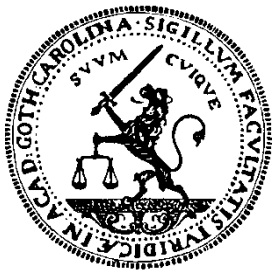

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Advisory Opinion:

A bridge between the CLCS and the ITLOS

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Contents

Summary

The purpose of this thesis is to try to establish a mechanism that will enable the Commission on the Limits of the Continental Shelf to get access to legal interpretation of the United Nations Convention on the Law of the Sea. The mandate of the Commission is to validate the outer limits line delineated by coastal States. For that, the Commission has to apply provisions of the Convention. The use of legal provisions necessitates interpretation. It is submitted that the Commission has to interpret some provisions of the Convention in order to perform its mandate. Yet, its interpretative attribute is limited to the assessment of its technical functions. When it cannot interpret, the Commission cannot fulfil its mandate and the outer edge of the continental margin cannot be established. To avoid maritime boundaries staying in an impasse, the Commission has to ask competent bodies to seek an advisory opinion from the International Tribunal for the Law of the Sea. The author reviews the possible mechanisms opened to the International Seabed Authority and international agreements, and promote a liberal interpretation of these provisions to open the scope of their availability. The possibility to open the advisory procedure to the Meeting of States Parties and States, acting under the umbrella of an international agreement or acting as individual States, is discussed and encouraged. In fact, States are the cornerstone between the advisory opinion and the Commission. Their will and sovereign power in terms of implementation of the Convention are the means through which the CLCS can be granted access to legal interpretation.

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I would like to thank the officials of the Registrar of the International Tribunal for the Law of the Sea for their kind suggestions and remarks. I would like to thank the members of the Tribunal who gave me a little of their time, a lot of their knowledge. I thank Dr. Chie Kojima for her useful comments and encouragement. I am very grateful to my Professor Dr. Proshanto K. Mukherjee for his constant help and support throughout the master's programme and his useful comments on the thesis.

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Abbreviations

Article 76	Article 76 of the United Nations Convention on the Law of the Sea
Chamber, the	Seabed Disputes Chamber of the International Tribunal for the Law of the Sea
CLCS or the Commission	Commission on the Limits of the Continental Shelf
ISA, or the Authority	International Seabed Authority
ITLOS, or the Tribunal	International Tribunal for the Law of the Sea
Meeting, the	The Meeting of States Parties
UNCLOS, or the Convention	United Nations Convention on the Law of the Sea

1 Introduction

In the 1958 Geneva Convention on the Continental Shelf the extent of the shelf was not defined.[1] Pursuant to Article 1, "a coastal States had jurisdiction over the adjacent continental shelf as far seaward as the resources of the adjacent shelf were exploitable."[2] Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS) gives a *definable limit* to the shelf and "to the claim that a state can make to the continental margin however difficult the defining of that limit may be."[3]

Besides ascertaining the possible limits of the continental shelf,[4] article 76 creates a Commission, the Commission on the Limits of the Continental Shelf (or CLCS), which is in charge of making recommendations on data and information submitted by the coastal State.[5] The purpose of the creation of such an organ was to ensure that the delineation of the continental shelf would be done by coastal States with due respect to the provisions of article 76, its formulae and constraint lines.

In fact, coastal States that want to establish the limits of their continental shelf beyond 200 nautical miles, from the baselines from which the breadth of the territorial sea is measured, in accordance with the provisions of article 76, should submit information to the CLCS. Information submitted are scientific data that must reflect the geological and

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[1] Convention on the Continental Shelf, of 29 April 1958 (entered into force on 10 June 1964; *United Nations Treaty Series*, Vol. 499, p.311).

[2] Ted L. McDorman, "The Role of the Commission on the Limits f the Continental Shelf: A Technical Body in a Political World", International Journal for Marine and Coastal Law, Vol 17, No 3 (2002) p. 307.

[3] *Definable limit* is a term employed by Ted L. macDorman. In itallics in the text. See reference supra.

[4] The term continental shelf is used in the introduction as referring to the legal continental shelf. The legal notion of the continental shelf does not only refer to the shelf as a part of the continental margin; this notion refers to the shelf as it can be delineated in accordance with the formulae and constraint lines of article 76.

[5] Article 3, Annex II to UNCLOS, see Supplement A including Article 76 of UNCLOS and Article 3, Annex II to UNCLOS; United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982 (entered into force on 16 November 1994; *United Nations Treaty Series*, Vol. 1833, p.396). The other function of the CLCS is to provide scientific and technical advice; this function will not be looked at in this thesis.

geomorphological conditions set up in article 76.[6] Collecting relevant data in order to establish the outer limits line of the shelf is a difficult task; as well as delineating the outer limits line according to the provisions of article 76. Coastal States may, intentionally or not, establish the line not in accordance with article 76.

To avoid the outer limits line being established beyond the scope of the provisions of article 76 and to avoid the Area to be encroached by national jurisdiction, the Commission has been assigned with the mandate to control that the outer limits line are justified,[7] thus that the line is delineated in accordance with the provisions of article 76. The Commission is a watchdog, which has the responsibility to control that the outer limits line submitted by the coastal State does not constitute an exaggerated claim.[8]

If the outer limits line is recognised to be in conformity with the provisions of article 76, the continental shelf can be delimitated by the coastal State in a legitimate manner. The CLCS has thus a role of *legitimator* in regards to the delineation of the outer continental margin.[9]

The role of the Commission is to verify that the outer limits line proposed by the coastal State is in conformity with article 76. When the Commission verify the information submitted it must check that the outer limits line is delineated in accordance with article 76. The CLCS should thus make use of legal provisions. The use of legal provisions might imply their interpretation and it is the purpose of this thesis to know whether the Commission has the capacity to interpret legal provisions.

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[6] United Nations, Office of Legal Affairs, DOALOS (ed.), ”Defintion of Continental shelf”, p.22-23.

[7] Ted L. MacDorman, see footnote 2, p.308. The outer edge of the continental margin depends on the choice made by the submitting State to the CLCS. Article 76 provides with formulae and constraint lines that gives choice as to where the outer limits may be situated. One formulae or one constraint line may be chosen over others.

[8] Ibid. Ted L. MacDorman refers to 1994 US Commentary, US Senate Treaty Doc. 103-109, 103rd Congress, 2nd Session, 1994: ”The Commission is designed to provide a mechanism to prevent or reduce the potential for dispute and uncertainty over the precise limits of the continental shelf... Ultimate responsibility for the delimitation lies with the coastal State itself, subject to safeguards against exaggerated claims”.

[9] Itallics used by the author , ibid. p.319.

In order to apprehend the mandate of the Commission and its scope, legal instruments, documents and reports are used. This dogmatic method does not bring into the equation any elaborated case law analysis.

The question whether the Commission has the ability to interpret legal provisions is analysed. In fact, the Commission has not been directly entrusted with the competence to interpret the Convention. Yet, because law and science are intertwined, the CLCS has to take on a capacity to interpret in order to fulfil its mandate.[10] The interpretative prerogative of the Commission is limited and the restricted scope of its capacities put the CLCS in an impasse. Consequently, the Commission needs to find other ways to access legal interpretation and carry out its technical functions. The question whether there are any mechanisms available under the Convention and its related instruments that may create a bridge between the CLCS and the ITLOS are examined. In fact, the Commission is not yet entitled to seek an advisory opinion. Other bodies must seek an advisory opinion for the CLCS.

[10] First Report of the Committee, Legal Issues of the Outer Continental Shelf, in International Law Association, *Report of the Seventy-Second Conference* (ILA, Berlin: 2004) (hereafter Berlin Conference), p.3. The First and Second Report are available at www.ila-hq.org/html/layout_committee.htm, accessed May 23rd, 2013.

2 Capacity for interpretation of the CLCS

The Commission, in order to assess the scientific and technical data, should make use of the terms and concepts of the Convention. Using terms and concepts that are not defined can be tricky for a technical body that is not composed of jurists. The members of the Commission have to assess scientific and technical terms and concepts outside the scope of geology, geophysics and take into account the legal meaning that has been embedded in them. Thus, the Commission cannot refer to scientific methodology solely to assess the submitted data. The Commission has to take into account that the terms and scientific concepts have lost their pure scientific meaning and that they have to be processed in a legal context. The scientific terms and concepts (or formulae) have to be understood under the umbrella of the legal instrument, the Convention. Thus, the Commission has to clarify the meaning of such terms and concepts and consequently interpret the provisions of article 76.

2.1 Nature of the capacity of interpretation of the CLCS

To interpret provisions of the Convention the Commission should have the competence to do so. It will be analysed whether the Commission has the mandate to interpret provisions of UNCLOS.

2.1.1 Presumption of competence of the CLCS

The Commission is an organ created under article 76 paragraph 8 of UNCLOS and is presumably independent. However, this organ may be seen as a subsidiary body of the United Nations. This would imply that the Commission would be attached to a higher authority and would not be allowed much room for manoeuvre in terms of competence and interpretation of legal provisions.

2.1.1.1 Autonomous status

In 1997, the CLCS requested the Legal Counsel of the United Nations to provide the Commission with a formal legal opinion as to the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission.[11] The Legal Counsel answered through a legal opinion.[12]

The point here is not to analyse whether the members of the Commission can benefit from the privileges and immunities granted to employees of the United Nations; it is rather to analyse the explanation given by the Legal Counsel regarding the status of the Commission.

In fact, in order to be granted privileges and immunities, the members of the Commission have to be considered as working for the United Nations. For that purpose, the status of the Commission is examined and the Under-Secretary-General of the United Nations for Legal Affairs answered that:

> [t]he Commission is neither a principal nor a subsidiary organ of the United Nation, but might be considered as a "treaty organ" of the Organization. Indeed, there is a group of organs which, though their establishment is provided for in a treaty, are so closely linked with the United Nations that they are considered organs of the Organization.[13]

Thus, the Commission, a "treaty organ" of the Organisation, is not a subsidiary organ of the United Nations. The Commission is linked to the Organisation but is independent in its work. Besides, Elie Jarmache noted that:

> [l]'alternative entre autonomie et subordination n'est pas tranchée pour autant. Il reste une relation qui est fonctionnelle avec le Secrétaire général permettant d'ancrer la CLPC dans le moule des Nations Unies.[14]

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[11] It can be noted that this request for a legal opinion to the Legal Counsel was the first to have been asked by the Commission after its creation. The question whether the Commission has the competence to ask legal opinions to the Legal Counsel of the United Nations may be raised.

[12] Letter dated 11 March 1998 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf, CLCS 3rd Session, 4-15 May 1998, CLCS/5, Legal Opinion on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission (hereafter CLCS/5).

[13] Ibid., CLCS/5, p.1.

[14] Elie Jarmache, 'A propos de la Commission des Limites du Plateau Continental', (2006) XI *Annuaire du droit de la mer*, p.57. Translation: The choice between autonomy and subordination is not settled, for all that. A relationship remains which is functional with the Secretary-General and permits to anchor the CLCS in the mould of the United Nations. This translation and the following ones are made by the author of this thesis.

Consequently, the Commission is linked to an organ, the United Nations. The functional relationship allows the CLCS to benefit from the Secretariat-General. The secretariat of the Commission is provided by the Division of Ocean Affairs and the Law of the Sea (DOALOS), a division of the Office of Legal Affairs;[15] and a resolution of the General Assembly requested the Secretary-General to provide "from within existing resources, such services as may be required ... for the Commission on the Limits of the Continental Shelf."[16]

Consequently, the Commission is, on the one hand, not subordinated to another organ but is, on the other hand, not entirely independent in its functioning, and the members of the Commission are considered to be "experts on mission" on behalf of the United Nations.[17] The CLCS seems to possess an unusual status;[18] as being independent in its assessment of the data and information submitted to it, yet being linked to DOALOS regarding its functioning, the CLCS may be considered as a *sui generis* organ.

The mandate of the Commission may go further than what has been expressly assigned to it in the Convention and its Annex II. Its independence and its role of application of legal provisions of the Convention may bring it to extend the scope of its mandate, and take *kompetenz kompetenz*[19] to deal with interpretation of legal provisions.[20]

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[15] See footnote 12, p.2.

[16] Ibid., p.2 referring to General Assembly resolution 49/28, of 6 December 1994, para. 10.

[17] Ibid., p.3.

[18] See footnote 14, p.55.

[19] See Bjørn Kunoy, 'Legal Problems Relating to Differences Arising between Recommendations of the CLCS and the Submission of a Particular State', in Clive R. Symmonds (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), p.326 referring to the *Nottebohm case*, Preliminary Objection, Judgement, [1953] ICJ Rep., p.119, in which the Court affirmed the *kompetenz-kompetenz* principle as a principle of international law: "Since the *Alabama case*, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."

[20] See footnote 14, p.55: "La CLPC dispose d'une compétence normative directe et effective qui va contribuer a son originalité."

2.1.1.2 Normative input

Coastal States in order to fulfil their duty, that is to say, submit the outer limits of their extended continental shelf to the CLCS, must refer to the provisions of article 76. These provisions define the concepts of the continental shelf and continental margin and explain the different formulae to delineate the outer limits of the shelf. In order to make their submissions, coastal States use the provisions of article 76 and try to construe their significance. 65 submissions have been made to the Commission. Each coastal State and each submission may contain different interpretations of the terms and formulae of article 76. Consequently, the CLCS will have to deal with several interpretations of article 76 and its related provisions.

The combination of formulae used and delineation lines submitted by coastal States differ from State to State and from submission to submission because the terms and concepts are not defined identically.[21] In addition, the members of the CLCS might have different opinions on the application of article 76 and use different scientific methodologies.

The plethora of submissions and interpretations points to the need for harmonisation of the work of the Commission. Consequently, the Commission will have to give guidance on the application of the provisions of article 76 to harmonise its practice and the ones of the submitting States.

The Scientific and Technical Guidelines of the Commission were created to ensure uniform practice among submitting States.[22] The Guidelines frame the admissibility of scientific data and clarify the interpretation of provisions contained in UNCLOS.[23] Together with the Rules of procedure, that frames the practice of the Commission, the CLCS created a corpus of instruments that concur to uniformity of its practice and of the ones of the submitting States.

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[21] These uncertainties will allow coastal States to take advantage on this lack of clarity to delineate the limits with the elasticity offered by the provisions of article 76.

[22] United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (ed.), "Training manual for delineation of the outer limits of the continental shelf beyond 200 nautical miles and for preparation of submissions to the Commission on the Limits of the Continental Shelf" (hereafter Training manual), I-52.

[23] Ibid.

Beyond creating uniformity, these instruments conceal a legal essence. In fact, the Commission has the power to create rules.[24] These rules cover the procedural aspects of the work of the Commission.[25] These sets of rules have an impact on coastal States. They create standards that coastal States must observe when submitting. In fact, it should be the responsibility of coastal States to choose the data they want to submit. Coastal States may oppose to these rules and bring their own information. And yet, if States want their submission to be accepted, they have an interest in submitting information that can be validated by the Commission. Consequently, the coastal States are bound by the rules created by the CLCS[26] and the fact that the data submitted comply in practice with the rules established by the CLCS shows that all the elements of a normative power are in place.[27]

Creating a corpus of instruments to ensure uniformity in the work of the Commission and the submission of coastal States, seem to be a prerogative of the Commission.[28] If the CLCS has the power to create legal instruments, it might be that the Commission has consequently the power to interpret them and their legal framework. In the Training manual it is said that the Guidelines "serve to clarify the interpretation of scientific, technical and *legal* terms contained in UNCLOS (emphasis added)."[29] Thus, it seems that the Commission "has to be

[24] See footnote 14, p.58-60, Elie Jarmache uses the term 'normative input' (apport normatif).

[25] See footnote 22.

[26] "Le règlement intérieur participe de la même logique normative: la CLPC doit disposer de l'outil de base qui décrit, autant pour elle-même que pour ses clients que sont les Etats côtiers demandeurs, la procédure à suivre, les différentes étapes qui vont du dépôt d'un dossier au rendu des recommendations. La richesse de ce document exprime bien son objet d'être un indicateur des comportements des différents acteurs de la chaîne de l'extension", Elie Jarmache, see footnote 14, p.59. Translation: The rules share the same normative logic: the CLCS must have the basic tool that describes, both for itself and its customers that are the submitting coastal States, the procedure, the different stages ranging from filing of a case to the making of recommendations. The richness of this document expresses the object to be an indicator of the behavior of various actors in the extension chain.

[27] "Derrière ces circonvolutions et ces prudences de langage, tous les élèments d'un «pouvoir normatif» sont en place." Elie Jarmache, ibid., p.58.

[28] Berlin Conference, see footnote 10, p.5.

[29] See Training manual, footnote 22.

presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention."[30]

Yet, interpretation of legal provisions may be hardly conceived as a prerogative of a technical body.[31] However, the competence of the Commission to interpret provisions of UNCLOS is relevant to the extent required to carry out the functions that are explicitly assigned to it.[32]

2.1.2 Interpretative attribute of the CLCS[33]

The mandate of the CLCS is linked to the interpretation of the legal provisions. Assessment of its technical functions relies on the clarity of the legal terms used in article 76 and related provisions. The Commission navigates in legal uncertainties and its mandate suffers from this situation. The Commission is subjected to a deadlock whenever legal interpretation arises in the course of its assessment of technical information. Thus, the Commission has no other choice than to deal with these legal provisions and has to take legal functions to pursue its mandate. The interpretation of legal provisions is incumbent upon a competent body. The question raised is whether the Commission, a technical body, has competence to undertake legal work, that is to say, interpret legal provisions.

2.1.2.1 Interpretative requisite

Data submitted by the coastal State should prove that the limits delineated are so in accordance with the provisions of article 76.[34] Thus, the work of the Commission is confined

[30] See footnote 28.

[31] Commission on the Limits of the Continental Shelf, Twenty-eighth session (1 August-9 September 2011), Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chairperson (16 September 2011), CLCS/72 (hereafter CLCS/72), Item 14, p.10.

[32] See footnote 28.

[33] "Interpretative attribute" is a term used by the author to refer to the capacities that has the CLCS to interpret certain provisions in order to carry out its technical functions.

[34] See footnote 5 and Supplement A.

within the framework of legal provisions in which the CLCS ensure that the delineation line submitted by the coastal State is in accordance with the provisions of article 76:[35]

> [a]lthough the functions of the CLCS are concerned with the assessment of scientific and technical data, this assessment has to be carried out 'in accordance with article 76 of the Convention'. This wording indicates that the CLCS is bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State. This requirement would raise few problems if the provisions of article 76 would not raise any questions concerning their interpretation or application. However, this clearly is not the case. The interpretation and practical application of various provisions of article 76 are controversial. While one interpretation of a provision of article 76 may lead to the conclusion that specific data proves that the requirements of the article are met, under another interpretation the same data might not provide sufficient proof in this respect.[36]

The provisions of article 76 lack clarity. In fact, they contain scientific terms but these terms instead of taking on a purely scientific meaning, actually assume a legal significance.[37] The use of article 76 raises for the Commission problems of application and interpretation. In the process of ensuring that the technical provisions of article 76 are met, the Commission will have to refer to terms and concepts that are scientific in nature but used in a legal context,[38] which means that the sense of these terms and concepts may be blurred by the context in which they are used.

The lack of clarity is due to the fact that at the third United Nations Conference on the Law of the Sea, the scientific terms used in legal provisions have not been defined:

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[35] The Commission should ensure that the technical and scientific requirements of the provisions are met, that is to say, that the calculation and proof of location of lines are met, or in other words, that the lines are delineated in accordance with the definition of the foot of the slope, sea floor highs etc.

[36] Berlin Conference, see footnote 10, p.3. For an analysis of the Berlin and Toronto Conferences in relation to the legal expertise of the Commission and its competence to interpret the Convention see Betsy Baker, 'States Parties and the Commission on the Limits of the Continental Shelf' in Ndiaye and Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) p.680-686.

[37] It is not the purpose of this thesis to analyse the challenges of the application of article 76 in relation to the delineation of the outer edge of the continental margin. See author's paper: "The Bengal rule".

[38] Berlin Conference, see footnote 10, p.6; "Article 76 'makes use of scientific terms in a legal context which at times departs [sic] significantly from accepted scientific definitions and terminology'", in Bjørn Kunoy, see footnote 19, referring to the "Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf", UN Docs, CLCS/11 (13 May 1999) (hereafter the Guidelines or CLCS/11), point 1.3. The notion of the continental shelf in the provisions of UNCLOS does not refer to the scientific shelf. The legal notion of the continental shelf refers to the 200 nautical mile (M)-zone from the baselines from which the breadth of the territorial sea is measured, see footnote 6, p.22 et s.

> La CLPC souligne que ce travail à portée normative a pu être justifié aussi en raison du silence de la 3ème Conférence sur le droit de la mer au cours de laquelle il a pu ne pas être "jugé nécessaire de définir le sens exact des termes scientifiques et techniques utilisés".[39]

The technical functions of the Commission, which are to consider data and make recommendations,[40] presume that the CLCS will have to make use of scientific concepts. Since these concepts are controversial, the Commission will have to provide itself with interpretations of terms used in article 76.[41] In terms of interpretation, the CLCS states, in its training manual, that the purposes of its Guidelines serve to "clarify the interpretation of scientific, technical and legal terms contained in UNCLOS".[42] Thus, the Commission vests itself with the capacity to interpret legal provisions.

Legal and scientific concepts are intertwined in the context of article 76 and its related provisions.[43] Therefore, even if the CLCS should be charged with the interpretation of scientific terms and concepts only, it could not do so. Scientific terms, under the Convention, have lost their scientific sense and are clothed with a legal sense, to give birth to original concepts mixing law and science. Therefore, the CLCS has no other choice but to interpret the scientific and the legal terms.

The Commission should not interpret legal provisions but should rather interpret legal provisions in order to fulfil its functions:

> The CLCS is an organ that has been assigned specific functions under the Convention. In order to make recommendations to coastal States, it has to make an independent evaluation of the submissions of coastal States in respect of the outer limits of the continental shelf. The CLCS has to be presumed to have the competence that is required to carry out these tasks. The […] Convention attributes certain functions explicitly to the CLCS, namely the consideration of scientific and technical data submitted by the coastal State and the provision of scientific and technical advice to coastal States in the preparation of submissions. On the other hand, the

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[39] Elie Jarmache, see footnote 14, p.58. Translation: The CLCS emphasizes that this work, with a normative scope, could also be justified because of the silence of the 3rd Conference on the Law of the Sea during which it could not be "considered necessary to define the exact meaning of the scientific and technical words used."

[40] See footnote 5 and Supplement A.

[41] See Rules of procedure of the Commission on the Limits of the Continental Shelf, Doc. CLCS/40/Rev.1 of 17 April 2008, (CLCS/40) (hereafter the Rules of procedure or CLCS/40), and the Guidelines, footnote 38.

[42] Training manual, see footnote 22, I-52.

[43] "Given that Article 76 of the Convention includes scientific concepts which are subject to autonomous legal definitions, it is obvious that the scope of these provisions can only be determined according to legal hermeneutics" in Bjørn Kunoy, see footnote 19, p.311.

> Convention does not charge the Commission to consider and make recommendations on legal matters. However, the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it.[44]

The Commission takes this prerogative in order to execute its mandate. Therefore, the competence of the Commission is subordinated to the fulfilment of its technical functions. The CLCS cannot consider data and make recommendations without interpreting the legal framework in which its technical mandate lies. Interpretation is an attribute of its technical functions. In other words, interpretation is a quality belonging to the exercise of its technical functions.

2.1.2.2 Delimited attribution

The Commission has the duty to consider the data submitted and make recommendations on the submission. Going through the data submitted indicates that the Commission will have to deal with interpretations of the provisions of article 76 made by coastal States in their submissions. This function includes:

> [a]n assessment of the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit lines it proposes. At times, this may involve a choice between different interpretations of specific provisions of article 76. The Commission will have to make its own assessment of whether the interpretation a coastal State (implicitly) adopted in its submission actually is in accordance with article 76." [45]

One submission may use one methodology and another submission may use another methodology. The function of the Commission is not to say whether one interpretation, or one methodology used,[46] prevails over another. The role of the Commission is to assess the data submitted, that is to say, verify that the methodology used, by the submitting State, to delineate the limits of the shelf is in accordance with the provisions of article 76:

> [t]he competence of the CLCS is not to be interpreted restrictively as far as the evaluation of scientific and technical data submitted by the coastal State is concerned. The Commission has the function to make an independent assessment of the scientific and technical data submitted by a coastal State. This implies a power to establish whether the scientific and technical data

[44] Berlin conference, see footnote 10, p.4-5.

[45] Second Report of the Committee, Legal Issues of the Outer Continental Shelf, in International Law Association, *Report of the Seventy-Second Conference* (ILA, Toronto: 2006) (hereafter Toronto Conference), p.12; see footnote 10.

[46] See Training manual, footnote 22, I-53.

> submitted by a coastal State prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met.[47]

Yet, it seems that the Commission interprets legal provisions only to assess the scientific and technical data. To verify that the methodology used is in accordance with article 76 implies that the CLCS analyses article 76. Analysis cannot be done without interpretation. The CLCS has consequently to interpret to carry out its functions. Therefore, it is supported that the capacity of interpretation of the CLCS is limited to the exercise of its technical functions, and should only be recognized for these purposes.

These interpretations are made for the sole purpose of enabling the functioning of the CLCS; which means that its interpretations should allow the Commission to assess whether the data submitted are consistent with the object and purpose of the provisions. These interpretations are therefore made to judge whether submissions of the coastal States are valid in relation to Article 76 and its related provisions. Yet, the interpretative function of the CLCS is only recognised in the realm of the assessment of its technical functions. The interpretative capacities of the Commission are then limited.

To give to the Commission the power to interpret all provisions of the Convention would not make sense. The CLCS is not a legal but a technical body; its power of interpretation is justified for the performance of its technical functions. These technical functions are set forth and regulated by Article 76.[48] Therefore, the power of interpretation of the CLCS is enshrined in the frame of article 76, and does not extend to other provisions of the Convention.

Not being subordinated to another body and having normative competence, the capacity to interpret of the Commission could represent a threat for coastal States and their sovereignty. Indeed, it is up to coastal States to draw their boundaries. The power of the Commission in the process of delineation could threaten the flexibility of choice of coastal States. But a

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[47] These conditions refer to the "questions whether: a) the scientific and technical data submitted by the coastal State actually support the conclusions which are drawn from them (e.g. do submitted data indicate the existence of a specific sediment thickness); and b) these conclusions are in accordance with article 76 (e.g. when the data indicate that the sediment thickness at a specific point is 0.5% of the shortest distance of the foot of the slope, the specific point cannot be used to establish the outer limit of the continental shelf beyond 200 nautical miles)", Toronto conference, see footnote 45, p.13.

[48] CLCS/72, see footnote 31, p.10.

point must be raised, the capacity of interpretation of the Commission does not hold the competence of States Parties in that matter.[49]

The Commission may face situations that surpass its competence. Indeed, if the request has, in whole or in part, a legal content exceeding the capacities of interpretation of the Commission,[50] the latter will have to rely on a competent authority that has the competence to interpret.[51]

The interpretative attribute of the CLCS is restricted. When submissions contain legal questions the Commission cannot interpret the procedure that should be implemented in order to consider the data submitted and make recommendations is undermined. The CLCS cannot deal with the submission and carry out its technical functions. The Commission faces an impasse and is deadlocked.[52] Consequently, the Commission must bring the legal issue to a

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[49] "[The Commission's] interpretation of the Convention will not curtail the competence of States Parties to adopt authoritative interpretations of the Convention", Bjørn Kunoy, see footnote 19, p.312, referring to the General Assembly Official Records, A/49PV.77 (herafter A/49PV.77), p.3, where it was stated that "the meeting of States Parties is the supreme body in relation to the Convention".

[50] See footnote 48.

[51] Requests of legal opinions to the Legal Counsel of the United Nations have been used by the Commission as a mechanism to seek for interpretation from an external body when the question raised surpasses the CLCS's interpretative capacities. See CLCS/72, footnote 31; Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf, "Legal opinion whether it is permissibile, under the United Nations Convention on the Law of the Sea and the riles of procedures of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additionnal material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secreteriy-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission" (7 September 2005), Commission on the Limits of the Continenta Shelf, Sixteenth session (29 August-16 September 2005) (hereafter CLCS/46); CLCS/5, see footnote 12.

[52] Alex G. Oude Elferink, 'Causes, Consequences, and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf' in Clive R. Symmonds (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), p.253-272.

competent body which, once the answer is given, will allow the Commission to resume its functions.[53]

2.2 Extent of the interpretative attribute of the CLCS

The competence of the Commission is framed by the functions that have been assigned to it. That is to say, the Commission is competent to interpret certain provisions of UNCLOS to the extent that these interpretations help finding the outer limits of the continental shelf:

> [t]he Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit lines it proposes. At times, this may require the interpretation of specific provisions of article 76. The Commission will have to make its own assessment of whether the interpretation a coastal State has (implicitly) adopted in its submission actually is in accordance with article 76. At the same time, the requirement to consider submissions and make recommendations *in accordance with* article 76 indicates a limit on the scope for independent action by the Commission (emphasis added).[54]

The Commission seems to be entrusted with the function to interpret in order to make it possible to carry out the functions that have been explicitly assigned to it.[55] Yet, the capacities of the Commission to interpret are limited. The realm of its action is the framework in which it carries out its technical functions.

2.2.1 Restrictive mandate of the CLCS

The Commission needs to interpret to carry out its technical functions. The fulfilment of its technical functions seems so intertwined with the understanding of the legal provisions that it seems to the author that the CLCS has an interpretative attributive function. The latter would

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[53] Elie Jarmache wonders whether the Commission could have answer *proprio motu* to a question that call for interpretation of the Convention. He concludes that the principle of reality, the one that imposes the effective functioning of the CLCS, leads to deal with situations not provided for, sometimes within political conditions which make necessary a detour by the legal opinion of the Legal Counsel of the United Nations, see footnote 14, p.60; see CLCS/46, footnote 51.

[54] Berlin Conference, see footnote 10, p.5.

[55] "The Commission has the function to make an independent assessment of the scientific and technical data submitted by a coastal State. This implies a power to establish whether the scientific and technical data submitted by a coastal State prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met", Berlin Conference, idid.

be entrusted with the role to validate the outer limit lines of coastal States and with the function to interpret legal provisions. However, it is not clear whether the CLCS has the capacity to interpret article 76 or article 76 and other provisions.

2.2.1.1 Limited mandate of the CLCS

In a proposal to seek advice from the Legal Counsel of the United Nations, the following question was posed:[56]

> [w]hat mechanisms are available to the Commission on the Limits of the Continental Shelf to seek advice on matters of interpretation of provisions of the Convention other than those contained in article 76 and annex II as well as in the Statement of Understanding adopted 29 August 1980 by the Third United Nations Conference on the Law of the Sea?

Although the question was never brought to the Legal Counsel, some States Parties argued that "the Commission, in accordance with its mandate, should focus on matters of a scientific and technical nature and should refrain from looking into, or seeking advice on, legal matters of interpretation of provisions of the Convention other than those contained in article 76 and annex II".[57] It can be noted that the capacity to interpret is recognised through the expression "should refrain from *looking into* legal matters of interpretation of provisions of the Convention (emphasis added)".

Therefore, it seems that the Commission has competence in relation to article 76 and Annex II to UNCLOS. This view has been supported by the Chairperson of the Commission, in response to a statement on the competence of the CLCS, in which he said that "the Commission had the competence to interpret article 76 and annex II of the Convention for the fulfilment of its mandate but did not have the competence to interpret other provisions of the Convention that were not relevant to its mandate."[58]

The note contained in the Progress of work of the Commission does not mention the Statement of Understanding Concerning a Specific Method to Be Used in Establishing the Outer Edge of the Continental Margin, Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea. The question whether the CLCS can interpret it is raised. The Report of the Nineteenth Meeting of States Parties says that:

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[56] See CLCS/72, footnote 31, p.10.

[57] Ibid.

[58] See Report of the twenty-second Meeting of States Parties (4-11 June 2012), Meeting of States Parties (11 July 2012), twenty-second Meeting, (SPLOS/251) (hereafter SPLOS/251), paragraph 79, p.13-14.

> [t]he Commission [has the] ability to determine the scope of its deliberations in accordance with article 76 of, and Annex II to, the Convention *and* the Statement of Understanding (emphasis added).[59]

The Statement of Understanding concerns a specific method of delineation and has, consequently, to be applied by the Commission. If the Commission applies the criteria of the Statement of Understanding, the CLCS will have to deal with its interpretation. The interpretative attribute of the Commission must be borne by the CLCS in relation to the application of article 76 but also in relation to its related provisions: Annex II of UNCLOS and the Statement of Understanding.

In addition, the Commission faces legal issues that question the scope of its interpretative capacities. China brought a proposal for the inclusion of a supplementary item to the nineteenth Meeting of States Parties,[60] where it proposed 'in accordance with rule 7 of the rules of procedure [of the Meeting of States Parties], the inclusion in the agenda of a supplementary item entitled "International Seabed Area as the common heritage of mankind and article 121 of the United Nations Convention on the Law of the Sea'.[61] This proposal aimed to deal with the mandate of the Commission and its possibility to interpret provisions of the Convention and more specifically article 121 of the Convention.

In the twenty-third session of the CLCS, the Chairman of the Commission on the progress of work of the Commission acknowledged that, "[the Commission] has no role on matters relating to the legal interpretation of article 121 of the Convention".[62] The Commission does not have the power to interpret other provisions of the Convention beyond article 76 and its related provisions.

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[59] Report of the nineteenth Meeting of States Parties (22-26 June 2009), Meeting of States Parties (24 July 2009), nineteenth Meeting (SPLOS/203) (hereafter SPLOS/203), paragraph 79, p.13.

[60] Meeting of States Parties, "Proposal for the inclusion of a supplementary item in the agenda of the nineteenth Meeting of States Parties, Note verbale date 21 May 2009 from the Permanent Mission of China to the United Nations addressed to the Secretary-General" (22 May 2009), Meeting of States Parties (22 May 2009), nineteenth Meeting (SPLOS/196) (hereafter SPLOS/196).

[61] See SPLOS/196, ibid.

[62] See CLCS/72, footnote 31.

The issue whether an island generates an EEZ, a continental shelf, and if the test of appurtenance is demonstrated,[63] an extended continental shelf, affects the work of the Commission. The technical assessment of the outer limit lines depends on whether or not the island generates an (extended) continental shelf.

The Commission has no capacity to interpret such provisions because it is not the responsibility of the CLCS to say whether a rock can sustain human habitation or economic life.[64] The status of the island is related to the work of the Commission but its status does not directly affect the Commission. It affects the coastal States, which will be able to submit data to the CLCS. The Commission has only to deal with the consequences of such decision. If the island can sustain human habitation or economic life, the island can generate a continental shelf; and if the continental shelf goes beyond 200 nautical miles, the Commission will then be competent to validate the outer limit lines delineated by the coastal States.

The Commission cannot deal with this issue because giving an answer to the status of an island overrides the scope of its capacities. It does not have the mandate to say whether coastal States have a continental shelf. Its role is to say whether the continental shelf passes the test of appurtenance (that is to say whether the shelf goes beyond 200 nautical miles) and watch for exaggerated claims.

The Commission does not have mandate to deal with legal issues.[65] The Commission has the mandate to deal with scientific and technical issues in relation to the application of article 76; and in that context the CLCS is recognised as having the capacity to interpret article 76 and its related provisions because the interpretation of these provisions is intertwined with its assessment of the data submitted and the making of recommendations. It is the role of legal or judicial organs to determine whether an island can generate a continental shelf.

In conclusion, the Commission has a role to validate submissions of coastal States,[66] a procedural role of legitimisation,[67] and seems to be recognised as having an interpretative

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[63] Training manual, see footnote 22, I-35.

[64] Article 121 paragraph 3, UNCLOS.

[65] SPLOS/203, see footnote 59, paragraph 12, p.4.

[66] The lines could still be challenged by the neighbouring States, adjacent or opposite to the submitting State. The line with the Area is to be differentiated with the borders with neighbouring States. The border between two States is the result of a process of agreement between the two States. The boundary with the Area is fixed

function in order to assess its technical role. Yet, interpretation is not one of the roles of the Commission. It is a function knotted to its mandate.

2.2.1.2 Mandate of States Parties

In the Report of the Nineteenth Meeting of States Parties it is mentioned that the States Parties expressed the view that:

> [t]he Meeting should not confine itself to discussing budgetary and administrative matters. In that connection, several delegations observed that interpreting the Convention was one of the prerogatives of the Meeting of States Parties. It was also recalled that the Meeting had already adopted decisions that amounted to an interpretation of the Convention.[68]

Other delegations were of the view that:

> [t]he mandate of the Meeting of States Parties was to deal with administrative and budgetary issues. These delegations emphasized that the Meeting should not engage in the interpretation of the Convention. It was also observed that the Convention contained appropriate mechanisms that could be resorted to for the interpretation of its provisions. A view was expressed that it would be inappropriate for the Meeting of States Parties to advise on the work of the Commission, which was an independent body.[69]

Matters of interpretation seem to be the mandate of the States Parties in the view of some delegations. However, some delegations argue that the Meeting of States Parties (or Meeting) does not have such a function because it would impinge on the functions of the Commission.

Overall, it seems that the Meeting has the power to provide guidance. In fact, in the same Report, it is said that the Commission, when it faces legal issues for which it does not have the capacity to interpret,[70] "might provide the Meeting with a list of legal issues on which it required guidance."[71] The Report points out that the Meeting "had the exclusive power to provide such guidance and to decide in which cases the Commission might seek a legal opinion from the Legal Counsel of the United Nations".[72] Therefore, the Meeting seems to be

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unilaterally by the coastal State, after submission of the limits of the outer edge of its continental margin to the CLCS.

[67] Ted L. McDorman, see footnote 2, the author says that the "the principal role of the Commission is as a *legitimator* of the claims of a coastal State".

[68] SPLOS/203, see footnote 59, paragraph 11, p.3.

[69] SPLOS/203, ibid., paragraph 13, p.4.

[70] In the case of interpretation of article 121 of UNCLOS.

[71] SPLOS/203, see footnote 59, paragraph 72, p.12.

[72] SPLOS/203, ibid., paragraph 73, p.13.

competent to interpret the Convention, and seems to be the organ towards which the Commission should refer to when it faces a legal issue that its interpretative attribute does not permit to elucidate.

The twentieth Report reiterates that the Meeting of States Parties would be a competent organ to deal with interpretations of the Convention and, "several delegations reiterated that the Meeting of States Parties was the forum for the exchange of views and discussions on matters of a general nature relating to the Convention."[73] It is explained that "such exchange [would facilitate] the implementation of the Convention and [would lead] to further development of the law of the sea."[74]

Therefore, in relation to interpretation of the Convention, it seems that the States Parties would discuss and exchange views on the Convention.[75] The use of such expressions depicts the scope of competence of the States Parties. They would not interpret the provisions of the Convention but would rather consider the current issues in a political surrounding.[76] Therefore, matter of interpretation should be forwarded to a competent legal body, the International Tribunal for the Law of the Sea (the Tribunal, or ITLOS), by the States Parties.

2.2.2 Restrictive scope of interpretation of the CLCS

The CLCS performs interpretative functions in order to assess the submitted data and make recommendations. The Commission has to use the rules of legal interpretation as the terms the CLCS should interpret are plunged into a legal context.[77] The Commission should take into account the object and purpose of the Convention and the will of States Parties in its interpretation of article 76 and its related provisions. Consequently, the Commission will use methods of interpretation that are usually employed by States Parties to the Treaty. To

[73] Report of the twentieth Meeting of States Parties (14-18 June 2010), twentieth Meeting, Meeting of States Parties (13 July 2010), (SPLOS/218) (hereafter SPLOS/218), paragraph 112, p.18.

[74] SPLOS/218, ibid., paragraph 112, p.18.

[75] See "decisions of Meeting of States Parties, such as those contained in document SPLOS/72, SPLOS/183 and SPLOS/201, related to the implementation of the Convention" in SPLOS/218, ibid.

[76] SPLOS/218, ibid.

[77] Berlin conference, see footnote 10, p.6.

interpret, the CLCS should use the existing rules of interpretation and refer to the "canons of treaty interpretation".[78]

2.2.2.1 The intention of the States Parties

The data must correspond to the rules and formulae of Article 76. The Commission must judge the value of the data in relation to the provisions of Article 76. This judgment must be made in accordance with the existing methods of interpretation.

There are mainly three schools of thought in treaty interpretation law, namely, the "intentions" approach which is characterized as subjective, the "textual" approach characterized as objective, and the so-called "teleological" or "object and purpose" approach.[79]

Interpretation of a treaty can be based on the "plain and natural meaning" of the words and phrases.[80] This textual approach can be said to be objective.[81] In the process of interpretation it is only referred to the words of the provisions, not to its context.

Grammatical interpretation however should not result in an absurdity or in marked inconsistency.[82] The intention of the parties should be at the heart of the process of interpretation of a treaty. It is the intention of the parties at the time of the drafting of the text and the particular meaning attached by the parties to the words and phrases at the time of the drafting of the treaty that should prevail.[83]

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[78] See Bjørn Kunoy, footnote 19, p.311.

[79] See Proshanto K. Mukherjee, *Maritime Legislation* (World Maritime University) (2002) p.134.

[80] The "words 'largest ship-owning nations' in art 28 of the convention of 6 March 1948, establishing the Organisation, was held to mean the countries with the largest figures of registered tonnage, without regard to questions of the real national ownership" in I.A. Shearer (ed.) *Starke's International Law*, 11th ed., 1994, "interpretation of treaties" 434-438, p.435, referring to the *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation* ICJ 1960, 150.

[81] See P. K. Mukherjee, footnote 79, p.134.

[82] See Starke's International Law, footnote 80, p.434-438.

[83] Ibid.

It should not be forgotten that the goal of a treaty is to write down agreements between States on a certain issue,[84] and thus to define the relations between two or more States in relation to a certain point. A treaty is based on willingness of international legal entities, States, to enter into an agreement. The entry into force of this treaty marks the will of States to be bound by the provisions set up in this agreement.

Therefore it is in the interest of the Commission to establish an interpretation that will favour States Parties' actions and relations. Thus interpretation of treaties should not result in inconsistency or absurdity, because these could cause the failure of the purpose and application of the treaty.

The grammatical interpretation more than meaning that the interpretation of a treaty should be the exegesis of the words of the provisions,[85] should mean that the text should be interpreted in the context of the intention of the parties at the moment the text has been drafted. According to Sinclair, each approach is not exclusive of the others:[86]

> [t]he most rigid adherent of the textual approach would scarcely argue that a tribunal should deliberately seek to establish a meaning which was not within the contemplation, or intention, of any of the parties to the dispute; and the most rigid adherent of the intentions approach would not seek to deny that the text of the treaty will constitute evidence of what was the intent of the parties.[87]

Thus, the CLCS, in the process of interpretation, should not prefer an approach over another. The Commission should, in analogy to a tribunal, interpret the provisions in order to give effect to the intention of the States Parties:

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[84] In accordance with the definition adopted in Article 2 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p.331 (herafter Vienna Convention), a treaty may be defined as "an agreement whereby two ro more states establish or seek to establish between themselves a relationship governed by international law" in P. K. Mukherjee, footnote 79, p.117.

[85] In the context of a treaty, it may be that a word has a specific meaning. Thus, the use of this word in the treaty have to always refer to this specific meaning. See the meaning of continental shelf and continental margin in DOALOS (ed.) *Definition of the Continental Shelf*, footnote 6.

[86] See P. K. Mukherjee, footnote 79, p.134.

[87] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (1984), p.115.

> [t]he main task of any tribunal called upon to construe or apply or interpret a treaty is to give effect to the expressed intention of the parties, that is 'their intention as expressed in the words used by them in the light of the surrounding circumstances'.[88]

The Vienna Convention, article 31 paragraph 1 states that "a treaty is to be interpreted in good faith 'in accordance with the ordinary meaning to be given' to its terms in their context and in the light of its *object and purpose* (emphasis added)." This interpretation is usually used when the sense of a word or phrase is doubtful.[89]

This "object and purpose" interpretation[90] should be understood to mean that the treaty should be interpreted in the context of its creation and the ambition embedded in it. Under this approach, the provisions should be interpreted in a way to ensure that the word or expression that is the subject of interpretation will allow the parties to the treaty to achieve the goal they intended to agree when they concluded the treaty.

Besides, the interpretation in light of the object and purpose does not mean that the whole treaty needs necessarily to be examined to find the sense of the particular word. It rather means that the word will have to be examined in the context of its particular provision and in relation to the object and purpose at the time of the drafting.[91]

Moreover, the process of interpretation of a treaty should give an interpretation in which the reasonable meaning of words and phrases is preferred, and in which a consistent meaning is given to different portions of the instrument.[92] Besides, interpretation should be done in conformity with previous practice and international law.

Interpretation should be done with reasonableness and consistency. It means that interpretation of words and expressions should not go beyond the intent of the parties. In other words, interpretation should be done in a context of objectivity. Thus, interpretation should be reasonable in the sense that the interpretation should not go beyond what States intended to bind themselves, "since it is to be assumed that states entering into a treaty are as

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[88] I. McNair, *The Law of Treaties* (1961), p.365.

[89] See Starke's international law, footnote 80, p.434-438.

[90] This expression has been incorporated into Article 31, paragraph 1 of the Vienna Convention, see footnote 84.

[91] See Starke's international law, footnote 80.

[92] Ibid.

a rule unwilling to limit their sovereignty."[93] Starke adds that "ambiguous provisions should be given a meaning which is the least restrictive upon a party's sovereignty, or which casts the least onerous obligations."[94]

Thus, the Commission, in the process of interpretation, should render the Convention most effective and useful. In other words, interpretation of the provisions should favour the concrete application of article 76. The CLCS should enable through its interpretations a better application of the provisions of the Convention and thus permit the outer limits to be delineated.

If the grammatical interpretation does not permit the understanding of the meaning of the terms, as is the case here,[95] the Commission should defer to an interpretation based on the object and purpose of the provisions;[96] so to speak, to the purpose and the context in which the agreement was written.

2.2.2.2 Lack of authoritative competence

The Commission takes the power to interpret to carry out its functions. In fact, it is a matter of proper exercise of its functions: compliance with the rules established by the Convention and, consequently, smooth functioning of the process of delineation of the continental shelf. It could be said that the CLCS has no competence *per se* to interpret, but has rather an interpretative attribute attached to the fulfillment of its technical functions.

The interpretations done by the CLCS are recognised by some coastal States because they facilitate the work of the Commission and help harmonising submissions of coastal States; but the interpretations are not authoritative.[97] The Commission is not a legitimate interpretative body. The CLCS does not have the competence, it takes it. The nature of the organ may explain why the Commission has no authoritive power to interpret. The CLCS is

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[93] Ibid.

[94] Ibid.

[95] Ambivalence between the scientific and the legal terms.

[96] See footnote 84.

[97] The Commission "is not vested with powers to adopt authoritative interpretations of the Convention," in Bjørn Kunoy, footnote 19, p.312.

not a legal body; it is not composed of jurists. The composition of the Commission represents an obstacle to the possibility for the CLCS to carry out this function with legitimacy.

The CLCS is a technical body and the Commission can interpret article 76 and its related provisions for the sole purpose of carrying out its technical functions. The role of interpretation of the Commission is justified but is not yet supported by legal instruments or by every States Party.[98] That is why the CLCS has at the moment only the capacity to interpret but does not have the competence. The Commission will have competence when all States Parties will recognise the interpretative function of the CLCS.

The latter will have to be recognised to have the competence to interpret article 76 and its related provisions by States Parties. In fact, the increasing number of submissions and the questions the Commission has to handle are expanding and demand from the CLCS more work that what has been planned at the Third United Nations Conference on the Law of the Sea. The delineation of the extended continental shelf is not only about application of formulae, it brings legal and political issues in the equation. The submissions contain more than scientific information. In brief, the mandate of the CLCS is amplifying inexorably. The Commission has to deal with issues that go beyond the scope of its original mandate. This will force recognition of the Commission's interpretative competence.

In the current context, UNCLOS or States Parties do not distinctly vest the Commission with an interpretative competence. The competence that has the Commission is recognised but is not currently legitimised by a legal instrument. Judge Wolfrum said that the CLCS provides "guidance" to the interpretation of Article 76.[99] This means that the Commission, when it interprets, is simply adopting a "course of conduct".[100] When the Commission interprets article 76 and its related provisions, it does so only in order to give the *modus operandi* of the provisions. Its interpretations are not authoritative in the sense that they are not intended to

[98] CLCS/72, footnote 31, p.10.

[99] In Bjørn Kunoy, footnote 19.

[100] Ibid.

"dire le droit".[101] In the current context, the Commission is not recognised with the power to interpret the Convention; only the States Parties are recognised to have this competence.[102]

Some international organs are vested with the competence and the authority to interpret legal documents. The Legal Counsel of the United Nations seemed to have the competence to give legal guidance to the CLCS through legal opinions.[103] However, the practice of acquiring legal opinion seems to be disappearing; probably because of lack of legitimacy of the Division of Ocean Affairs and the Law of the Sea. In fact, States Parties are the ones competent to interpret the treaty (UNCLOS) by virtue of their sovereignty.

Consequently, the Commission is not currently recognised to have the competence to interpret because of lack of legal authority, and States Parties seem to appear as the competent powers to deal with the interpretation of article 76 and its related provisions. The Meeting of States Parties (the Meeting), gathering the States party to UNCLOS could be the competent authority to deal with interpretation of the Convention. Yet, the Meeting is basically diplomatic conferences. It is doubtful that such meetings help to ensure clear definitions of technical terms. Each State Party would like to defend its position and its interpretation of the said provisions. Thus the Meeting of States Parties may bring more ambiguities to the definition of the provisions than precision.

As a conclusion, it seems that the appropriate body vested with the competent authority to deal with legal interpretation of the whole Convention would be a court or a tribunal.[104] ITLOS should be the judicial organ competent to deal with interpretation of the Convention, for ITLOS is specialised in law of the sea matters.

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[101] "lay down the law" in Elie Jarmache, footnote 14, p.66.

[102] Bjørn Kunoy., referring to the A/49PV.77, footnote 38, p.3.

[103] CLCS/72, footnote 31, p.10; Item 16, Commission on the Limits of the Continental Shelf, Twenty-ninth session (19 March-27 April 2012), Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chairperson (30 April 2012), (CLCS/74) (hereafter CLCS/74), p.10. However, the competence of the Legal Counsel was questioned by the Meeting of States Parties which "had the exclusive power to provide such guidance and to decide in which cases the Commission might seek a legal opinion from the Legal Counsel", SPLOS/203, footnote 59.

[104] Betsy Baker, 'States Parties and the Commission on the Limits of the Continental Shelf', in Ndiaye and Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) p.683, see footnote 36.

3 Possibility to seek an advisory opinion for the CLCS

Under the provisions of UNCLOS, the CLCS cannot seek an advisory opinion from ITLOS.[105] The CLCS is not recognised as an international body having the capacity to access the dispute settlement mechanisms of Part XV of UNCLOS (article 287). The Commission on the Limits of the Continental Shelf is not a legal body, is not composed of jurists and is not recognised the possibility to legally interact with the Tribunal or the International Seabed Authority. Each of these organisations works independently.

The Commission was created to assess data submitted by coastal States to ensure that the outer limits of the continental shelf, delimitated by coastal States in a sovereign manner, would be delineated in accordance with the provisions of article 76. However, in order for the Commission to carry out its technical functions, the CLCS needs to interpret article 76 and its related provisions. Even though the drafters of the Convention did not intend to, the Commission has to take on a legal mandate to carry out its functions.

Yet, the interpretative attribute of the Commission is limited to the extent required to carry out its technical functions. Where the Commission cannot interpret, the CLCS should be given the possibility to ask for legal interpretation to the Tribunal. The question whether the CLCS can take on the capacity to seek an advisory opinion is raised. It has been argued that the interpretative capacity of the Commission needs to be recognised because the CLCS needs to interpret to carry out its functions. Along the same line of reasoning, the capacity to seek advisory opinions for the Commission needs to be recognised, because the CLCS cannot carry out its functions when submissions contain a legal issue it cannot answer.

This thesis encourages a liberal approach on the interpretation of UNCLOS and promotes the efficient work of the CLCS. It is in the interest of the Commission and in the interest of States Parties, potential submitting States to the Commission, to allow the latter to seek an advisory opinion. In the case where the Commission is stuck and cannot assess the data submitted because the submission contain legal issues the Commission cannot deal with, the

[105] See article 287 of UNCLOS.

process of delimitation of the extended continental shelf is threatened. Parties to the disputes might use the judicial proceedings but they may also be interested in seeking an advisory opinion on the subject matter.

Under certain conditions, the advisory procedure might allow to answer the legal questions faster and more efficiently. In fact, if the parties to the dispute agree to seek an advisory opinion, it might allow the parties to get an answer to the legal question and allow at the same time the Commission to resume its functions, consequently allowing the coastal States to delimitate its continental shelf. Therefore, States Parties to the Convention and the Tribunal should recognise the possibility to seek advisory opinions to the CLCS. This issue, like the issue concerning the interpretative capacity of the Commission, depends on the good will of States Parties and their ability to distance themselves from the concept of sovereignty.

The Commission cannot entrust itself with the competence to seek advisory opinions; it should be entrusted with such competence by another body. Currently, the Meeting of States Parties does not seem to be willing to allow the CLCS to seek advisory opinions. The Meeting or States Parties as a whole do not recognise the interpretative function of the CLCS. Not all States Parties recognise the legal capacity of the Commission. If they do not recognise this function, they consequently do not recognise the possibility for the Commission to seek advisory opinions.

States Parties want to keep their hands on the implementation of the Convention. The Meeting of States Parties (the Meeting) might allow the Commission to seek advisory opinions but only when the Meeting grants express permission. The solution would be that ITLOS grant access to the advisory procedure of the Tribunal directly to the CLCS on the basis of article 21 of the Statute. The Tribunal would have to include the Commission, as a competent organ to seek an advisory opinion, in the provisions of article 138 of the Rules of the Tribunal or in a separate article. Yet, States Parties might object. In fact, it would give legal capacity to a technical organ, would extend the scope of the mandate of the Commission, and affect the establishment of the outer limits line.

On a long-term basis, the advisory procedure needs to be opened to the CLCS, directly. The Meeting of States Parties and the Tribunal should understand that the CLCS needs to be granted direct access to the advisory procedure in order to carry out its functions. The intermediate solution is, in the meanwhile, to open the extent of the existing provisions to

allow the authorised or legitimate organs to seek advisory opinions on questions concerning the interpretation of the Convention that affects the work of the Commission.

3.1 Organs authorised to seek an avisory opinion

The Seabed Disputes Chamber (or Chamber) exercises the advisory function of the ITLOS on matters related to activities within the scope of Part XI of the Convention. The International Seabed Authority is the international organisation competent to seek advisory opinions on these matters to the Chamber.

3.1.1 International Seabed Authority

The International Seabed Authority is an autonomous international organisation established under the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.[106] The Authority is the organisation through which States Parties to the Convention shall, in accordance with the regime for the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organise and control activities in the Area, particularly with a view to administering the resources of the Area.[107]

The Authority ”shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”,[108] which are, ”in accordance with [Part XI], [to] organize and control activities in the Area, particularly with a view to administering the resources of the Area.”[109]

[106] See International Seabed Authority homepage, available at http://www.isa.org.jm/en/about accessed on May 23rd, 2013.

[107] Ibid.

[108] Article 176 of UNCLOS.

[109] Article 157 of UNCLOS.

The Authority comprises[110] the Assembly,[111] consisting of all members of the Authority,[112] which is the supreme organ of the Authority and establishes general policies;[113] the Council,[114] consisting of 36 members of the Authority elected by the Assembly,[115] which is the executive organ of the Authority;[116] the Secretariat,[117] consisting of such qualified scientific and technical and other personnel as may be required to fulfill the administrative functions of the Authority,[118] which has an international character;[119] and the Enterprise,[120] which is the organ of the Authority which ”shall carry out activities in the Area directly, [...] as well as the transporting, processing and marketing of minerals recovered from the Area”,[121] and has legal capacity.[122]

3.1.1.1 The procedure of advisory opinion offered to the ISA

The Assembly or the Council of the ISA can request an advisory opinion from the Seabed Disputes Chamber of the ITLOS on legal questions arising within the scope of their activities.[123] Article 191 of UNCLOS is to be read in conjunction with article 131 of the

[110] See Judge Tafsir Malick Ndiaye, ”The Advisory Function of the International Tribunal for the Law of the Sea”, 9 Chinese JIL (2010), for a comprehensive analysis on the advisory function of the ITLOS, paragraphs 23-31 for the powers and functions of the Assembly and the Council.

[111] See Sub-section B, Section 4, Part XI of UNCLOS.

[112] ”All States Parties [to UNCLOS] are *ipso facto* members of the Authority” in Article 156 paragraph 2.

[113] See article 160 UNCLOS.

[114] See Sub-section C, Section 4, Part XI of UNCLOS.

[115] See election procedure in article 161 UNCLOS.

[116] See article 162 UNCLOS.

[117] See Sub-section D, Section 4, Part XI of UNCLOS.

[118] See article 167 UNCLOS.

[119] See article 168 UNCLOS.

[120] See Sub-section E, Section 4, Part XI of UNCLOS.

[121] See article 170 paragraph 1 UNCLOS.

[122] See article 170 paragraph 2 UNCLOS.

[123] See article 191 UNCLOS and Supplement B.

Rules of the Tribunal.[124] The latter states that the request for an advisory opinion "shall contain a precise statement of the question."

The Seabed Disputes Chamber has competence to respond to a request for an advisory opinion issued by the Assembly or the Council if the question is legal in substance,[125] arises within the scope of activities of the Assembly or the Council;[126] and if the request contains a precise statement.[127] The Chamber will have to decide whether the question falls within the scope of activities of the body that seeks the advisory opinion.[128]

The Chamber should take a liberal approach in order to include in the activities of the Assembly or the Council any question that would be raised by them. Where the rights of the States Parties are affected in the Area, the Chamber should allow the Assembly or the Council to seek an advisory opinion. The rights of the States Parties are not only affected by exploration or exploitation activities in the Area. Maritime boundary delimitation affects as well the Area and the activities in it. Legal questions in relation to the status of an island affect the delimitation of the territorial sea and the continental shelf,[129] which in turn affects the establishment of national jurisdiction and thus the limit between the latter and the Area and consequently the activities therein.

Moreover, it seems that States Parties should use the advisory procedure provided for in the Convention. If the Assembly or the Council, and through it States Parties, wish to ask for an

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[124] See Supplement B containing articles 159, 191 UNCLOS, article 21 of the Statute of the ITLOS, and articles 131, 138 of the Rules of the Tribunal.

[125] See Ndiaye, footnote 110, paragraph 41, referring to the approach adopted by the ICJ in term of interpretation of the concept of a "legal question": "Most of the time when a question is submitted, [the ICJ] considers it an abstract issue. It avoids considering the motives behind the request for advisory opinion and the arguments put forward by the political organs as well as the existence of a dispute between two or more parties relating to the issue for which an advisory opinion is sought."

[126] See footnote 123 and Supplement B.

[127] Article 131 Rules of the Tribunal in Supplement B.

[128] The Chamber will have to decide whether it has jurisdiction. See Ndiaye, footnote 110, paragraph 42-43: "[t]he Seabed Disputes Chamber will have to urgently define the scope of the discretionary powers of the Authority".

[129] Under this section the terms continental shelf refers to the whole continental margin, whether going beyond 200 nautical miles or not.

advisory opinion that would benefit the application or the interpretation of the Convention, the Tribunal should take this opportunity to interpret the provisions widely to put itself as the competent and authoritative body in matter of interpretation of the Convention. The Tribunal should open the advisory procedure before the Chamber on issues that affects, directly and indirectly, the Area and the activities therein.

Article 159 paragraph 10 of UNCLOS states that the Seabed Disputes Chamber may also be competent[130] to give an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter. The proposal is introduced to the Chamber upon a request addressed to the President of the Assembly and sponsored by at least one fourth of the members of the Authority.[131] The possibilities for seeking an advisory opinion under this provision are broad. The advisory opinion may be given on "any matter". It would be assumed that the proposal should be in relation to the Area and its resources.[132] However, the States Parties should take this opportunity to take a liberal approach and thus use this mechanism to seek advisory opinions on any matter related to the Area, and thus its extent.

The fact that the proposal has to be sponsored by one fourth of the members, thus States Parties, may prevent the question from being sought. However, in the context of seeking an advisory opinion to get an interpretation of provisions of the Convention, it is unlikely that States Parties refuse or reject such a proposal. It is in the interest of States to get clarification on the application of the Convention.

Besides, articles 159 and 191 of UNCLOS, and article 131 of the Rules of the Tribunal have to be read together with article 21 of the Statutes of the Tribunal. The latter states that the Tribunal's jurisdiction includes "*all matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal (emphasis added)".[133] It provides that the Tribunal has a large competence and can thus deal with advisory opinions, not only disputes. This provision is to be seen as the founding principles of the liberal approach to be taken by the

[130] See the requirements in the article, in Supplement B.

[131] Article 159 paragraph 10 UNCLOS in Supplement B.

[132] Article 137 UNCLOS.

[133] Article 21 of the Statutes of the International Tribunal for the Law of the Sea, in Supplement B.

Tribunal regarding its competence.[134] It is from this article that the Tribunal should legitimise its broad competence in regards to its mandate and functions. The Tribunal should welcome advisory opinions for the sake of clarification of the Convention.

Where the Convention did not provide for, the Tribunal should create law, interpret provisions in a broad sense or amend the provisions,[135] in order to ensure effective application of the Convention. This could be called the functional requirements or functional needs of the Convention.[136] Where legal changes need to be introduced out of necessity, the Tribunal should assume competence to deal with the matter and interpret the provisions of the Convention to provide practical solutions to the deadlocks encountered.

3.1.1.2 The States Parties as a link between the CLCS and the advisory procedure

The Assembly or the Council, as bodies of the Authority, can seek advisory opinions from the Seabed Disputes Chamber. Consequently, it is not States Parties who seek advisory opinions but an international organisation, the ISA. In this thesis, a mechanism is sought to allow the CLCS to get an interpretation of the Convention that it cannot elucidate itself in order for it to avoid a deadlock in the process of the assessment of technical data.

If the Assembly or the Council seeks an advisory opinion, it is the Authority that gets an answer to a legal question, not the Commission. However, the competent body issues the question under the will of States Parties. In fact, the Assembly and the Council are the representatives of States Parties. The ISA is an intergovernmental organisation and as such represents States and acts under the directions of the latter. The policies undertaken by the Authority are directed by the will of States Parties. Consequently, even though the advisory opinion would be issued by the ITLOS to the Authority, the answer could be applicable by the Commission. In fact, the States Parties to the ISA are also probable submitting States to the CLCS. The coastal States could annex the advisory opinion to their submission to the CLCS. The coastal States could be the link between the CLCS and the advisory procedure.

It seems difficult to admit the CLCS to have direct access to the response to the advisory opinion issued by the Chamber to the ISA. The two organs are not linked in terms of

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[134] and its chambers.

[135] by way of interpretation.

[136] See P. Chandrasekhara Rao, "ITLOS: The First Six Years", Max Planck UNYB 6 (2002), p.211.

procedure. The activities of the Commission and the Authority are linked in terms of jurisdiction. The extended continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured is situated in the Common heritage of mankind.[137] In fact, coastal States should make payments and contributions to the Authority with respect to the exploitation of the continental shelf beyond 200 nautical miles.[138] Therefore, the delineation of the extended continental shelf impacts the Area and its management. Yet, the Authority and the Commission do not entertain links under the provisions of the Convention. The work of the two is independent. The Commission thus cannot use the response to the request for advisory opinion directly. The States Parties or submitting States are the link between the Commission and the response.

The advisory opinion to be recognised as being of the competence of the Tribunal has to be in the frame of the activities of the Assembly or the Council. The activities of both these bodies are executive, they give orientations to the work of the Authority, in other words, they elaborate the policies of the Authority. The Common Heritage of Mankind[139] is affected by the delimitation of extended continental shelves. In fact, "in carrying out [its] work, the Commission help[s] give practical meaning to the concept of the common heritage of mankind."[140] Policies of exploration and exploitation of mineral resources are dependent on the delineation of the outer limit lines of the continental shelves. At the twenty-second session of the meeting of States Parties, the Chairperson of the Commission expressed the view that "the work of the Commission was relevant to, and complemented, the work of the

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[137] In the personal opinion of the author, the extended continental shelf is not situated in the Area. The Area starts where national jurisdictions cease. The extended continental shelf is in the national jurisdiction of the coastal State and the coastal States exercises sovereign rights over the resources of the shelf. The mineral resources in the portion of the shelf that extends beyond 200 nautical miles are subjected to payment to the Authority. Thus, the sovereign rights of the Coastal States, in this portion, are amputated. This portion is subjected to a *sui generis* status. It forms part of the common heritage of mankind, although being within national jurisdiction.

[138] Article 82 UNCLOS. See Report on Article 82 of the 1982 UN Convention on the Law of the Sea (UNCLOS), Outer continental shelf, International Law Association, Rio de Janeiro Conference (2008) (hereafter Rio Conference); see Virginia Commentary on Article 82, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Vol. II (1993) p.315-381.

[139] Article 136 UNCLOS.

[140] See SPLOS/251, footnote 58, paragraph 68.

Tribunal and the Authority, and *vice versa*."[141] Therefore, it seems that the Authority, through the Assembly or the Council, has competence to seek advisory opinions on legal questions in relation to the delimitation of the extended continental shelf.

In conclusion, if the provisions of article 191 of UNCLOS and article 131 of the Rules of the Tribunal are interpreted in a wide sense by ITLOS, it will allow the ISA to seek advisory opinions on legal questions about the delineation of the extended continental shelf. The States Parties, under the umbrella of the competent bodies of the Authority, would be able to use the mechanism offered under article 191 of UNCLOS to seek an advisory opinion on a legal question relating to the delimitation of the shelf and thus use the answer of the Tribunal in their submission to the Commission. It may favour the interpretation of legal provisions of the Convention for the CLCS, and thus favour its technical assessment, if the States Parties, acting as coastal States,[142] annex this advisory opinion to the information submitted to the Commission.

3.1.2 International agreements

Besides the Seabed Disputes Chamber, the Tribunal, as a full court, may also be competent to deal with advisory opinions issued under an international agreement that "specifically provides for the submission to the Tribunal of a request for such an opinion."[143]

3.1.2.1 Support to the creation of advisory opinion for the full court

It is not mentioned either in the Convention or in the Statutes that the Tribunal could be competent to respond to an advisory opinion as a full court. It is during the drafting of the Rules of the Tribunal, in 1996, that the Tribunal took the initiative to insert article 138 on the

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[141] Ibid., par. 68.

[142] See definition of coastal States and difference between coastal States and States Parties in "The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea", Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea at the 73rd Biennal Conference of the International Law Association, Rio de Janeiro, Brazil, 21 August 2008, p.5.

[143] Article 138 of the Rules of the Tribunal, in Supplement B.

possibility for the Tribunal to respond to an advisory opinion.[144] The Tribunal created this mechanism under the umbrella of article 21 of the Statutes which gives competence to the Tribunal on "all disputes and *all applications* submitted to it (emphasis added)".

Some States Parties and intergovernmental organisations discussed the establishment of such a mechanism. The Director General of the Regional Fisheries Committee of the Gulf of Guinea addressed the issue regarding the advisory jurisdiction of the Tribunal,[145]as well as the Vice Prime Minister of Singapore who said that "[t]he ITLOS should be empowered to offer advisory opinions, like the [ICJ]".[146] States Parties[147] also raised the issue whether "regional fisheries management organizations would be authorized to request an advisory opinion".[148] Some delegations, at the 16th session of the meeting of States Parties expressed a strong interest in such a procedure;[149] and it seems that "there [was] thus a general movement in favour of the advisory jurisdiction of the Tribunal, an expression of support from States Parties to the Convention, which seem to consider it as a fallback procedure."[150] Therefore, it appears that the creation of article 138 of the Rules of the Tribunal, although not intended by the Convention, was created by the Tribunal with or under the will of States Parties.

3.1.2.2 A procedure opened to international organisations

Article 138, paragraph 10 of the Rules states that "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an

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[144] See Ndiaye, footnote 110, paragraph 58.

[145] Second regional workshop held in Libreville (Gabon) from 23 to 27 March 2007, in Ndiaye, footnote 110, paragraph 66.

[146] Fourth workshop of the Tribunal held in Singapore, in Ndiaye, ibid., referring to Malaysian, Singapore Press (30 May 2007), World News Connection (Newswire), 30 May 2007, available at Westlaw, International News.

[147] The States Parties concerned were Lesotho, Namibia, South Africa and Mozambique. See Ndiaye, ibid., par.67 and his footnotes 65-66.

[148] See Ndiaye, ibid., referring to the question asked by the delegation of Namibia; in ITLOS Report on Regional Workshops of 23 February 2010, 4. See *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, submitted 28 March 2013 to the ITLOS full court.

[149] See Ndiaye, footnote 110, par.68.

[150] Ibid.

opinion." Thus, comes the question whether an advisory opinion should only be made by organs of some organisations, and not by individual States.[151] In fact, the provisions of article 138 apply to "international agreement", which means that international organisations would be the organs to seek an advisory opinion of the full court.

Underlying the wording of article 138 appear the uncertainties relating to who may seek an advisory opinion from the Tribunal. In fact, the expression "international agreement" may refer to the founding treaty[152] of an international organisation. In that case, the latter is likely to contain different bodies and charge one of them with the possibility to seek an advisory opinion to the Tribunal. If the international agreement is just a convention, there is no need to create an international organisation and entrust one of its bodies with the capacity to seek an advisory opinion to the full court. In that case, any international agreement that is related to the scope of the Convention and that gives possibility to seek an advisory opinion enters into the framework of article 138. Thus, any agreement, between international organisations, an international organisation and a State or States, or an international agreement between States, is a concern of the provision.

The debate on who may seek an advisory opinion dates back to the establishment of advisory opinions to the Permanent Court of International Justice (PCIJ). The PCIJ could give an advisory opinion "upon any dispute or question referred to it by the Council or the Assembly [of the League of Nations]."[153] In fact, the Council addressed advisory opinions to the Court on behalf of individual States.[154] The Court has been criticized by some authors for taking a liberal approach,[155] but "the fact remains that it was via this collective body that such requests found their way on to the docket of the Court."[156]

In the doctrine and jurisprudence of the ICJ, there have been debates on the possibility to open advisory opinions to States. In fact, opening such a procedure to States would impinge

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[151] P. Chandrasekhara Rao and Ph. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary*, 2006, p.378. Article 138 was not aimed to target the CLCS at the time of its drafting.

[152] See Ndiaye, footnote 110, par.69.

[153] Article 14 of the Covenant of the League of Nations.

[154] See Rao and Gautier, footnote 151, p.378.

[155] Ibid.

[156] Ibid.

on judicial settlement of disputes. If a State Party to UNCLOS, in a conflict with another State Party in regards to the delimitation of a maritime boundary, seeks an advisory opinion from the Tribunal on the matter, the latter would have to respond to one State and give its opinion on the dispute. The advisory opinion could be used by the State in case the dispute would be brought to judicial proceedings. The decision of the tribunal would be bound by the advisory opinion, although the latter is non-binding. The other State would object to the decision of the tribunal and the conflict would not be settled. Consequently, it seems difficult to open the advisory procedure to States. It is the reasoning given to explain why international organisations are the only ones recognised the possibility to seek advisory opinions from the Court.[157]

The Tribunal, in writing its Rules, seem to have followed the approach of the PCIJ and the ICJ after it.[158] Yet, the wording of article 138 contains a liberal approach.[159] The ITLOS seems to open the way to a liberal interpretation of article 138 and thus broad competence in terms of possibility to seek advisory opinions. In fact, the Tribunal should be encouraged to open the doors of advisory procedure to other bodies.[160]

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[157] The ICJ only recognises the possibility to seek advisory opinions to international organisations. Furthermore, "[t]he idea entertained by some countries that individual States should be allowed to request an advisory opinion was rejected in San Fransisco by the drafters of the Charter of the United Nations." in Rao and Gautier, ibid., p.379.

[158] "In a way, the procedure contained in article 131, paragraph 1, of the Rules retains the long judicial practice of the PCIJ and the ICJ of not accepting requests for advisory opinions made by individual States or international organizations that are not specifically authorized to do so." in Rao and Gautier, ibid.

[159] ''Indeed, article 21seems to indicate that such opinions could deal with 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.' The language of this provision is admittedly very broad.'' in Rao and Gautier, p.381.

[160] See Rao, footnote 136, p.211.

3.2 Organs that should be encouraged to seek an advisory opinion

The advisory procedure is open for now only to international organisations under the provisions of article 138 of the Rules of the Tribunal. It may be conceived that the advisory procedure could open for States Parties.[161]

The Tribunal is competent to interpret the Convention[162] and should introduce legal changes out of necessity. Article 138 could be amended to open the advisory procedure to States Parties as individual States. The Tribunal, as an authoritative body is recognised to have the capacity to interpret the Convention, should take a liberal approach on the interpretation of the provisions of the Convention, the Statutes, and the Rules it created, to open the advisory procedure to any organ that has an interest in the interpretation of the Convention.[163] Yet, the provisions of article 138 should in the meanwhile be used as they stand. States Parties should sign international agreements providing for an advisory jurisdiction clause giving competence to an organ[164] to seek advisory opinions.

As the Convention does not provide such possibility for treaty organs, such as the Commission, to seek advisory opinions in order to fulfil their mission, the competent bodies should create the necessary bridges between them to promote application of the Convention and peaceful settlement of disputes.

3.2.1 The Meeting of States Parties

The Meeting of States Parties may be seen as the competent organ to seek an advisory opinion on a question of interpretation of the Convention that could be used by the

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[161] The advisory procedure could be opened to States in the future after the opening of resolutions of the issues on the affect that advisory opinions have on judicial procedure. Advisory opinions to States would have to be strictly framed. Thus the ITLOS should have a liberal approach on the interpretation of article 138 but a strict one on the scope of the request of States. See Section 3.2.2.2.

[162] Article 287 para. 1 (a) UNCLOS.

[163] The question whether the CLCS could be one of these organs is raised.

[164] An organ of the international organisation or States acting as an organ of the international organisation.

Commission. To that end, the Meeting needs to be recognised as having the legal status to seek advisory opinions. The Meeting has a President, and may be convened by the Secretary-General of the United Nations.[165] The functioning of the Meeting may allow thinking that the latter has the status of an international organisation, thus capable under the Rules of the Tribunal to seek an advisory opinion.

The Meeting has a role to play in the introduction of changes and the creation of a bridge between the bodies, the Commission and the Tribunal, created under the Convention. The Meeting has to figure out its relationship with the Tribunal and with the Commission and the relation with the Tribunal and the Commission.

3.2.1.1 Sovereign status

The Tribunal could amend the provisions and include the Meeting of States Parties as a competent organ to seek advisory opinions. Yet, it seems that the most efficient way would be that the Meeting entrusts itself with this competence. The Meeting would have to consider itself as a competent organ to seek advisory opinions from ITLOS. The Tribunal would in a second step recognises the competence of the Meeting to seek advisory opinions from the Tribunal. A smoother way would be for the Meeting of States Parties to consider itself as an international organisation. That way, it could entrust itself with the capacity to seek advisory opinions.

The Meeting could be seen as a permanent organ and thus an international organisation, since it created its Rules of Procedure;[166] or as a "treaty organ".[167] The Meeting of States Parties could be an international agreement between the States party to the Convention. In fact, the Meeting of States Parties is mentioned in the Convention;[168] the States who ratified the Convention were aware that they would meet under the auspices of the Meeting. Thus, it can be surmised that the States who ratified the Convention also entered into an international agreement creating "the Meeting of States Parties".

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[165] See Rules of Procedure of the Meeting of States Parties, Fifteenth meeting (16-24 June 2005), Meeting of States Parties (24 January 2005) (SPLOS/2/Rev.4) (hereafter SPLOS/2/Rev.4), Rule 3-5.

[166] Ibid.

[167] See Rao, footnote 136, p.211.

[168] Article 319 para.2 (e).

If the Meeting is recognised as an international organisation, the Meeting should introduce a clause, in UNCLOS, its constitutive agreement, that would give competence to the Meeting or the President of the Meeting to seek advisory opinions from ITLOS on any legal question concerning the interpretation or application of the Convention.

The Meeting could also decide that it is a competent organ, as a treaty organ dealing with the application and interpretation of the Convention, to seek advisory opinions from ITLOS, without regard to the provisions of article 138 of the Statutes of the Tribunal. If the States Parties to the Convention gather and agree on a proposal to seek an advisory opinion, there would not be any barrier to stop them. The States Parties are sovereign and are the ones who ratified the Convention. They are the legitimate body to decide of the application and future of the Convention. Consequently, the capacity of the Meeting to seek advisory opinions seems to arise from the need to seek advisory opinion.[169]

3.2.1.2 Warrant to seek an advisory opinion

When the Meeting needed to, it "made a change in respect of the date of commencement of the ten-year period"[170], the Meeting also postponed the election of judges of the Tribunal "clearly deviating from the mandatory provisions of article 4, paragraph 3 of the Statute."[171] The Meeting can be seen as having legal personality because it is a reunion of sovereign States who have legal personality. If the Meeting decides to grant itself the capacity to seek advisory opinions, it could presumably have legitimacy to do so. Subsequently, it should be agreed with Judge Rao that, "in the scheme of the Convention and the Statute, there is thus *warrant* for the Meeting of States Parties to seek advisory opinion of the Tribunal should the need arise (emphasis added)."[172]

It seems to some delegations that "the Meeting of States Parties [has] the exclusive power to provide such guidance" on the uncertainties concerning the interpretation of the Convention on issues that might affect the rights and duties of coastal States".[173] The justification of the

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[169] "it may be argued that even a 'treaty organ' like the Meeting of States Parties might, *if it so decides*, request advisory opinions of the Tribunal (emphasis added)." in Rao, footnote 136, p.211.

[170] See Rao, ibid., p.212.

[171] Ibid.

[172] Ibid.

[173] See SPLOS/203, footnote 59, paragraph 73.

Meeting of States Parties to seek advisory opinions has also been backed up during the twentieth meeting. The Report of the Secretary-General under article 319 of the United Nations Convention on the Law of the Sea mentioned that:

> [d]ivergent views were expressed concerning the mandate of the Meeting of States Parties to discuss matters of a substantive nature relating to the implementation of the Convention. It was pointed out that the global forum with the mandate to undertake an annual substantive review and evaluation of the implementation of the Convention and other developments relating to ocean affairs and the law of the sea was the General Assembly and its facilitator, the Informal Consultative Process. While a number of delegations were of the view that the Meeting of States Parties should limit itself to the consideration of financial and administrative matters relating to the Tribunal, the Authority and the Commission, several delegations reiterated that the Meeting of States Parties was the forum for the exchange of views and discussions on matters of a general nature relating to the Convention. In their view, such exchange facilitated the implementation of the Convention and led to further development of the law of the sea. In support of that view, it was also noted that decisions of the Meeting of States Parties, such as those contained in document SPLOS/72, SPLOS/183 and SPLOS/201, related to the implementation of the Convention.[174]

The Meeting has been empowered in its Rules of Procedure with the ability to adopt a proposal submitted to it;[175] in addition, the Secretariat should reproduce and distribute "documents, reports, resolutions and decisions of the Meeting". The Meeting also has the capacity to "establish such subsidiary bodies as it deems necessary for the exercise of its functions."[176] Thus, the Meeting has the capacity to make decisions and resolutions and can create authoritative documents. It seems consequently that it has power to decide on substantive matters, not only on administrative ones.[177] If the Meeting of States Parties has power on substantive matters, this power should cover all matters concerning the Convention. Power on substantive matters coupled with the sovereign powers of the members of the Meeting should be enough to allow the latter to decide of its competence and allow it to decide that it can seek advisory opinions.

In the case of the PCIJ, the Covenant of the League of Nations did not provide for the authorisation for the Assembly or the Council of the latter to seek advisory opinions. The Council, however, "made requests for advisory opinions on behalf of other international

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[174] See SPLOS/218, footnote 73, par. 112.

[175] See Rules 47 of the Rules of Procedure of the Meeting of States Parties, SPLOS/2/Rev.4, footnote 165.

[176] See Rules 68, ibid.

[177] The Meeting has the capacity to make "decisions on matters of substance", in Rules 53. See Rules 53, 54, 55, ibid. These arguments also corroborate that the Meeting may be seen as an international organisation.

agencies and States".[178] The Meeting of States Parties should be exhorted to create for itself the right to seek advisory opinions to the Tribunal. For instance, in the context of the whaling case brought to the ICJ,[179] where there is a disagreement on the interpretation of the treaty between Australia, Japan and New Zealand, the possibility for the Meeting of States Parties to be able to seek an advisory opinion to ITLOS would may be prevent that States initiate a judicial procedure and enter into a conflict. It would provide with a better implementation of the treaty instruments.

The tribunal, for its part, should clarify the scope of article 138 of its Rule and determine which bodies have the capacity to seek advisory opinions.[180] As Judge Ndiaye said, "[t]he Tribunal needs several requests for advisory opinions in order to gradually set the pace with regard to the advisory function of the full Court."[181] He further stressed the point that "advisory proceedings before the Tribunal on legal questions concerning the application and interpretation of provisions of the Convention may prove to be a useful tool to States."[182] Advisory opinions would be a good tool to get interpretation of provisions that are the cause of disputes between States. Opening the advisory procedure would be beneficial for an efficient application of the Convention.

3.2.2 States Parties

The Meeting of States Parties might be reluctant to deal with issues of substantive matters and consider its capacity to seek advisory opinions.[183] The Meeting throughout its sessions raises issues concerning the application or interpretation of the Convention.[184] Questions are raised but the issues are usually reported in following sessions, and answers, if any, are

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[178] See Rao, footnote 136, p.211.

[179] *Whaling in the Antarctic* (Australia v. Japan), ICJ, pending case No 2010/16.

[180] The ITLOS received a request for an advisory opinion from the Sub-Regional Fisheries Commission (SRFC) on 28 March 2013, see footnote 148. The decision will probably give light on the interpretation and application of article 138 of the Rules of the Tribunal.

[181] See Ndiaye, 110, paragraph 87.

[182] See Ndiaye, ibid., par.88, referring to ITLOS, 12 Yearbook, p.258, par.9.

[183] See SPLOS/218, footnote 73, p.18 paragraph 112.

[184] See SPLOS/196, footnote 60, p.231, 251.

evasive.[185] The diplomatic nature of the Meeting of States Parties implies that where delegations do not agree, the Meeting avoids addressing the matter.

Where the decision-making power of the Meeting is not desired to be used,[186] States Parties in their individualities should seek for other options to establish a mechanism to seek advisory opinions.

3.2.2.1 Use of the response

It is likely that the Commission will not reject the proposal regarding advisory opinions as part of the submission. If the advisory opinion represents information relevant to the submission,[187] it is in the interest of the Commission to consider it. The interpretation of a provision, or provisions, of the Convention by the ITLOS will allow the CLCS to get an interpretation, from a competent and authoritative body, the ITLOS, which could be used by the Commission in its technical assessment to consider the outer limits line delineated by the submitting State and make recommendations; consequently permitting avoidance of a deadlock in the process of making recommendations by the CLCS to coastal States.[188]

The Meeting of States Parties should ensure, in the process of creating a bridge between itself and the Tribunal, that the CLCS could use the response to the advisory opinion in its technical assessment, either by allowing coastal States to submit the response to the advisory opinion in their submissions or by allowing the Commission to use such response directly. Such disposal should be included in the provision on the advisory procedure of the Meeting of States Parties.

It would probably have more legitimacy if coastal States would include the response to the advisory opinion in their submissions. The question whether the CLCS has the capacity to use the response on its own initiative may be raised. The function of the CLCS is technical in nature, and its interpretative prerogative is restricted to article 76 and its related provisions. It

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[185] See SPLOS/218, footnote 73, p.18 paragraph 112.

[186] See SPLOS/203, footnote 59, p.13 para.73, 75; SPLOS/218, ibid.

[187] The CLCS should "consider the data *and other material* submitted by coastal States (emphasis added)", Article 3 paragraph 1(a), Annex II to UNCLOS, footnote 5.

[188] See Rule 46 in the Rules of procedure of the CLCS, Annex I, see footnote 41.

is thus questionable whether the Commission has the legal ability to know when an interpretation of the Convention is related to its functions.

Such an approach would reduce the scope of action of the CLCS. In fact, the aim of opening the advisory procedure to the Meeting is to create access, through the creation of a bridge between the Meeting and the ITLOS, to interpretation of the Convention for the Commission. Thus, the use of the response to the advisory opinion should be as broad as possible. Consequently, the Commission should be allowed to use the response even though a coastal State did not, whether or not intentionally, included it in its submission. Thus, the provision that allows the Meeting to seek an advisory opinion should also mention that the response to an advisory opinion could be used directly by the Commission, to carry out its technical functions.

In the case of an international agreement between States where they agree to seek an advisory opinion, it must be inserted in the agreement that the answer, whether it pleases the parties or not, can be used by the CLCS. Besides, when the CLCS is facing a deadlock, it should make a request to the Meeting, through the Statement of the Chairperson of the Commission to the Meeting of States Parties,[189] to ask the Meeting to seek an advisory opinion on the question that blocks the assessing of the data submitted and the making of recommendations.

When the advisory procedure is engaged either under the auspices of the ISA or under the provisions of an international agreement, the States, party to the Authority or to the agreement, constitute the link between the Commission and the response issued by the Tribunal, as a full court or by the Seabed Disputes Chamber.

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[189] The CLCS asked to the fifty-fourth session of the General Assembly to include provisions ”to encourage States parties to the Convention that intend to establish the outer limits of their continental shelves beyond 200 nautical miles to undertake the necessary measures for implementing the relevant provisions of the Convention”, in ”Letter dated 21 October 1999 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the fifty-fourth session of the General Assembly of the United Nations, Commission on the Limits of the Continental Shelf, sixth session (30 August-3 September 1999) (CLCS/19) (hereafter CLCS/19), p.3; in its eighth session the Chairman of the CLCS addressing the President of the fifty-fifth session of the General Assembly of the United Nations requested ”to bring to the attention of the Assembly several important matters related to the implementation of article 76 of the Convention.” in Commission on the Limits of the Continental Shelf (CLCS/27) (hereafter CLCS/27), p.1. The CLCS also addresses the Meeting of States Parties, see Statement by the Chairman of the Commission on the Limits of the Limits of the Continental Shelf on the progress of work in the Commission (CLCS/62) (hereafter CLCS/62), p.15-16.

It would be threatening for some States to allow this technical body to decide when and how to use the response given by the Tribunal. Yet, this should not be felt as a threat. The Commission should be granted access to responses because it needs legal interpretation to carry out its technical functions.[190] The relation between the recommendations of the Commission and the decision (binding or not binding) of the Tribunal is the point that needs to be clarified.

3.2.2.2 Window for individual States

States Parties to the Convention may sign an international agreement on a matter related to the purposes of the Convention and provide that a body or a State party[191] to this agreement may seek an advisory opinion from the Tribunal on a legal question related to the application or interpretation of the Convention.

In the case of an international agreement between States, there would be no body to implement the agreement, the international agreement is not creating an international organisation, and thus the States Parties to the agreement would be the ones which would be granted the possibility to seek an advisory opinion.[192] Yet, the States Parties would have to be taken as acting under the umbrella of the international agreement and not as individual States.[193]

States Parties should sign international agreements on maritime boundary disputes,[194] which should contain provisions on delineation of the extended continental shelf and submissions to

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[190] "a member expressed the view that legal certainty was needed in order for the Commission to properly discharge its functions" in Item 14 in CLCS/72 paragraph 39, see footnote 31; Item 16 in CLCS/74, see footnote 103.

[191] See Ndiaye, footnote 110, par.69.

[192] See article 138 par.2., in Supplement B.

[193] See Rao and Gautier, footnote 151, p.379 and p.394: ''As to the meaning of the expression 'body', it appears that any organ, entity, institution, organization or State that is indicated in such an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a 'body' within the meaning of article 138, paragraph 2, of the Rules''.

[194] See Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, available at < http://www.regjeringen.no/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf >, accessed on 23rd May 2013.

the CLCS. These agreements should integrate an advisory jurisdiction clause giving competence to the States, as parties to the international agreement, to seek advisory opinions from ITLOS. In that case, the international agreement would not be creating an international organisation, for there is no need to create one. The purpose of such an agreement is to settle the maritime boundary dispute. The international agreement is signed to permit the seeking of an advisory opinion to find legal answers to legal issues blocking the settlement of the maritime boundary.

These agreements would have to raise the legal issues in regards to the settlement of the maritime boundaries and clearly frame the legal questions arising therefrom.[195] The Tribunal would, in its response, "determine the principles and rules of international law applicable to a delimitation dispute"[196] that would allow the States party to the international agreement to settle their maritime boundaries peacefully,[197] on the basis of the advisory opinion.

The settlement of maritime boundaries through, or with the help of, the advisory procedure, might be another way of settling boundaries, out of the judicial procedure, "and could be an

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[195] "It is open to States concerned [...], to seek opinions of the Tribunal on, for example, what principle and rules of international law are applicable to the sea boundary delimitations in question on the basis of which the parties would be able to negotiate an agreed delimitation." in Ndiaye and Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes*, (2007), p. 895; and "States may also consider entering into special agreements for conferring jurisdiction on [a court or tribunal] in regard to delimitation disputes, thereby giving greater precision to the scope of the dispute and focusing attention on the core issues of the dispute", footnote 151, p.897.

[196] Rüdiger Wolfrum, President of the ITLOS, 55th plenary meeting of the General Assembly of the United Nations, sixtieth session, Monday, 28 November 2005, 3p.m., New York, on Agenda item 75 (continued) on Oceans and the law of the sea, p.27.

[197] Article 33 of the Charter of the United Nations states that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, *shall, first of all, seek a solution by negotiation*, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphasis added)." Advisory opinion is a mean of negotiation. In the context of settling maritime boundaries, advisory procedure should be encouraged, as a solution for peaceful settlement of disputes.

interesting option for those seeking a non-binding opinion on a legal question or an indication of how a particular dispute may be solved through direct negotiations."[198]

The most effective way to ensure that the Commission gets access to interpretation of legal provisions of the Convention in order to assess its technical function is to give the possibility to States to seek advisory opinions. Once the Commission holds off from making recommendations because the submission contains elements that the Commission is not mandated to assess, submitting States should be able to ask the Tribunal to give its opinion on the impasse faced by the Commission, so that the outer edge of the continental shelf can be established. However, the possibility for individual States to seek advisory opinions should not be discarded. Where neighbouring States cannot reach an agreement on their disagreement, States as individual States, should be able to access the advisory procedure.

In order to restrict the procedure, the individual State should be allowed to seek an advisory opinion only when the agreement with the neighbouring State cannot be reached. Furthermore, the advisory opinion possibility should be open to the individual State after it has submitted its data and information to the Commission. The State should be allowed to seek an advisory opinion only when it is acting as a submitting State. The State would have to mention that the advisory opinion would be used only in the context of the procedure relating to the Commission and that the CLCS can use the answer, even though the coastal State does not insert it in its submission when the answer does not support its view. In addition, the question raised should be directly linked to the submission to the CLCS. The Tribunal would have the responsibility to make sure that it is. Once the response is given, the Commission would be able to make recommendations and the coastal State would be able to establish the outer edge of its continental margin if it wants to follow the non-binding opinion of ITLOS.

The outer edge of continental shelves not being settled may be a source of international conflicts between neighbouring States on questions of sovereignty, exploitation and exploration. The delimitation of maritime boundaries is a sensitive issue and everything must be done to settle the matter as soon as possible. An advisory opinion may be the first solution to the settlement of the continental shelf boundaries. This solution should however be an

[198] See Rüdiger Wolfrum , footnote 196, and from the same author: 'Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?' in R Wolfrum and I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?,* p.35-123.

intermediate one. The long-term solution is to find a way to link the recommendations of the Commission to the dispute settlement mechanisms of the Convention. This thought-provoking issue relates to the question of what happens to the recommendations of the Commission when the Tribunal must settle a dispute concerning a bilateral or multilateral delimitation of the continental shelf. In the opinion of the author, adjudicating the dispute is the task of the Tribunal and it might be within its prerogative to accept or reject the recommendations of the Commission after giving them due consideration.

4 Conclusion

The first question, in the context of the relationship between the CLCS and the ITLOS, is whether the Commission can seek advisory opinions from the Tribunal to obtain an interpretation on a legal issue that arises in the course of carrying out its technical functions. It has been concluded that the Commission *per se* cannot currently seek an advisory opinion, and that it is States Parties to the Convention, through competent organs, that must seek an advisory opinion on a legal question that affects the Commission, to the ITLOS.

The other question in relation to the relationship between the CLCS and ITLOS concerns binding settlement of disputes.[199] In fact, the Tribunal and the Commission are both linked to the establishment of the outer limits line of the extended continental shelf. If the outer limits are established on the basis of the recommendations of the CLCS, whether ITLOS can then challenge the line if a dispute is brought to it on the matter is a question of crucial importance.

The relationship between ITLOS and the Commission concerns, likewise, the technical/legal aspect of article 76 and its related provisions. On the one hand, the Commission should find natural prolongation beyond 200 nautical miles so that the coastal State is recognised to have the right to an extended continental shelf. On the other hand, the Tribunal is competent to say whether the coastal State has entitlement to the shelf.

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[199] See literature: ILA Berlin and Toronto conferences, footnotes 10 and 45; ITLOS case n°16, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*; Clive R. Symmonds (ed.) *Selected issues on the Law of the Sea*, (2011) Part VI; Judge Wolfrum, Statement to the ILA, footnote 142; Tullio Treves, "Law and Science in the Interpretation of the Law of the Sea, Article 76 Between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf" Journal of International Dispute Settlement, Vol. 3, No. 3 (2012), pp.483-491; Ndiaye and Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes*, footnote 195; Bjørn Kunoy, "The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf", International Journal of Marine and Coastal Law 25 (2010) 237-270; Rüdiger Wolfrum, 'The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf' in Rainer Lagoni and Daniel Vignes (eds.) *Maritime delimitation* (2006).

The functions of both bodies are intertwined. If the Tribunal gives a binding decision (judicial procedure) on the delimitation of the extended continental shelf, before the Commission gives its recommendations on the outer limits line, the Tribunal risks impingement on the role and competence of the Commission. Yet, it may be that the Tribunal calls the members of the Commission for an expert opinion. In fact, both bodies can interact, even though they are independent in their work, because they have both been created under UNCLOS. If so, the work of both bodies would be coordinated and the risk of impingement diminished.

The role of the CLCS is to consider whether the data submitted supports that the continental shelf is the natural prolongation of the coastal State and whether the State is entitled to an extended continental shelf (test of appurtenance). If the Tribunal rules on the establishment of the extended continental shelf, it recognises that the coastal State has a shelf. However, this work is technical and the evaluation of whether there is a natural prolongation and a continental margin going beyond 200 nautical miles falls within the mandate of the Commission. If the Tribunal recognises the existence of the shelf, it oversteps its duty and impinges on the role of the CLCS.

If the Tribunal rules on the extended continental shelf after the CLCS has made its recommendation, the binding decision of the Tribunal might not recognise the outer limit line established by the coastal State. The present situation is likely to happen when the line established by the coastal State has not been delineated on the basis of the recommendations of the Commission. In that case, the recommendations of the Commission would not be on the same path as the decision of the Tribunal. The lines established would not be usable. The coastal State would in that case have to resubmit data to the Commission and the CLCS in its new recommendations would have to take into consideration the decision of the Tribunal. Yet the decision is binding only on the State which brought the matter to the Tribunal; furthermore, the Commission is an independent body and does not have to follow the precedents of courts or tribunals.

If the line is established on the basis of the recommendations, the question may be raised whether the tribunal could find that the line established is not correct. In other words, the Commission, which has the mandate to make recommendations on the outer limits submitted and assess whether this limits are calculated in accordance with the provisions and thus calculation of article 76 and its related provisions, would be judged by the Tribunal as not having made recommendations in accordance with article 76. An affirmative answer would

put the Tribunal into the role of a watchdog of the CLCS. The Commission is independent and is not subject to any control of its assessment. It is not possible to think that the experts would not assess the data correctly. It is to be assumed that the only possibility is that the coastal State did not establish its line on the basis of the recommendations.

In the case the Tribunal would not recognise the line established by the coastal State, the question arises as to whether the line is final and binding. The status of the line is at stake. The line established on the basis of the recommendations is final for it is deposited to the UN secretariat and binding towards the submitting coastal States. The line in that situation would not be binding to other States because the line is not recognised by the Tribunal and could then be challenged or objected to by other States.

It may give rise to situations where the line used by the coastal State is not the same as the one recognised by other States; the coastal State may use the line established after the CLCS made its recommendations, the other States would recognise the line in the decision of the Tribunal. It seems that the line established by the Tribunal should be the one prevailing since an authoritative and competent adjudicative body issues it. Nevertheless, it should be kept in mind that the line could still be uncertain and both lines used. The coastal State should be encouraged to resubmit and the CLCS to take into consideration the decision of the Tribunal so that there is only one line, recognised by all.

If the coastal State does not establish the line on the basis of the recommendations the question may be raised as to whether the CLCS can object to the lines and access the Tribunal for resolution of the matter. The CLCS is not recognised, under article 287 of UNCLOS, as an international body having the capacity to access the dispute settlement mechanism of Part XV of UNCLOS. The other States should access the Tribunal to challenge the line established incorrectly, that is to say, established not in accordance with the recommendations of the CLCS.

Part XV gives a possibility to States Parties to opt out of certain provisions concerning the compulsory dispute settlement mechanisms. Although borders between opposite or adjacent coastal States is not subject to compulsory dispute settlement, the line between the Area and national jurisdiction is. The issue of delineation of the extended continental shelf can thus be brought to compulsory dispute settlement. The question is thus whether other States, i.e., third States, can access the Tribunal on behalf of the Area, that is to say, under the doctrine of common heritage of mankind.

Actio popularis is not yet recognised in international law. The ITLOS should take a liberal approach and take into account the functional needs approach to implement UNCLOS. In fact, the Area is the common heritage of mankind and represents the interest of the whole international community, as its resources belong to all. Third States should be entitled to access the Tribunal to challenge the extended continental shelf, where the latter has not been established on the basis of the provisions of article 76, breaching international law, because this breach impinges on the rights of other States to explore and exploit the resources of the deep seabed.

If the Tribunal judges that *actio popularis* is too liberal, because too many States might bring disputes to the Tribunal on matters they disagree with and clog the Tribunal, the latter should support another option. The solution would be that the Tribunal should open the scope of Part XI to recourse on the extent of the Area; and gives the possibility for the ISA to access the Seabed Disputes Chamber for establishment of the extended continental shelf of a coastal State impinging on the Area.

Supplement A

United Nations Convention on the Law of the Sea

Article 76

Definition of the continental shelf

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Annex II of the United Nations Convention on the Law of the Sea

Article 3

1. The functions of the Commission shall be:

   (a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

   (b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

2. The Commission may cooperate, to the extent considered necessary and useful, with the Intergovernmental Oceanographic Commission of UNESCO, the International Hydrographic Organization and other competent international organizations with a view to exchanging scientific and technical information which might be of assistance in discharging the Commission’s responsibilities.

Supplement B

United Nations Convention on the Law of the Sea

Article 159

Composition, procedure and voting

10. Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipts of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.

Article 191

Advisory opinions

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

Statute of the International Tribunal for the Law of the Sea

Article 21

Jurisdiction

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Rules of the Tribunal

Article 131

1. A request for an advisory opinion on a legal question arising within the scope of the activities of the Assembly or the Council of the Authority shall contain a precise statement of the question. It shall be accompanied by all documents likely to throw light upon the question.
2. The documents shall be transmitted to the Chamber at the same time as the request or as soon as possible thereafter in the number of copies required by the Registry.

Article 138

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

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