nautical miles] and those beyond that point."[54] From this basis, it was concluded that the "coast is relevant, irrespective of whether that overlap occurs within 200 [nautical miles] of both coasts, beyond 200 [nautical miles] of both coasts, or within 200 [nautical miles] of one and beyond 200 [nautical miles] of the other."[55] The reasoning of the arbitral tribunal relied on coastal projections, notwithstanding the fact that coastal projections as such do not determine whether coastal states have entitlements to outer continental shelf areas.[56] Further, the arbitral tribunal observed the parties' agreement that both states have entitlements to outer continental shelf areas[57] and, on that basis, relied on ITLOS's finding in *Bay of Bengal (Bangladesh v Myanmar)*, "which ruled that the delimitation of the continental shelf beyond 200 [nautical miles] through judicial settlement was in conformity with article 76 of [*UNCLOS*]."[58] Thus, the arbitral tribunal contented itself with assimilating the area beyond the two hundred nautical mile distance line with the area within that distance.

A similar approach is also reflected in the award of the arbitral tribunal in *Barbados v Trinidad and Tobago*, in which the arbitral tribunal refused to accept the argument of Barbados that the tribunal should refrain from

[54] *Bay of Bengal (Bangladesh v India)*, *supra* note 16 at 93, para 299. Judge Cot also observed in similar terms in his separate opinion to the judgment of ITLOS in the *Bay of Bengal* case that, consistent with the "view that there is a single continental shelf[, there is] no basis for distinguishing between projections within 200 [nautical miles] and those beyond that point." *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at 190, Separate Opinion. For a contrary view, see the Declaration of Judge Xue, noting that "[w]ith the radial projection methodology, it is difficult to proceed to identifying the relevant coasts and the relevant area that includes the potential overlapping entitlements in the continental shelf beyond 200 nautical miles, as its outer limits are not yet determined." *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 6, para 11, Declaration of Judge Xue.

[55] *Bay of Bengal (Bangladesh v India)*, *supra* note 16 at 93, para 299.

[56] The International Law Association Committee established to examine Article 76 of *UNCLOS* observed on this issue that "the foot of the continental slope provide[s] an alternative baseline to establish an equidistance line. The reason for suggesting this option is that under article 76 of [*UNCLOS*,] the outer limit of the outer continental shelf is not linked directly to the baseline of the territorial sea, as is the case for the territorial sea and 200 nautical mile zones, but depends on the location of the foot of the continental slope." *Preliminary Report of the International Law Association Committee* (15 January 2002) at 9, online: <www.ila-hq.org>. It should however be noted that the baselines from which the breadth of the territorial sea is measured may play a role where (1) the outer edge of the continental margin extends beyond 350 nautical miles, and (2) the 2,500 metre isobath depth constraint under *UNCLOS*, *supra* note 3, art 76(6), is not applicable or is located at a point less than 250 nautical miles from the baselines.

[57] *Bay of Bengal (Bangladesh v India)*, *supra* note 16 at 141, para 457.

[58] *Ibid* at 141, para 458.

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exercising jurisdiction with respect to entitlements beyond the 200 nautical mile distance line. According to the arbitral tribunal, the area beyond 200 nautical miles from the baselines "either forms part of, or is sufficiently related to, the dispute submitted by Barbados [and] in any event there is in law only one single 'continental shelf.'"[59] Yet this understanding ignores an element of importance. It is no coincidence that the entire delimitation operation within two hundred nautical miles "boils down to coastal geography."[60] The underlying reason for which the coastal configuration has overwhelming importance for the entire delimitation operation within two hundred nautical miles is that "it seems logical and appropriate to treat as relevant the coasts of the Parties which *generate* 'the complete course' of the provisional equidistance line."[61] It is not disputed that "[b]eyond 200 [nautical miles] from the coasts of two adjacent States, on the other hand, any area of overlapping entitlement is not determined by the configuration of the coasts of the two States, but rather by application of the geomorphological and geological criteria set out in Article 76 of *UNCLOS*."[62]

A similar understanding to those appearing in *Bay of Bengal (Bangladesh v India)* and *Barbados v Trinidad and Tobago* appears in the judgment of the Special Chamber in *Atlantic Ocean (Ghana v Côte d'Ivoire)*.[63] According to the Special Chamber, "the fact that Côte d'Ivoire has made its submission to the CLCS but that the latter has not yet made its recommendations in respect of Côte d'Ivoire does not call into question the admissibility of the submission on the delimitation of the continental shelf."[64] The Special Chamber observed to this effect "that there is in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf,"[65] prior to further examining whether the submission to delimit the outer continental shelf area was admissible. In this respect, the admissibility matter was looked at through the lens of whether the exercise of jurisdiction would interfere with the work of the CLCS, to

[59] *Barbados v Trinidad and Tobago*, (2006) 45 ILM 839 at para 213 (Permanent Court of Arbitration).

[60] Prosper Weil, "Geographic Considerations in Maritime Delimitation" in JI Charney & L Alexander, eds, *International Maritime Boundaries*, vol 1 (Dordrecht: Martinus Nijhoff, 1993) 116.

[61] *Guyana v Suriname* (2007), Arbitral Tribunal, PCA Case No 2004-04 at 113, para 352 [emphasis added].

[62] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 2, para 12, Separate Opinion of President Donoghue.

[63] *Atlantic Ocean (Ghana v Côte d'Ivoire)*, *supra* note 18.

[64] *Ibid* at 136, para 493.

[65] *Ibid* at para 490.

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which the Special Chamber responded in the negative, relying on the differing scopes of Article 76 and Article 83 of *UNCLOS* respectively.[66]

Finally, in the judgment on preliminary objections in *Indian Ocean (Somalia v Kenya)*, both states had made submissions pursuant to Article 76(8) of *UNCLOS*, but the CLCS had not yet made recommendations. The respondent argued that it was necessary to have established the seaward extent of entitlement prior to establishing a delimitation line, failing which it would, *inter alia*, not be possible to determine the relevant area for the purposes of the delimitation methodology.[67] Rather than reiterating that the roles of the CLCS, on the one hand, and that of courts and tribunals, on the other hand, are different but complementary, the ICJ observed that "[a] lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 [nautical miles], does not … necessarily prevent … the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations."[68] Accordingly, the lack of CLCS recommendations does not "necessarily prevent" the ICJ from establishing a delimitation line in claimed outer continental shelf areas "in appropriate circumstances." It would therefore appear that the transmission of a submission to the CLCS under Article 76 of *UNCLOS* does not necessarily make admissible a submission to a court or tribunal to delimit claimed outer continental shelf overlaps. Yet, this statement appears to stand at odds with the finding in *Nicaraguan Coast (Nicaragua v Columbia)* in which the ICJ clarified that the reason for which the applicant in *Maritime Dispute (Nicaragua v Colombia)* had not established entitlement to the claimed outer continental shelf was its failure to have transmitted a submission under Article 76(8) to the CLCS.

JUDICIAL DISCRETION OR INADMISSIBILITY?

Consistent with well-recognized judicial principles, once the jurisdictional matter is settled, courts and tribunals do not have unfettered discretion to

[66] *Ibid* at para 493. Likewise, in *Nicaraguan Coast (Nicaragua v Colombia)* and by way of implication in *Maritime Dispute (Nicaragua v Colombia)*, the admissibility of a submission to delimit outer continental shelf overlaps in the absence of recommendations from the CLCS was also addressed by examining the different roles of the CLCS and of courts and tribunals established under Part XV of *UNCLOS*, *supra* note 3. *Nicaraguan Coast (Nicaragua v Colombia)*, *supra* note 17 at 137, paras 111–15; *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11.

[67] See Oral Proceedings, Counsel of Kenya, Doc CR 2016/10 (19 September 2016) at 42–44, paras 21–23.

[68] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 38, para 94.

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decide whether to exercise or refrain from exercising jurisdiction.[69] This arises because an international court or tribunal, exercising its competence, is obligated to "exercise that jurisdiction to its full extent."[70] The forum is compelled to "decide the whole of the *petitum* entrusted to it."[71] For a court or tribunal to "discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require."[72] This is because a refusal to exercise jurisdiction "would normally be a renunciation of the very function of the Court,"[73] which is also the reason for which these cases are "highly exceptional."[74] In any event, these considerations fall within the "inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[75] Accordingly, notwithstanding a finding that a court or tribunal has jurisdiction to entertain a submission, it must "decline" to exercise jurisdiction where the very exercise of such jurisdiction would be contrary to the judicial functions inherent in an international court or tribunal.[76]

In *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice (PCIJ) listed three different categories of situations that would lead it to decline to exercise jurisdiction. First, it cannot "as a general rule be compelled to choose between constructions [of a treaty] determined beforehand one of which may correspond to the opinion at which it may arrive."[77] Second, it would be "incompatible with [its] Statute, and with its position as a Court of Justice to give a judgment which would be

[69] This does not necessarily imply that a court or tribunal needs to decide on jurisdiction prior to addressing whether a plea is admissible. Yet, for a contrary view on this question, see *Interhandel (Switzerland v United States of America)*, Preliminary Objections, [1959] ICJ Rep 6 at 97, Dissenting Opinion of Sir Hersch Lauterpacht. See also *South West Africa (Ethiopia v South Africa)*, Preliminary Objections, [1962] ICJ Rep 319 at 574, para 2, Dissenting Opinion of Judge Gaetano Morelli.

[70] *Continental Shelf (Libya v Malta)*, *supra* note 33 at 23, para 19.

[71] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, [1986] ICJ Rep 554 at 579, para 50.

[72] *Nuclear Tests (Australia v France)*, [1974] ICJ Rep 253 at 322, para 22, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock [*Nuclear Tests (Australia v France)*].

[73] Hugh Thirlway, "The International Court of Justice" in Malcolm Evans, ed, *International Law*, 2nd ed (Oxford: Oxford University Press, 2006) 572.

[74] *Nuclear Tests (Australia v France)*, *supra* note 72 at 322, para 22, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock.

[75] *Case Concerning the Northern Cameroons (Cameroon v United Kingdom)*, Preliminary Objections, [1963] ICJ Rep 15 at 29 [*Northern Cameroons (Cameroon v United Kingdom)*].

[76] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, [1998] ICJ Rep 275 at 308–09. On this issue, see Gorton, *supra* note 38.

[77] *Free Zones of Upper Savoy and the District of Gex* (1929), PCIJ (Ser A) No 42 at 15.

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dependent for its validity on the subsequent approval" of the disputing parties.[78] Third, there may also be questions that are "unsuitable to the role of a Court of Justice."[79] The relevant dispute in that case arose from questions involving the establishment of tariff exemptions. According to the PCIJ, the "interplay of economic interests [was] outside the sphere in which a Court of Justice, concerned with the application of rules of law, can help in the solution of disputes between two States."[80] It would appear difficult for the concept of "appropriate circumstances," put forward in the judgment on preliminary objections in *Indian Ocean (Somalia v Kenya)*, to be included within any of the above-mentioned categories. Rather, as will be explained below, the concept in question should be considered to relate to admissibility.

As mentioned earlier, in *Nicaraguan Coast (Nicaragua v Colombia)*, the ICJ established in unequivocal terms that the reason for which it could not entertain the submission of the applicant in *Maritime Dispute (Nicaragua v Colombia)*, by which the ICJ was requested to delimit the entire overlapping areas of the continental shelf, including those parts extending beyond the two hundred nautical mile distance line from the Nicaraguan mainland coast, was that Nicaragua had not fulfilled the obligation to transmit a submission to the CLCS under the relevant provisions of *UNCLOS* Article 76 and Annex II. Yet the plea concerning the delimitation of the outer continental shelf area was admissible in *Nicaraguan Coast (Nicaragua v Colombia)*, as the applicant had fulfilled the procedural obligation in Article 76 of *UNCLOS* prior to initiating the latter proceedings.[81] It appears from its particular use of terminology that the ICJ was resolute on the question of the admissibility of such claims. Its position was not a result that derived directly from the factual setting of the particular dispute. Consequently, where a forum is vested with jurisdiction to settle a dispute and the submissions of the parties are admissible, it would follow that the forum in question is compelled to exercise its jurisdiction.

Yet the statement of the ICJ in *Indian Ocean (Somalia v Kenya)* that the absence of recommendations from the CLCS does not "necessarily prevent" a forum from exercising its jurisdiction to delimit the area beyond two hundred nautical miles does not fit well with this narrative.[82] Quite the contrary. This is because, whereas the above-mentioned statements are not incompatible, they are nevertheless inconsistent. As mentioned earlier, immediately upon making this observation in *Indian Ocean*, the ICJ

[78] *Free Zones of Upper Savoy and the District of Gex* (1932), PCIJ (Ser A/B) No 46 at 161.

[79] *Ibid* at 162.

[80] *Ibid.*

[81] *Nicaraguan Coast (Nicaragua v Colombia)*, *supra* note 17, para 84.

[82] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 38, para 94 [emphasis added].

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introduced the caveat that this judicial rule applies "in appropriate circumstances."[83] However, the respondent did not challenge the admissibility of the relevant part of the applicant's application on the grounds that the CLCS had not made its recommendations. The reasons for this would appear obvious, as the ICJ only eleven months earlier in its judgment on preliminary objections in *Nicaraguan Coast (Nicaragua v Colombia)* had stated that the lack of recommendations from the CLCS does not imply that a submission to delimit outer continental shelf overlaps becomes inadmissible.

It may be worth recalling that objections to admissibility "take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[84] Reasons for determining that a plea is admissible or inadmissible, as the case may be, are not necessarily limited to procedural concerns but may also be closely related to the merits. Judge Gerald Fitzgerald observed on this issue that "there are also different categories of preliminary objections of a non-jurisdictional character, and … the category of questions of receivability is itself sub-divisible" into inadmissibility for procedural purposes and for purposes "closely connected with the merits."[85]

There can be no doubt that the conclusion regarding admissibility of the above-mentioned final submission of the applicant in *Nicaraguan Coast (Nicaragua v Colombia)* was based on procedural considerations. This is necessarily implied in the conclusion that the plea for delimiting the claimed overlaps was admissible based only on the fact that submissions had been made to the CLCS, whether or not the CLCS had made recommendations with respect to the relevant submissions and therefore in the absence of opposable findings *vis-à-vis* the breadth of the outer continental shelf entitlements.

Assuming accordingly that any plea to delimit claimed outer continental shelf entitlements is admissible provided only that the coastal states involved have fulfilled the procedural obligation in Article 76(8) of *UNCLOS* implies necessarily that the competent court or tribunal is, in principle, obligated to exercise its jurisdiction regardless of whether the CLCS has or has not made recommendations. Exceptional circumstances, whereby courts and tribunals, consistent with well-established judicial principles, may decline to exercise jurisdiction, would not extend to so-called "appropriate circumstances," to rely on the formula expressed by the

[83] *Ibid.*

[84] *Case Concerning Oil Platforms (Islamic of Republic of Iran v United States of America)*, [2003] ICJ Rep 161 at 176, para 29.

[85] *Northern Cameroons (Cameroon v United Kingdom)*, *supra* note 75 at 104, Separate Opinion of Judge Fitzmaurice.

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ICJ in the judgment on preliminary objections in *Indian Ocean (Somalia v Kenya)*. This arises clearly from the judgment in *Nicaraguan Coast (Nicaragua v Colombia)*. The only material difference in *Nicaraguan Coast*, in so far as concerns delimitation of the continental shelf, compared to *Maritime Dispute (Nicaragua v Colombia)*, it is recalled, is that the procedural obligation in Article 76(8) had been completed prior to instigating the judicial proceedings in *Nicaraguan Coast (Nicaragua v Colombia)*. In the latter case, the ICJ confirmed that it "did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so."[86] *A fortiori*, the transmission of a full submission to the CLCS by the applicant prior to the application in *Nicaraguan Coast (Nicaragua v Colombia)* being referred to the ICJ necessarily implied that the ICJ was in a position to delimit the claimed overlap in *Nicaraguan Coast*. The same rationale must necessarily be transposed to the reading of the judgment in *Indian Ocean (Somalia v Kenya)*.

It has been shown that the admissibility finding in *Nicaraguan Coast (Nicaragua v Colombia)* related to procedural considerations rather than being connected to the merits. Further, it has also been determined that the finding in *Indian Ocean (Somalia v Kenya)*, according to which courts and tribunals may proceed with the "delimitation of the boundary in *appropriate circumstances* before the CLCS has made its recommendations,"[87] cannot be seen to fall within the category of exceptional circumstances allowing courts and tribunals to decline to exercise jurisdiction contrary to the general obligation to exercise "jurisdiction to its full extent."[88] It remains to be determined how to conceive the above-mentioned finding in *Indian Ocean (Somalia v Kenya)*. Two propositions appear possible. One must be disregarded, while the other is not implausible (but on which it is not possible to draw firm conclusions due to the apparent ambiguity of the language employed by the ICJ).

First, in the judgment on the merits in *Indian Ocean (Somalia v Kenya)*, the ICJ "emphasize[d] that the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with *adjacent* coasts."[89] The argument could be put forward that "appropriate circumstances" may be understood to relate to situations where the coasts are not adjacent but opposite. However, there are two considerations that make this appear unlikely. On the one hand, in *Nicaraguan Coast (Nicaragua v Colombia)*, where the admissibility of the submission — notwithstanding the lack of recommendations from the CLCS — was established, the coasts were opposite. On the other hand, the law of

[86] *Nicaraguan Coast (Nicaragua v Colombia)*, *supra* note 17 at 132, para 85.

[87] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 38, para 94 [emphasis added].

[88] *Continental Shelf (Libya v Malta)*, *supra* note 33 at 23, para 19.

[89] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 67, para 189 [emphasis added].

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delimitation stresses that the same "delimitation methodology"[90] applies equally to situations where the coasts are adjacent and where they are opposite.[91] Accordingly, it would be incautious to read strong implications into the above-mentioned reference to adjacency *vis-à-vis* the undertaking of a delimitation in the absence of recommendations from the CLCS.

Second, it need not be excluded that what the ICJ had in mind, when observing that it need not — in appropriate circumstances — decline to delimit claimed outer continental shelf overlaps in the absence of recommendations from the CLCS, were admissibility concerns that "are closely connected with the merits"[92] — in contrast to those arising from a procedural perspective. For example, notwithstanding whether the relevant states have fulfilled the procedural obligation in Article 76(8), a plea to delimit the claimed outer continental shelf overlap may result in inadmissibility where there are doubts whether a claimed outer continental shelf entitlement can be substantiated under Article 76(8). It is obvious that such inadmissibility would not arise from procedural grounds but would exclusively be due to concerns closely related to the merits. On this issue, it has been observed that "[s]ubmissions by States to the CLCS are unilateral assertions made with a view towards maximizing the area of continental shelf that the State can claim."[93]

From this background, it would appear reasonable to assert that a finding — although in general terms — on the admissibility of a plea being exclusively contingent upon the fulfilment of the procedural rule in Article 76(8) does not foreclose that courts and tribunals could address admissibility concerns in outer continental shelf disputes where the CLCS has not made relevant recommendations. It must be emphasized that the ICJ did not provide for this possibility in explicit terms. Yet it is difficult to perceive any other means whereby the observations of the ICJ in *Indian Ocean (Somalia v Kenya)* can consistently, if only reluctantly, be accommodated within the previous case law of the ICJ. Accordingly, the proposition can be put forward that courts and tribunals will not necessarily determine that a submission to delimit claimed outer continental shelf overlaps is admissible notwithstanding the fulfilment of the procedural obligation of Article 76(8) of *UNCLOS*.

In sum, what the ICJ may have had in mind in *Indian Ocean (Somalia v Kenya)* in determining that the delimitation of claimed outer continental shelf overlaps may be entertained in "appropriate circumstances" was a

[90] *Black Sea (Romania v Ukraine)*, *supra* note 22 at 101, para 116.

[91] *Ibid.*

[92] *Northern Cameroons (Cameroon v United Kingdom)*, *supra* note 75 at 104, Separate Opinion of Judge Fitzmaurice.

[93] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 2, para 8, Separate Opinion of President Donoghue.

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recognition that a submission to a court or tribunal to delimit outer continental shelf areas may be inadmissible, depending on the factual matrix,[94] notwithstanding the fulfillment of the procedural obligation in Article 76(8) of *UNCLOS*. However, this suggestion does not fit well with *Nicaraguan Coast (Nicaragua v Colombia)*, where the ICJ took a categorical position concerning the question whether a plea to delimit outer continental shelf areas in the absence of recommendations from the CLCS is admissible. Accordingly, the suggestion can be accepted only with caution, unless the proposition is accepted that the admissibility finding in *Nicaraguan Coast* was only related to procedural considerations, whereas the qualification by the ICJ in *Indian Ocean (Somalia v Kenya)* regarding the exercise of jurisdiction in the absence of recommendations from the CLCS in appropriate circumstances reflects possible admissibility concerns closely related to the merits. Accordingly, it remains to be seen under what circumstances, and according to what reasoning, a court or tribunal would consider it appropriate to decline to exercise jurisdiction even where the disputing parties have fulfilled their obligations under Article 76(8) of *UNCLOS*.

Determination of Existence of Entitlement

It is a settled principle in the law of delimitation that in "[a]ny examination of methods [the] starting-point [is] the extent and features of the area found to be relevant to the delimitation."[95] Courts and tribunals have approached differently how this principle interacts, in so far as concerns disputed outer continental shelf claims, with the exercise of jurisdiction in the absence of recommendations from the CLCS. Further, whereas courts and tribunals have sought to engage in a bifurcation of their role *vis-à-vis* that of the CLCS, the approaches of courts and tribunals seem to suggest a simplification of the procedure in question.

courts' and tribunals' determinations of entitlement

While courts and tribunals have taken the view that the lack of recommendations from the CLCS does not constitute an impediment to delimiting claimed outer continental shelf overlaps, it is apparent that such submissions are, in the majority of cases, received with a certain amount of unease. This appears, *inter alia*, from the fact that judgments and awards in the above-

[94] On this reasoning, see the judgment of ITLOS in *Bay of Bengal*, observing that the "determination of whether an international court or tribunal should exercise its jurisdiction *depends* on the procedural and substantive circumstances of each case." *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 384 [emphasis added].

[95] *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18 at 82, para 114 [*Continental Shelf (Tunisia v Libya)*].

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mentioned disputes do not include outer continental shelf areas within the relevant area for purposes of delimitation,[96] notwithstanding the establishment of a delimitation line in such areas. It is understandable that courts and tribunals are reluctant to include outer continental shelf areas within the relevant delimitation areas — as courts and tribunals shall "delimit the continental shelf beyond 200 [nautical miles] *only* if such a continental shelf exists."[97] Yet, omitting these areas from the relevant area is inconsistent with the law on maritime delimitation, as the identification of the relevant area is a "legal concept [which] has to be taken into account as part of the methodology of maritime delimitation."[98] Accordingly, courts and tribunals are faced with the following tension: on the one hand, the inclusion of outer continental shelf overlaps within the relevant area for the purpose of the delimitation methodology may be considered an impediment to the intended work of the CLCS; on the other hand, omitting the disputed areas beyond two hundred nautical miles would be at odds with the principles underlying the delimitation methodology.

One way of avoiding the difficult discussions that necessarily follow from these tensions is to follow the approach of the arbitral tribunal in *Bay of Bengal (Bangladesh v India)*, where the tribunal sought to establish that, notwithstanding the different rules applicable to determining entitlement, only coastal projections matter for the purpose of delimitation.[99] Yet, as observed by Judge Hanqin Xue, such reasoning pays lip service to the fact that "[w]ith the radial projection methodology, it is difficult to proceed to identifying the relevant coasts and the relevant area that includes the potential overlapping entitlements in the continental shelf beyond 200 [nautical miles], as its outer limits are not yet determined."[100]

This is not different from what was observed almost thirty years ago in *St Pierre & Miquelon (Canada v France)* — namely, that a court or tribunal cannot "reach a decision by assuming hypothetically the eventuality that such

[96] On this issue, see Robin Churchill, "The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation" (2012) 1 Cambridge J Intl & Comp L 137; Bjørn Kunoy, "The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf" (2012) 83 Br YB Intl L 61.

[97] *Atlantic Ocean (Ghana v Côte d'Ivoire)*, *supra* note 18 at 136, para 491.

[98] *Black Sea (Romania v Ukraine)*, *supra* note 22 at 99, para 110.

[99] In *Bay of Bengal (Bangladesh v India)*, the arbitral tribunal observed, after noting that there is only a single continental shelf in international law, that it "considers that the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200 [nautical miles]. Having adopted the equidistance/relevant circumstances method for the delimitation of the continental shelf within 200 [nautical miles], the Tribunal will use the same method to delimit the continental shelf beyond 200 [nautical miles]." *Bay of Bengal (Bangladesh v India)*, *supra* note 16 at 142, para 465.

[100] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 6, para 11, Declaration of Judge Xue.

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rights will in fact exist."[101] As has been observed by the incumbent president of the ICJ, the inclusion of claimed outer continental shelf areas within the relevant area appears to ignore the observation that "[s]ubmissions by States to the CLCS are unilateral assertions made with a view towards maximizing the area of continental shelf that the State can claim. It cannot be assumed that [the CLCS] will adopt any State's submission."[102] Assuming entitlement may undermine the foundations that underlie any delimitation — that is, that the disputing parties have entitlements to the area in question and that their entitlements overlap. The question is how to determine entitlements in the absence of recommendations from the CLCS.

In *Bay of Bengal (Bangladesh v Myanmar)*, ITLOS referred to uncontested scientific evidence of substantial layers of sedimentary rocks "cover[ing] practically the entire floor of the Bay of Bengal,"[103] from which it concluded that "both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 [nautical miles]."[104] Reluctance would have been expressed, however, with respect to the exercise of jurisdiction if the conclusion had been "that there was *significant* uncertainty as to the existence of a continental margin in the area in question."[105] However, as mentioned earlier, ITLOS did not clarify whether such considerations related to inadmissibility or to matters regarding the exercise of jurisdiction.[106] It should also be borne in mind that the establishment of the outer edge of the continental margin on the basis of sediments is only one part of the exercise of delineating the outer limits of the continental shelf. The other part of the exercise is applying the constraints in Article 76(5)–(6), which relates not only to situations where the outer edge of the continental margin is established pursuant to Article 76(4) of *UNCLOS* but also where it is established in accordance with the *Statement of Understanding Concerning a Specific Method to Be Used in Establishing the Outer Edge of the Continental Margin*.[107] In *Bay of Bengal (Bangladesh v Myanmar)*, ITLOS determined that entitlement to the continental shelf extended beyond the two hundred nautical mile distance line but refrained, for obvious reasons, from

[101] *St Pierre & Miquelon (Canada v France)*, (1992) 31 ILM 1145 at 1172, para 81.

[102] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 2, para 8, Separate Opinion of President Donoghue.

[103] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at 115, para 445.

[104] *Ibid* at 116, para 449.

[105] *Ibid* at 115, para 443 [emphasis added].

[106] On this issue, see Gorton, *supra* note 38.

[107] *Final Act, Annex II*, *supra* note 34. Yet, for a different view — that is, that the constraints in *UNCLOS* Article 76(5)–(6) do not apply when reliance is made on the *Statement of Understanding* — see MCW Pinto, "Article 76 of the UN Convention on the Law of the Sea and the Bay of Bengal Exception" (2013) 3:2 Asian J Intl L 215.

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determining the specific extent.[108] The same underlying approach appears also in *Indian Ocean (Somalia v Kenya)*, where the ICJ held that "[a]n essential step in any delimitation is to determine whether there are entitlements, and whether they overlap."[109] Yet the question arises why it is important only to "determine entitlements of the Parties"[110] but not fulfill that operation by determining the extent of such entitlements. It is difficult to reject the proposition that, if it is important to establish that the entitlements overlap, the same would apply throughout the overlapping claims rather than constituting a determination *in abstracto*. It would indeed appear nonsensical to limit the analysis only to determining that the entitlements extend beyond the two hundred nautical mile distance line, because the "starting point"[111] of the delimitation operation is a determination of "the *extent* and features of the area found to be relevant to the delimitation."[112]

In so far as concerns the ICJ's consideration of the submission of the applicant in *Maritime Dispute (Nicaragua v Colombia)*, two matters appear clear. First, the transmission of a submission to the CLCS qualifies as a determination that the relevant states have established that the continental margin extends beyond two hundred nautical miles. Second, an overlap of entitlements, which, it is recalled, is a prerequisite for any delimitation (as the object "of delimitation consists in resolving the overlapping claims"),[113] may arise from the executive summaries of submissions to the CLCS. Interestingly, while recognizing the essential step of determining entitlements in *Indian Ocean (Somalia v Kenya)*, the ICJ did not ascertain that the entitlements of the disputing parties extended beyond the two hundred nautical mile distance line. The ICJ referred to the relevant provisions of Article 76 of *UNCLOS* that form the basis for outer continental shelf

[108] The implications arising from the exercise of jurisdiction in that particular dispute remain to be seen. For, while ITLOS determined that the delimitation line shall continue along the geodetic line established in the area within the two hundred nautical mile distance line "until it reaches the area where the rights of third States may be affected" (*Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 506(6)), the outer continental shelf claim of Sri Lanka in fact intersects with the two hundred nautical mile distance line of Myanmar and Bangladesh respectively. See *Executive Summary of the Democratic Socialist Republic of Sri Lanka* (8 May 2009) at 12, Figure 3. This raises the question at the outset whether the delimitation may be considered to extend beyond the two hundred nautical mile distance line. On the role of third parties to a judicial delimitation, see Emmanuelle Jouannet, "L'impossible protection des droits du tiers par la Cour internationale de Justice dans les affaires de délimitation maritime" in Vincent Coussirat-Coustère et al, eds, *La mer et son droit: Mélanges offerts à Laurent Luccini et Jean Pierre Quéneudec* (Paris: Pedone, 2003) 312.

[109] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 68, para 193.

[110] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12, para 413.

[111] *Continental Shelf (Tunisia v Libya)*, *supra* note 95 at 82, para 114.

[112] *Ibid* [emphasis added].

[113] *Maritime Dispute (Nicaragua v Colombia)*, *supra* note 11 at 674, para 140.

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entitlement,[114] but it did so without determining whether, in this particular case, the conditions were present for concluding that both parties have entitlements to the areas in question. Instead, the ICJ noted that the submissions of the disputing parties to the CLCS indicated an overlap and that "neither Party questions the existence of the other Party's entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim."[115]

It may strongly be presumed that neither party disclosed its CLCS submission material to the other. Consequently, it may be supposed that the materials upon which the ICJ relied in ascertaining the *bien-fondé* for drawing a delimitation line beyond the two hundred nautical mile distance line were merely the executive summaries of both parties. Yet these summaries contain very sparse information, which certainly would not suffice to permit a forum to determine whether the entitlements exist.[116] It is noteworthy in this regard to observe that President Joan Donoghue explained in her separate opinion that she cast her vote in favour of drawing a delimitation line in the area beyond two hundred nautical miles "with reluctance."[117] Judge Patrick Robinson observed in this regard that the "Judgment is bereft of even a scintilla of reliable evidence that the geological and geomorphological criteria, which the Judgment itself refers to in paragraph 193 as being essential in the determination of State entitlements, have been met."[118] For these reasons, according to Judge Robinson, "the [ICJ] has effectively eliminated the important difference drawn by [*UNCLOS*] between a coastal State's entitlement to a shelf within and beyond 200 [nautical miles]."[119] Whereas the ICJ did appear to set safeguards with an apparent view to establishing that its jurisdiction to delimit areas beyond two hundred nautical miles need not necessarily always be exercised in situations where the CLCS has not made recommendations, it is noteworthy that the principal reason for which the ICJ decided to entertain the submission, as indicated by Judge Robinson, was that both disputing

[114] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 67–68, paras 192–93.

[115] *Ibid* at 68, para 194.

[116] According to the *CLCS Guidelines*, the executive summary need only contain the following information: (1) Charts at an appropriate scale and coordinates indicating the outer limtis of the continental shelf and the relervant territprial sea baselines; (2) the provisions of *UNCLOS*, *supra* note 3, art 76, which are invoked in support of the proposed outer limits; (3) the name of any CLCS member who may have given advice in the preparation of the submission; and (4) any disputes with neighbouring coastal states. See *CLCS Guidelines*, *supra* note 20, point 9.1.4.

[117] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 1, para 1, Separate Opinion of President Donoghue.

[118] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Judgment of 12 October 2021, at 3, para 13, Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson, online: *ICJ* <www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-05-EN.pdf>.

[119] *Ibid* at para 16.

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parties mutually requested the ICJ to delimit the claimed outer continental shelf overlap. This circumstance was the reason for which the ICJ decided that it would "proceed to do so."[120]

The probative value of these mutual assertions that entitlements may extend beyond the two hundred nautical mile distance line can hardly be seen as determinative as to whether or not the criteria underlying the establishment of entitlement to an outer continental shelf are fulfilled. It is also apparent from the judgment that the ICJ is particularly cautious when proceeding with the drawing of a delimitation line in this area. This uncertainty appears unequivocally in the observations concerning a possible grey area[121] in *Indian Ocean (Somalia v Kenya)*. Because the geometric provisional equidistance line established within the two hundred nautical mile distance line was shifted considerably northwards, a grey area would necessarily arise. This assertion applies only if Kenya's entitlements extend beyond the two hundred nautical mile distance line. In this case, the grey area would result from the shift of the provisional equidistance line that allowed an outer continental shelf entitlement for Kenya in areas where Somalia has sovereign rights to the continental shelf and its superjacent waters.

However, notwithstanding the statement of the ICJ that a determination of entitlements is an essential step in any delimitation,[122] the court observed that the "delimitation *might* give rise to" a grey area.[123] Further, as "the existence of this 'grey area' is *only a possibility*, the [ICJ] does not consider it necessary … to pronounce itself on the legal regime that would be applicable in that area."[124] This qualification is made with a view to avoiding encroachment upon the mandate of the CLCS. Yet it would appear to be questionable reasoning as it necessarily implies that a delimitation is sought to be established while only being a possibility notwithstanding the azimuth being determined. These circumstances reflect the fact that, whereas the ICJ sought *a priori* to entertain a cautious approach with respect to the

[120] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 68, para 194.

[121] A "grey area" is an area on one side of a continental shelf boundary beyond two hundred nautical miles from the state on that side of the boundary, but within two hundred nautical miles of the state on the other side of the boundary. See Øystein Jensen, "The Delimitation of the Continental Shelf beyond 200 Nautical Miles" in Alex G Oude Elferink, Tore Henriksen & Signe V Busch, eds, *Maritime Boundary Delimitation: The Case Law* (Cambridge: Cambridge University Press, 2018) 351; Raghavendra Mishra, "The 'Grey Area' in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution" (2016) 47 Ocean Dev & Intl L 29. On grey areas, see Alex Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue" (1998) 13:2 Intl J Marine & Coastal L 143; Qi Xu, "Reflections on the Presence of Third States in International Maritime Boundary Delimitation" (2019) 18:1 Chinese J Intl L 91.

[122] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 68, para 193.

[123] *Ibid* at 69, para 197 [emphasis added].

[124] *Ibid.*

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establishment of the delimitation line in the area beyond two hundred nautical miles, it paid lip service to the importance given to the determination of entitlements prior to engaging in delimitation. It would be incorrect to infer, from the observation that "[a]n essential step in any delimitation is to determine whether there are entitlements,"[125] that the ICJ operated pursuant to an understanding that such determination is a prerequisite. This arises as it is undisputed that there would have been no qualification as to the existence of a grey area if the ICJ had determined the existence of entitlements.

The dispute in *Atlantic Ocean (Ghana v Côte d'Ivoire)*, insofar as it concerned the area beyond two hundred nautical miles, was unique as Ghana had received its recommendations from the CLCS, while the recommendations to Côte d'Ivoire were pending at the time of the proceedings.[126] This was the first maritime delimitation dispute referred to a court or tribunal where the CLCS had made its recommendations to any of the disputing parties. Accordingly, there could be no question as to whether Ghana had entitlement to the area beyond the two hundred nautical mile distance line. With respect to Côte d'Ivoire, the Special Chamber of ITLOS held that it "has no doubt that a continental shelf beyond 200 [nautical miles] exists for Côte d'Ivoire."[127] Yet the opinion that it was indisputable that Côte d'Ivoire had entitlement to an area beyond the two hundred nautical mile distance line was substantiated by postulating that "its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist."[128] Three observations can be identified.

First, it may be seen that the Special Chamber somehow underestimated the level of difficulty that often arises with respect to having the CLCS endorse proposed outer limits. For instance, as Côte d'Ivoire had made its submission, "[t]he *only* question which remains open for Côte d'Ivoire is the identification of the outer limits of its continental shelf beyond 200 nm."[129] It appears incongruous to characterize a point, which is the sole object and purpose of a submission — that is, to receive affirmative recommendations from the CLCS — as something ephemeral or easily sought. Yet this appears to be the understanding expressed by the Special Chamber when relying on the adjective "only" to characterize the legal situation with respect to

[125] *Ibid* at 68, para 193.

[126] The CLCS made its recommendations to Côte d'Ivoire on 5 February 2020. CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Amended Submission Made by the Republic of Côte d'Ivoire on 24 March 2016* (5 February 2020), online: <www.un.org/Depts/los/clcs_new/submissions_files/cvi42_09/2020_02_05_COM_SUMREC_CIV_web.pdf> [*CLCS Recommendations to Côte d'Ivoire*].

[127] *Atlantic Ocean (Ghana v Côte d'Ivoire)*, *supra* note 18 at 136, para 491.

[128] *Ibid.*

[129] *Ibid* at 137, para 497 [emphasis added].

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determining whether Côte d'Ivoire has an entitlement to the claimed outer continental shelf area. Indeed, as has been observed elsewhere, the process before the CLCS "est tout sauf un long fleuve tranquille qui verrait des États côtiers aller à la rencontre d'experts disposés à valider leurs demandes sans trop de difficulté."[130] Accordingly, it may not be presumed that the CLCS will necessarily endorse submitting coastal states' proposed outer limits.

Second, geology plays only a secondary role in the determination of entitlement to the outer continental shelf. Yet the Special Chamber substantiated its understanding in *Atlantic Ocean (Ghana v Côte d'Ivoire)* that the entitlement of Côte d'Ivoire could not be questioned with the observation that the geological setting of Côte d'Ivoire is identical to that of Ghana, for which there were affirmative recommendations from the CLCS.[131] That entitlement does not rest on geology is firmly confirmed in *Bay of Bengal (Bangladesh v Myanmar)*. In that case, ITLOS refused to accept Bangladesh's argument that Myanmar had no entitlement to an outer continental shelf due to a tectonic boundary.[132] Determining entitlement to the area beyond two hundred nautical miles is first and foremost a geomorphological undertaking in which bathymetry and morphology play a primary role and where the role of geology is secondary and only relevant where bathymetry or morphology do not allow the extent of the continental margin to be conclusively determined. Consequently, rather than basing its reasoning on the underlying geology, the Special Chamber might have undertaken an *a priori* geomorphological assessment,[133] as any forum "is to make use of geology only so far as required for the application of international law."[134]

Third, it appears a misconception to conclude that, because a neighbouring coastal state has received affirmative recommendations, the same will apply to Côte d'Ivoire, as the conditions underlying entitlement to the outer continental shelf may vary significantly from subregion to subregion. This appears symptomatically in the consideration of Côte d'Ivoire's submission by the CLCS.[135]

[130] Élie Jarmache, "À propos de la Commission des limites du plateau continental" (2006) 11 Ann dr mer 61 at 67.

[131] *Atlantic Ocean (Ghana v Côte d'Ivoire)*, *supra* note 18 at 136, para 491.

[132] *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 438.

[133] The practice of the CLCS abundantly supports the conclusion that the determining factor for verifying whether the submitting coastal state has an entitlement to outer continental shelf areas is morphology. See illustratively CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Barbados on 8 May 2008* (15 April 2010) at paras 11–12, online: <www.un.org/depts/los/clcs_new/submissions_files/brbo8/brbo8_summary_recommendations.pdf>.

[134] *Continental Shelf (Tunisia v Libya)*, *supra* note 95 at 54, para 61.

[135] See *CLCS Recommendations to Côte d'Ivoire*, *supra* note 126.

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In sum, it may be a daunting exercise for a court or tribunal to determine that disputing parties have entitlements to outer continental shelf areas prior to the CLCS having completed its consideration of the relevant submissions. There can be no question of determining entitlement to the relevant areas unless the court or tribunal assumes a similar role to that of the CLCS, which for obvious reasons is not possible. In these circumstances, courts and tribunals have to establish delimitation lines without asserting a conclusive understanding as to whether the states in question are vested with entitlements, notwithstanding the reassuring statements that "[a]n essential step in any delimitation is to determine whether there are entitlements."[136]

UNDERSTANDING OF ENTITLEMENT BY THE CLCS

The CLCS makes recommendations, which *per se* are not binding on any state.[137] A state may decide to disagree and establish outer limits of the continental shelf that are not made on the basis of the relevant recommendations of the CLCS. Yet, where this arises, it is unlikely that such limits would be opposable to third states. This follows from the dominant judicial and arbitral decisions attaching importance to outer limits that are based on the recommendations of the CLCS, which go beyond the black letter of Article 76[138] and imply that it is not possible to achieve final and binding limits other than by having such limits based on the recommendations of the CLCS.[139] This understanding can by no means be seen to be in conflict with the inherency doctrine but merely reflects the observation that, while rights to the continental shelf are inherent, the breadth of the continental shelf under international law is not at the discretion of states to determine.[140] In

[136] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 68, para 193.

[137] Yet, for a contrary view, see Laurent Lucchini, "La délimitation des frontières maritimes dans la jurisprudence internationale: vue d'ensemble" in Rainer Lagoni & Daniel Vignes, eds, *Maritime Delimitation* (Leiden: Koninklijke Brill, 2006) 15. See also Élie Jarmache's argument that one has to "admettre que les recommandations sont bien définitives et obligatoires, et qu'elles indiquent que les experts gouvernent; enfin ou hélas." Jarmache, *supra* note 130 at 68.

[138] See, for example, *Indian Ocean (Somalia v Kenya)*, where the ICJ observed that "[i]t is *only* after such recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves." *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at para 188 [emphasis added].

[139] In *Bay of Bengal (Bangladesh v Myanmar)*, ITLOS observed in this respect that "[i]t is only after the limits are established by the coastal State on the basis of the recommendations of the [CLCS] that these limits become 'final and binding'." *Bay of Bengal (Bangladesh v Myanmar)*, *supra* note 12 at para 407.

[140] In *Bay of Bengal (Bangladesh v Myanmar)*, ITLOS emphasized that the obligation to transmit submissions to the CLCS and the rule that only outer limits based on the recommendations of the CLCS can become "final and binding" do not "imply that entitlement to the continental shelf depends on any procedural requirements." *Ibid* at para 408.

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any event, where the outer limits of the continental shelf are based on the recommendations of the CLCS, these may not, in principle, be subsequently challenged.[141]

There is a non-negligible number of instances in which submitting coastal states have not been able to vindicate their proposed outer limits *vis-à-vis* the CLCS. A famous example is the area claimed in the submission of the United Kingdom with respect to Ascension Island,[142] the entirety of which was rejected by the CLCS. Yet there are also other situations where submitting coastal states have not been successful in their endeavours to have the CLCS endorse conformity with Article 76 of *UNCLOS* of their proposed continental shelf outer limits. The recommendations of the CLCS to Japan can also be seen to fall within this category.[143] A more recent example involves the recommendations to South Africa.[144] Parts of the latter's submission, pertaining to vast areas, were not endorsed by the CLCS, including the claimed generative feature of Southern Mozambique Ridge. Other areas were not endorsed, but, rather than completing its consideration of those areas, the CLCS invited the submitting coastal state to "investigate whether additional bathymetric and geophysical information might support a revised submission for the determination of the outer limits of the continental shelf beyond 200 [nautical miles]."[145] It is beyond any doubt that these positions have not been taken on the basis of abstract information appearing in the executive summaries.

The risks that follow from establishing delimitation lines in the absence of recommendations from the CLCS may also arise where one of the disputing parties has received affirmative recommendations. As indicated earlier, the

[141] Bernard Oxman notes in a paper published more than forty years ago that, with the adoption of Article 76(8), submitting coastal states are faced with "an extraordinary power nowhere reproduced with respect to any other maritime limit. … They may not be contested." Bernard H Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)" (1981) 75:2 Am J Intl L 219 at 230.

[142] *Partial Submission of the United Kingdom of Great Britain and Northern Ireland Relating to the Continental Shelf of Ascension Island* (9 May 2008), online: <www.un.org/depts/los/clcs_new/submissions_files/submission_gbr.htm>.

[143] See e.g. the recommendations of the CLCS of 19 April 2012 with respect to the submission of Japan of 12 November 2008, in which the CLCS did not endorse approximately 40 % of the outer continental shelf areas claimed by Japan. CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan on 12 November 2008* (19 April 2012), online: <www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf>.

[144] CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Partial Submission Made by the Republic of South Africa in Respect of the Area of the South African Mainland on 5 May 2009* (17 March 2017), online: <www.un.org/depts/los/clcs_new/submissions_files/zaf31_09/2017_03_17_com_sumrec_zaf.pdf>.

[145] *Ibid* at 7, figure 2.

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submission of Côte d'Ivoire is illustrative in this regard. In its revised submission of 2016, Côte d'Ivoire established fifteen foot-of-the-continental-slope (FOS) points. Two of these points (FOS 1 and 2) were located on the Côte d'Ivoire-Ghana Marginal Ridge (CGMR), while the remaining thirteen points were located on the Romanche Fracture Zone (RFZ), which the submitting coastal state considered to be a geomorphological continuation of the CGMR.[146] Yet, prior to the reading of the judgment by the Special Chamber, the CLCS expressed the view in March 2017 that the FOS points on which the outer limits were based "might be located beyond the jurisdiction of the submitting State."[147] This observation by the CLCS was confirmed upon the reading of the Special Chamber's judgment, subsequent to which the CLCS "requested that Côte d'Ivoire re-examine the test of appurtenance in light of this finding."[148] Not only did the CLCS not accept the FOS points on the CGMR — because of the maritime boundary established by the Special Chamber in *Atlantic Ocean (Ghana v Côte d'Ivoire)* — but it also followed from this decision that Côte d'Ivoire was not permitted to rely on those parts of the RFZ that lie to the west of the maritime boundary. This is because the demonstration of continuity of the continental margin with the submerged landmass of Côte d'Ivoire would imply that this feature would have to cross the maritime boundary with Ghana, which, in the view of the CLCS, would not be permissible under Article 76 of *UNCLOS*.

Accordingly, Côte d'Ivoire had to document the natural prolongation of the FOS points from the land territory without crossing a maritime boundary rather than from the CGMR.[149] Whereas geology has not had a primary role in the documentation of entitlement, it may nonetheless have significance where bathymetry and morphology do not clearly establish entitlement. In the presence of a complex bathymetric setting, the submitting coastal state was successful in relying upon seismic data as geological evidence that demonstrates distinctive geological features where active slope processes were used as a supporting criterion to differentiate the continental slope from the continental rise.[150] Yet this exercise was only carried out subsequent to the judgment made by the Special Chamber. Accordingly, there is no doubt that the assessment of the Special Chamber, according to which it

[146] See *CLCS Recommendations to Côte d'Ivoire*, *supra* note 126 at 11, Figure 6.

[147] *Ibid* at 12, para 51.

[148] *Ibid* at 12, para 53.

[149] The Statement of the Chair of the CLCS observed that the judgment in the dispute between Ghana and Ivory Coast required a "test of appurtenance from a foot of the continental slope point that was part of the natural prolongation from the land territory of Côte d'Ivoire in accordance with section III of annex III to the rules of procedure." *Statement of the Chair on the Progress of Work in the Commission on the Limits of the Continental Shelf During the Forty-Sixth Session*, Doc CLCS/103 (6 April 2018) at 8, para 48.

[150] *CLCS Recommendations to Côte d'Ivoire*, *supra* note 126 at 16, para 66.

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"ha[d] no doubt that a continental shelf beyond 200 [nautical miles] exists for Côte d'Ivoire,"[151] was made on the basis of considerations that were subsequently disqualified by the CLCS. This discrepancy derives from the fact that the Special Chamber apparently relied on the FOS points on the CGMR in the revised submission of 2016, while the CLCS did not even consider those FOS points in its preliminary finding concerning the fulfillment of the test of appurtenance. In sum, "[i]t cannot be assumed that [the CLCS] will adopt any State's submission."[152] This statement has proven correct and certainly must be given due consideration by any court or tribunal prior to establishing delimitation lines in outer continental shelf areas.

Conclusion

A common element in the majority of the relevant judgments and awards with regard to the delimitation of claimed overlapping entitlements to outer continental shelf areas is the unease of courts and tribunals in exercising jurisdiction where there are no recommendations from the CLCS in support of the claimed entitlements. An analysis of the reasoning of courts and tribunals demonstrates that, while being reluctant to exercise jurisdiction in such circumstances, courts and tribunals have nevertheless — on different grounds — sought to justify doing so. Four approaches are reflected in the relevant case law. First is the approach endorsed in *Bay of Bengal (Bangladesh v Myanmar)* by ITLOS, according to which the exercise of jurisdiction depends on the factual circumstances, where courts and tribunals are willing to assess the merits of the claimed area of the outer continental shelf. Second is the approach followed by the Annex VII arbitral tribunal in *Bay of Bengal (Bangladesh v India)* where recommendations from the CLCS *per se* are not considered of any importance for the purpose of determining entitlement. The entire delimitation line is considered dependent upon the coastal configuration. Third is the approach of the ICJ in *Nicaraguan Coast (Nicaragua v Colombia)* and, subsequently, in *Maritime Dispute (Nicaragua v Colombia)* and partly also in *Atlantic Ocean (Ghana v Côte d'Ivoire)*. In this approach, the disputing parties' applications for delimitation of claimed outer continental shelf areas in the absence of recommendations from the CLCS are deemed admissible where they have fulfilled the procedural obligation in Article 76(8) of *UNCLOS*. Fourth is the approach in *Indian Ocean (Somalia v Kenya)*. Even though the disputing states have made submissions to the CLCS (consistent with which, if one is to rely on the relevant case law, the claim is admissible), there may nevertheless be

[151] *Atlantic Ocean (Ghana v Côte d'Ivoire)*, *supra* note 18 at 137, para 491.

[152] *Indian Ocean (Somalia v Kenya)*, *supra* note 6 at 2, para 8, Separate Opinion of President Donoghue.

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circumstances that inhibit courts and tribunals from exercising jurisdiction with respect to the delimitation of the area beyond the two hundred nautical mile distance line.

It follows that it may not be easy for disputing parties to know whether, in the absence of recommendations from the CLCS, an application to delimit a claimed area of disputed entitlement to areas beyond the two hundred nautical mile distance line will result in the exercise of jurisdiction. However, it would appear fair to argue that the determination in *Indian Ocean (Somalia v Kenya)*, according to which the drawing of a delimitation line — in the absence of recommendations from the CLCS — can be effectuated in appropriate circumstances, builds upon, rather than contradicts, the case law established in *Nicaraguan Coast (Nicaragua v Colombia)*. The finding on admissibility in the latter case clearly related to procedural considerations, whereas the finding in *Indian Ocean* can be considered to relate to admissibility not on procedural grounds but, rather, on considerations that may be closely related to the merits.

As the CLCS continues its work and can eventually be expected to complete its consideration of pending submissions, most of the difficulties discussed in this article will evaporate. Until this happens, jurisdiction, in the current state of affairs, will apparently be exercised without a determination of whether an entitlement effectively extends beyond the relevant two hundred nautical mile distance line or without a determination of its extent. Such a determination is necessarily a requisite to determining whether there is an overlap of entitlements, which is likewise a requisite for conducting a delimitation operation, according to the law of maritime delimitation. Yet proceeding on this basis entails the risk that courts and tribunals, like the Emperor in the tale of Hans Andersen, set off in a procession in which they are wearing nothing at all.