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ARTÍCULOS

The Continental Shelf Dispute between Chile and Argentina in the Sea of the Southern Zone

La disputa sobre la plataforma continental entre Chile y Argentina en el Mar de la Zona Austral

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ABSTRACT The 2021 revision of nautical chart no. 8 by Chile has sparked a maritime boundary dispute with Argentina. This issue arises from Argentina's 2009 submission to the Commission on the Limits of the Continental Shelf for an extended continental shelf and centres on conflicting interpretations of the Treaty of Peace and Friendship of 1984. The treaty delineates the maritime boundary from Points A to F, but Chile's inclusion of a legal continental shelf southeast of Point F in its updated chart extends beyond Argentina's recognized limits, leading to an overlap with Argentina's extended continental shelf claim. This paper analyses the legal validity and enforceability of both nations' continental shelf entitlements under UNCLOS and the Treaty of Peace and Friendship, discussing the procedural challenges and potential solutions to the overlapping claims.

PALABRAS CLAVE Continental shelf; Treaty of Peace and Friendship; UNCLOS; CLCS; extended continental shelf; ICJ, *Nicaragua v. Colombia* (2023)

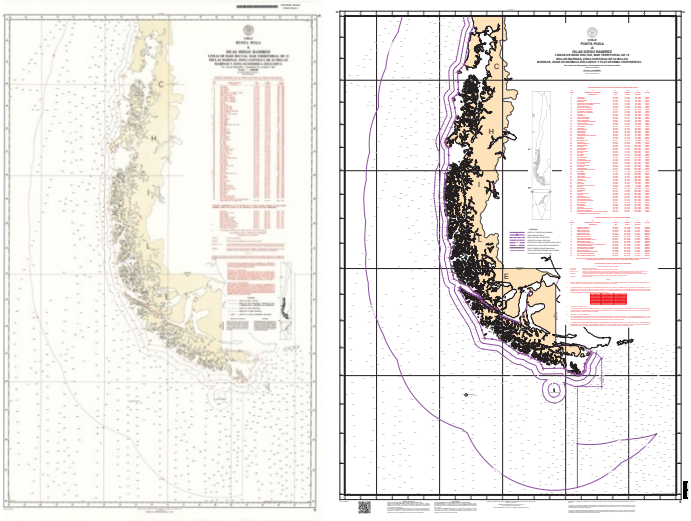
RESUMEN La revisión en 2021 de la carta náutica nº 8 por parte de Chile ha desencadenado una disputa sobre límites marítimos con Argentina. Esta cuestión surge a raíz de la presentación en 2009 por parte de Argentina ante la Comisión de Límites de la Plataforma Continental de una plataforma continental extendida y se centra en interpretaciones contradictorias del Tratado de Paz y Amistad de 1984. El tratado delimita la frontera marítima de los Puntos A a F, pero la inclusión por parte de Chile de una plataforma continental legal al sudeste del Punto F en su carta actualizada se extiende más allá de los límites reconocidos por Argentina, lo que lleva a una superposición con la reclamación argentina de plataforma continental extendida. Este articulo analiza la validez jurídica y la aplicabilidad de los derechos de plataforma continental de ambas naciones en virtud de la CONVEMAR y el Tratado de Paz y Amistad, y examina los problemas de procedimiento y las posibles soluciones a las reclamaciones superpuestas.

KEYWORDS Plataforma continental; Tratado de Paz y Amistad; CONVEMAR; CLPC; plataforma continental extendida; CIJ, *Nicaragua v. Colombia (2023)*

Introduction

The revision of the nautical chart no. 8 of the Republic of Chile (hereinafter: Chile) in 2021 has given rise to a maritime boundary dispute between the Argentine Republic (hereinafter: Argentina) and Chile. Since gaining independence from Spain, both nations have encountered a series of border disputes, prompting four arbitral procedures in the past century (Fuentes, 2000: 104-105). Facing an imminent war crisis after the Beagle Channel arbitration award in 1977, the mediation of Pope John Paul II ultimately led to the Treaty of Peace and Friendship in 1984 (TPF) (Moncayo, 2008: 3). Although the 1977 award was intended to resolve the dispute, it instead heightened tensions. Argentina rejected the outcome and perceived it as a threat to its territorial integrity, bringing the two nations to the brink of armed conflict. The TPF outlines the maritime border between the two nations in the southern zone, extending from Points A to F.[1] Originating from Argentina's submission to the Commission on the Limits of the Continental Shelf (CLCS) for an extended continental shelf (ECS) in 2009, the current controversy centres in the projection of Chile's and Argentina's respective continental shelves (CS) southeast of Point F and their contrasting interpretations of the TPF. Chile has included a legal CS southeast of Point F in their nautical chart no. 8 in 2021, extending beyond the limits acknowledged by Argentina and partly overlapping with Argentina's claim of ECS entitlement (Rivas and Montes, 2021).[2]

This paper endeavours to analyse the legal validity and enforceability of the respective CS entitlements under the United Nations Convention on the Law of Sea (UNCLOS) and the TPF. Therefore, this paper will define the maritime zones, the CS, and the CLCS. Subsequently, it will scrutinize Argentina's submission to the CLCS. The development of the dispute will be presented. The paper will then delve into the substantive aspects of the respective claims of CS entitlement within the TPF and UNCLOS frameworks. The challenge posed by overlapping ECS and legal CS entitlements will constitute the subject of a discussion. Finally, the procedural dimension and solutions will be laid out.



(Chile's old and new nautical map no. 8)

[1] Treaty of Peace and Friendship of 1984 between Chile and Argentina, Nov. 29, 1984 (TPF), Art. 7 (2).

[2] See: Chile, Nautical Chart No. 8, 2021; Decree No. 95.

(Border limits according to the TPF)

Definitions

Continental Shelf

The CS of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[3] The right of coastal States on their CS entitlement exists *ipso facto* and *ab initio*, in short it is inherent.[4] Coastal States have sovereign rights over the natural resources of the CS, including the right to explore and exploit oil, gas, and other minerals (Llanos Mansilla, 1991: 391-398; Baumert, 2017: 832; McDorman, 2015: 183; Churchill, Lowe and Sander, 2022: 130).

The legal CS is the area of the seabed and subsoil that extends beyond a coastal State's territorial sea but is still within 200 nm from its baselines (Suárez-de Vivero, 2013: 114). Even if the geomorphological CS does not reach 200 nm, the area in between baseline and 200 nm is still considered a coastal States' legal CS (Kunoy, 2019: 345).[5] The ECS refers to the area of the seabed and subsoil that extends beyond the 200-nm limit of the legal CS (Oude Elferink, 2004: 108). It, therefore, lies beyond the EEZ, in the high sea. The EEZ extends up to 200 nm from the baseline.[6] In this zone, the coastal State has the exclusive rights to explore and exploit

[3] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (UNCLOS), Art. 76 (1).

[4] UNCLOS, Art. 77 (3); North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 19; SPLOS, Eleventh Meeting Report, (2001), 12, para. 75.

[5] Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, para. 39.

[6] UNCLOS, Arts. 55, 57.

natural resources.[7] Beyond the EEZ, the high seas are areas of the sea that are not subject to the jurisdiction of any single State, Arts. 86, 87 (1) UNCLOS.[8]

Under Art. 82 (1) UNCLOS, coastal States are to make payments or contributions in kind in respect of the exploitation of the non-living resources in the ECS (Rothwell and Stephens, 2016: 135). Although both legal CS and ECS entitlements are inherent rights, a coastal State will need to establish the limits of their ECS entitlement claim through a complex formula laid out in Art. 76 (4) – (7) UNCLOS (Lando, 2017: 149).[9] This process entails the collection and submission of comprehensive scientific data and obtaining positive recommendations from the CLCS (Woker, 2023: 11). The ECS can only reach a maximum of 350 nm from the baseline or shall not exceed 100 nm from the 2,500-meter isobath, which is a line connecting the depth of 2,500 meters.[10]

CLCS

According to Art. 76 (8) UNCLOS, claims for an ECS from UNCLOS member States are submitted to the CLCS, a body established under UNCLOS.[11] The CLCS serves a twofold purpose: firstly, it evaluates ECS submissions and issues recommendations, and secondly, it offers scientific and technical advice upon request (St. Claver Francis, 1999: 141-142; Cavnar, 2009: 12). The CLCS ensures equitable geographic representation, comprising 21 experts in geology, geophysics, or hydrography elected for their expertise (Macnab, 2004: 9-10; St. Claver Francis, 1999: 142; Cavnar, 2009: 12).[12] The CLCS can agree with the proposed limits or reject them, in which case the country must rework its evidence and resubmit its claim.[13] Only when the CLCS has given its recommendation can the country set final and binding boundaries (Cavnar, 2009: 2).[14]

A coastal State seeking CLCS recommendations for its ECS limits must demonstrate that the seabed and subsoil of the shelf are a natural prolongation of their land territory and that it is a continuation of their continental margin.[15] Art. 76 (4) UNCLOS outlines two technical criteria for determining the outer edge of the continental margin, both of which are to be calculated from the foot of the slope (Proelß/Parson, 2017: Art. 76 para. 31).[16] The first criterion, as specified in Art. 76 (4)(a)(i) UNCLOS, is based on geological data pertaining to the extent of sedimentary rocks along the margin (Proelß/Parson, 2017: Art. 76 para. 31). The second criterion, detailed in Art. 76 (4)(a)(ii) UNCLOS, involves a geodetic measurement of 60 nm (Proelß/Parson, 2017: Art. 76 para. 31). A State has the option to utilize either or both

[7] UNCLOS, Art. 55 (1).

[8] For the debate if high seas begin at the end of the territorial seas, see Allott, 1983: 14 and the following.

[9] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p. 62, para. 120.

[10] UNCLOS, Art. 76 (5).

[11] States who are not party to UNCLOS do not have to submit to the CLCS, as Art. 76 (1) UNCLOS, hence both legal CS and ECS, is customary law, see U.S. Department of State, Announcement ECS; Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2023, p. 413, para. 75.

[12] UNCLOS, Annex II, Arts. 2 (1), (4), 3.

[13] UNCLOS, Annex II, Art. 8.

[14] UNCLOS, Art. 76 (8) S. 3 “on the basis of these recommendations”.

[15] UNCLOS, Art. 76 (4).

[16] UNCLOS, Art. 76 (4)(a)(i), (ii).

of these methods to optimize the delineation of the continental margin (Proelß/*Parson*, 2017: Art. 76 para. 31).

Argentina's submission to the CLCS in 2009

Content of the submission

In 2009, Argentina made a full submission of the outer limit of its CS.[17] The part of the submission addressed in this paper is a region known as the "Outer Crescent", commencing from the southern tip of the Staten Island and extending towards Tierra del Fuego (Guzmán, 2023). This extension surpasses Point F specified in Art. 7 of the TPF's established limit (Wilson, 2021). Moreover, the delineation of this area in Argentina's submission, demarcated by points RA-3458, RA-3839, and RA-3840, was claimed as an international border by Argentina (Argentine Submission to the CLCS, Executive Summary, 21 April 2009, 14). Some assume that there is a geopolitical interest in the submission regarding Argentina's claim of territory in Antarctica (Kouyoumdjian Inglis, 2021; Rivas and Montes, 2021). Both the hypothetical elongation of the border and the outer limits of the CS beyond 200 nm would project the meridian from Cape Horn to the South Pole, leaving the Antarctic Peninsula, a desired access and entrance point to Antarctica, almost entirely under Argentine sovereignty (Kouyoumdjian, 2021; Rivas and Montes, 2021).

Legally correct submission to the CLCS

Pursuant to Art. 76 (8) of and Annex II, Art. 4 to UNCLOS, Argentina was required to submit information on the limits of their CS beyond 200 nm from the baselines to the CLCS in order to establish their ECS. In 1997, Argentina initiated maritime research, leading to the establishment of the National Commission on the Outer Limit of the Continental Shelf (COPLA).[18] Comprising scientific, technical, and legal experts, COPLA documented the genuine extension of Argentina's CS. The complete findings were presented to the CLCS on 21 April 2009.[19] Notwithstanding, Argentina may have potentially exceeded the deadline for submitting to the CLCS. Pursuant to Art. 4 of Annex II to UNCLOS, States seeking to delineate the outer edge of their CS extending beyond 200 nm are mandated to submit pertinent documentation to the CLCS within ten years from the entry into force of UNCLOS for that specific State. Given Argentina's accession to UNCLOS on 31 December 1995, the deadline for its submission would ostensibly have elapsed on 1 January 2006. However, the implementation of this provision prompted deliberation among diverse States, accentuating the intricate technical and financial challenges associated with defining this limit, particularly for numerous developing States.[20] Consequently, a determination by the CLCS established the initiation of the ten-year period, referred to in Art. 4 of Annex II, on 13 May 1999 for States parties for which UNCLOS entered into force before that date as the adoption date of the

[17] Argentine Submission to the CLCS, Executive Summary, 21 April 2009, 4.

[18] Argentine Submission to the CLCS, Executive Summary, 21 April 2009, 3, fn. 11.

[19] Argentine Submission to the CLCS, Executive Summary, 21 April 2009.

[20] See SPLOS, Decision on Commencement Date of Continental Shelf Submissions, Doc. SPLOS/72 of 29 May 2001, preamble.

Scientific and Technical Guidelines (Suárez-de Vivero, 2013: 115).[21] As a result, Argentina's submission in 2009 adhered to the stipulated deadline, thereby ensuring compliance with the mandated timeframe prescribed by Annex II, Art. 4 to UNCLOS.

Moreover, Argentina could have been obligated to notify the CLCS of a dispute with Chile. The submitting coastal State is required to notify the CLCS of any disputes related to the submission.[22] The "Outer Crescent" Argentina asserted was not submitted as a matter of dispute by Argentina. Their interpretation of the TPF seemingly deemed an overlapping CS entitlement, and hence a dispute, impossible.[23] Had Chile adopted a different perspective, they could have indicated the existence of a dispute to the CLCS.[24] However, Chile only referenced a dispute concerning Argentina's claims in Antarctica, and not regarding Argentina's ECS entitlement in the "Outer Crescent".[25] Hence, Chile did also not assume a dispute there. Consequently, Argentina was not obligated to notify the CLCS of a dispute with Chile. In conclusion, Argentina's CLCS submission aligned with the provision of Art. 76 (8) of and Annex II, Art. 4 to UNCLOS.

Work and Recommendations of the CLCS

Following the analysis and evaluation conducted by a subcommission of the CLCS between 2012 and 2016, Argentina's submission was largely approved by the CLCS in their recommendations in 2016 and 2017, the most striking exceptions being the aspect concerning the Malvinas/Falkland Islands and Antarctica, which remained subject to dispute and controversy.[26] The approval encompassed the "Outer Crescent".[27]

Development of the dispute

The current dispute regarding overlapping claims of CS entitlement between Chile and Argentina arose in recent years, following Argentina's submission to the CLCS in 2009.

Chile's Verbal Note no. 8367 in June 2009

After Argentina's CLCS submission in April 2009, the Ministry of Foreign Relations of Chile sent verbal note no. 8367 to Argentina, asserting its reservation of rights concerning the

[21] SPLOS, Decision on Commencement Date of Continental Shelf Submissions, Doc. SPLOS/72 of 29 May 2001, preamble, para. (a).

[22] Moreover, the State concerned shall ensure the CLCS to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States (CLCS, Rules of Procedure, Annex I, para. 2).

[23] The Argentine interpretation of the TPF will be further analyzed under section *"Substantive conditions of the respective claims of CS entitlements"*.

[24] After Russia submitted to the CLCS, Japan opposed their submission due to an unsettled border issue: Japan, Position on Russian Federation's CLCS Submission, para. 1(2); Russian Federation, Deputy Minister's Statement on CLCS Submission, 6.

[25] Permanent Mission of Chile to the UN, Note No. 93/2016, 25 May 2016; Note No. 247/2004, 22 December 2004.

[26] CLCS, Summary Recommendations Argentina (2016); Summary revised Recommendations Argentina (2017).

[27] See CLCS, Summary Recommendations Argentina (2016), 18.

delimitation outlined in the executive summary of the Argentine submission.[28] The note explicitly stated that such delineation would not be binding on Chile in those sections that deviated from the established boundary between the two countries, as per the existing treaties.[29] Specifically, this reservation pertained to Argentina's asserted border in the "Outer Crescent", which Chile contended did not align with the boundaries defined in the TPF, as it was located south of Point F, which Art. 7 TPF marked as the “end of the boundary”.[30]

Chile’s Notes 2016 - 2020 and Argentina’s law Nr. 27,557

After the recommendation of the CLCS in 2016, Chile sent a note to the Secretary General of the UN, reserving Chile’s legal position in Antarctica, while not commenting on the approval of the “Outer Crescent” ECS for Argentina.[31] From May to July 2020, Chile reaffirmed its reservation of rights regarding Argentina’s submission in three notes, especially regarding Argentina’s border claim in the “Outer Crescent”.[32] Later that year, in August 2020, the Argentinian congress passed law Nr. 27,557 over marine space, which defines their ECS boundaries, adhering to the recommendations of the CLCS from 2016 and 2017.[33]

Publication of revised nautical map no. 8 and decree no. 95

The commencement of the current CS dispute can be traced back to 27 August 2021 when the Chilean government, through decree no. 95, undertook the revision of their nautical chart no. 8, precisely delineating the boundaries of its legal CS in the southern region.[34] The nautical chart no. 8 incorporated a legal CS adjacent to Chile's coast, spanning from Punta Puga to Islas Diego Ramírez. The asserted legal CS entitlement established by decree no. 95, which covers an area of 25,383 km², overlaps with Argentina's asserted ECS entitlement, encompassing an area of approximately 5,300 km².[35] In response, Argentina sent a note to the Executive Office of the Secretary General rejecting in all its terms the decree no. 95, Chile’s note no. 022/2020, as well as any attempt of Chile to establish maritime areas east of the 67° 16 0 meridian, which is the Cape Horn meridian connecting Points E and F.[36]

[28] Ministry of Foreign Relations of Chile, Verbal Note No. 8367/2009, 24 June 2009. The note remains non-public but is echoed in 'Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020' and 'Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021'.

[29] Permanent Mission of Chile to the UN, Note No. 74/ 2021, 25 October 2021.

[30] Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020.

[31] Permanent Mission of Chile to the UN, Note No. 93/2016, 25 May 2016.

[32] Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020; Permanent Mission of Chile to the UN, Note No. 022/2020, 26 May 2020; Note No. 294 of 30 July 2020. Note No. 294 remains non-public but is mentioned in 'Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021'.

[33] Argentina, Law No. 27.557 on Maritime Spaces of 4 August 2020.

[34] Chile, Decree No. 95; Nautical Chart No. 8, 2021.

[35] Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021.

[36] Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

Interim conclusion

Thus, the current conflict between Chile and Argentina regarding overlapping claims of CS entitlement emerged, as well as general doubts from Argentina regarding the validity of the Chilean claim.

Substantive conditions of the respective claims of CS entitlements

Argentina and Chile both assert claims to CS entitlements. These claims partially overlap, necessitating delimitation.[37] Delimitation of CS only occurs where the claims of disputing parties are legally possible under international law.[38] Consequently, the overlapping claims of CS entitlement of Argentina and Chile must conform to legal standards under international law. The following section will evaluate the legal viability of the respective claims by examining their substantive conditions.

Separability of CS from EEZ

In accordance with Art. 7 (5) TPF, the region situated south of Point F is designated as high seas. Despite this area being governed by UNCLOS (Arts. 86-120), it does not negate the possibility of bilateral agreements between States, specifying the constraints on their respective maritime rights (Lindsley, 1987: 451). Given that both CS entitlements lie within an area classified as high seas, the initial inquiry is to ascertain the feasibility of asserting CS rights in a region that concurrently does not qualify as an EEZ.

Argentina (CS beyond 200 nm)

Given that the EEZ extends up to a distance of 200 nm from the baseline, both the CS and EEZ frequently overlap in the same geographic area. Nevertheless, Argentina's assertion pertains to an entitlement to ECS. An ECS, by definition, commences beyond the 200-nm limit from the baseline, signifying that it consistently extends beyond the boundaries of the EEZ and into the high seas (Suárez-de Vivero, 2013: 114). Consequently, there is a legal imperative to distinguish between the EEZ and ECS.

Chile (CS within 200 nm)

Chile's assertion of CS entitlement, in contrast, pertains to its legal CS, situated within the 200-nm radius from its baseline. Typically, this region classifies as an EEZ, but due to Art. 7 (5) TPF, it is deemed high seas in this particular instance. The rules of Part VI UNCLOS (CS) might be incorporated into the legal régime that governs the EEZ, which could make them inseparable.[39] According to Art. 56 (3) UNCLOS, the rights concerning the seabed and subsoil

[37] North Sea Continental Shelf, para. 57.

[38] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, para. 34; Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4, para. 397).

[39] *Nicaragua v. Colombia (2023)*, para. 64.

are to be exercised in accordance with the legal framework governing the CS. Furthermore, the delimitation of the CS and the EEZ are governed by the same rules (Proelß/Tanaka, 2017: Art. 83 para. 1). Thus, the legal frameworks governing the EEZ and the legal CS of a coastal State are interrelated.[40]

Nonetheless, judicial and arbitral decisions typically acknowledge the autonomy and differentiation of the two regimes (Evans and Ioannides, 2023: 3).[41] Furthermore, States have delimited the EEZ and the CS separately in several bilateral agreements.[42] This practice of States indicates that States may establish distinct arrangements. Moreover, UNCLOS' individual sections for EEZ and CS present a systematic argument against a unified legal concept (UNCLOS, Part V (Arts. 55-75, EEZ) and Part VI (Arts. 76-85, CS)). The EEZ, furthermore, is not an inherent right like the CS – it needs to be asserted (*Proelß/Maggio,* 2017: Art. 78 para. 7).[43] Where no EEZ is claimed, the superjacent waters of the CS beyond are governed by the *régime* of the high seas (Proelß/Maggio, 2017: Art. 78 para. 7).[44] The possibility of a State having the inherent right to its legal CS, while not claiming its EEZ, underscores the separability of the EEZ and the legal CS. This is further reinforced by Art. 78 (1), (2) UNCLOS, explicitly stating that the condition of the CS does not impact the legal status of the waters above them. Hence, while Art. 56 (3) UNCLOS establishes a link between the two zones, it falls short of asserting their inseparability in maritime delimitation (Liao, 2018: 105).[45] Chile's legal CS entitlement could exist without an EEZ surrounding it.[46]

Waived rights to CS entitlement south of Point F due to TPF

By becoming party to the TPF, Chile and Argentina may have waived their rights to a CS entitlement south of Point F. According to UNCLOS, agreements between States to limit their maritime territories are not prohibited.[47] The TPF establishes Point F as its final and southernmost boundary point, Arts. 7 (2), 14 (2) TPF. The area beyond Point F is only mentioned in Art. 7 (4)-(5) regarding the EEZ. UNCLOS asserts the exclusive sovereign rights of the coastal state over their CS in Art. 77 (1). This sovereignty is further highlighted by the requirement of express consent for activities that may interfere with these rights (Proelß/Maggio, 2017: Art. 77 para. 21).[48] Hence, international treaties can, while in force,

[40] *Nicaragua v. Colombia (2023)*, Judge Iwasawa, Separate opinion, para. 7.

[41] *Nicaragua v. Colombia (2023)*, Separate Opinion, para. 22; Continental Shelf (Libyan Arab Jamahiriya/Malta), para. 34.

[42] *Nicaragua v. Colombia (2023)*, Judge Xue, Separate Opinion, paras. 28-29; Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 (concluded 9 October 1972, entry into force 8 November 1973) 974 UNTS 319; Agreement between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, (concluded 14 March 1997, not yet in force) 36 ILM 1053.

[43] Note the difference between claiming an EEZ and claiming entitlement to a CS. While the EEZ must always be claimed, entitlement to CS includes an inherent right that may overlap with another State's CS entitlement, leading to overlapping claims of inherent rights.

[44] UNCLOS, Part VII, Arts. 86-120.

[45] *Nicaragua v. Colombia (2023)*, Judge Xue, Separate Opinion, par. 21.

[46] It is, however, controversially debated whether the EEZ can exist without a CS, see *Libyan Arab Jamahiriya/Malta*, para. 34; Evans and Ioannides, 2023: 3.

[47] See under section *"Separability of CS from EEZ"*.

[48] UNCLOS, Art. 77 (2).

limit CS rights with express consent of the regarding parties.[49] Therefore, if Argentina and Chile both expressly consent within the treaty, the TPF could delimit their CS rights south of Point F.

The boundary regarding the Sea of the Southern Zone is addressed in Arts. 7, 14 of the TPF. Although CS is not expressly mentioned, the reference to "seabed and subsoil" in Art. 7 (1) clearly refers to CS, signifying that Art. 7 also regulates boundaries regarding CS.[50] Therefore, the absent mentioning of CS or references to it in the rest of Art. 7 TPF could indicate the possibility of CS entitlement rights south of Point F.

On the other hand, the respective EEZs of Chile and Argentina are regulated in Art. 7 (4)-(5) TPF, with each required to remain on *their* side of the meridian up to Point F. One could contend that Chile's EEZ extends even further south than Point F, suggesting a corresponding extension of its CS in that direction. However, this prospective extension of the EEZ is subject to explicit regulation as outlined in Art. 7 (5) TPF. A general possibility can, hence, not derive from this exception. Nevertheless, if the TPF were interpreted to allow only Chile's EEZ to extend south of Point F due to an explicit exception, CS entitlements south of Point F would be deemed impossible (Wilson, 2021). This interpretation, however, misses the nature of delimiting a State's CS. This can only be done explicitly. The term *express consent* is only used in two other articles of UNCLOS (Arts. 245, 265), underlining its need for restrictive interpretation.[51] Therefore, express consent must be interpreted in a strict legal sense. The special mentioning of Chile's EEZ south of Point F, hence, does not as an *argumentum e contrario* exclude CS entitlements south of Point F.

Conversely, the absence of either State exercising their alleged CS rights beyond Point F between 1984 and 2009 may imply an interpretation of the TPF as proscribing claims of CS entitlement in that particular sector. However, at that time Argentina had not yet presented its outer limits to the CLCS, rendering it impracticable for them to assert their ECS rights. The intent to pursue such rights is discernible through the efforts of the COPLA, which diligently prepared the Argentine submission between 1999 and 2009. In the case of Chile, mere abstention from action cannot unequivocally be construed as express consent to relinquish their CS rights. Consequently, not exercising their alleged CS rights during the aforementioned period is no indication of a waiver of CS rights south of Point F.

Finally, Point F, identified as the southernmost point of the border, is explicitly designated as part of a "final and irrevocable confine" between the countries, Art. 14 (2) TPF. While this might suggest a prohibition on any entitlement or claim south of Point F, careful consideration of the wording and context of Art. 14 TPF is necessary. Arts. 7 and 14 (2) TPF prevent unilateral extensions of boundaries in the sea, soil, and subsoil south of Point F. Therefore, Art. 14 (2) TPF does not establish Point F as the ultimate southern extension point, but rather as the ultimate boundary extension point to the south. Entitlement to a CS is, however, not bound by boundaries; rather, it grants specific rights to the coastal State, distinct from full sovereignty over a particular area (Suárez-de Vivero, 2013: 114). Accordingly, Art. 77 (1) UNCLOS provides restricted sovereign rights in the CS only "for the purpose of exploring it and exploiting its natural resources". The use of the term "outer limit" instead of "boundary" in Art. 76 (7)-(9) UNCLOS further supports this interpretation. Therefore, since Art. 14 (2) TPF only concerns a "final and irrevocable confine" regarding a border, entitlement to a CS

[49] UNCLOS, Arts. 77 (2), 83 (4).

[50] UNCLOS, Art. 76 (3).

[51] See Proelß/Huh/Nishimoto, 2017: Art. 245 paras. 11–12; Maggio: Art. 77 para. 21 fn. 65.

south of Point F is feasible. Consequently, the inherent rights of Chile and Argentina to a CS south of Point F remain unaffected, as Art. 7 TPF does not impose limitations on CS entitlements south of Point F.[52]

Relinquished rights to CS entitlement southeast of Point F (Chile)

Due to its geographical position to the east of the meridian, Argentina's claim within the boundaries established by the TPF is straightforward and not waived. However, Chile may have relinquished its rights to a CS entitlement southeast of the meridian for various reasons, such as signing the TPF, the assertion of a border by Argentina, the establishment of final and binding ECS limits by Argentina, inconsistent argumentation, or by virtue of their claim overlapping the "Area".

TPF problems: bioceanic principle and EEZ-limits

Chile may have waived their rights to their legal CS entitlement beyond the confines of meridian 67° 16', because they signed the TPF (Rivas and Montes, 2021). Argentina contends that, by signing the TPF, Chile has not only waived its rights to a CS entitlement east of the meridian extending to Point F but also to the east in the region south of Point F.[53] This argument is grounded in Argentina's perspective that the TPF upholds the bioceanic principle, which Argentina believes to be a concept integral to the nature of the two nations (Bustos, 1990: 190; Lindsley, 1987: 436-437, 448; Kouyoumdjian, 2021).[54] The bioceanic principle emanates from Argentina's interpretation of the 1893 Boundary Protocol, an annex to the Treaty of Limits of 1881.[55] According to Argentina's interpretation, the 1893 Protocol delineates the southern extension of Chile only up to the meridian of Cape Horn, thereby precluding any Chilean claims in the Atlantic, as such claims would be positioned east of the designated meridian (Guzmán, 2023).

However, the TPF does not explicitly articulate a bioceanic principle. Quite conversely, Art. 9 TPF designates the entire maritime space delimited in the TPF as the "Sea of the Southern Zone", explicitly omitting reference to the Atlantic and Pacific (Kouyoumdjian, 2021). This aligns with the reality that the Atlantic and Pacific Oceans are not easily separable; rather, they exhibit a continuous, flowing transition (Kouyoumdjian, 2021). Additionally, the bioceanic principle has been previously deliberated and implicitly rejected prior to the TPF during the 1977 arbitration award that preceded the Beagle Crisis (Kouyoumdjian, 2021).[56] In this award, Chile was granted full sovereignty over the islands Picton, Lennox, and Nueva, all located to the east Cape Horn and the proposed meridian by Argentina (Kouyoumdjian, 2021).[57] Despite Argentina declaring this award void, they proceeded to sign the TPF.[58] The

[52] Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021.

[53] Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

[54] Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

[55] Boundary Treaty of 23 July 1881; Protocol of 1st May 1893.

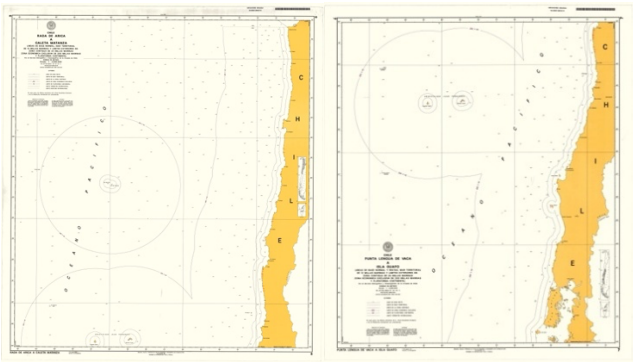
[56] Case concerning a dispute between Argentina and Chile concerning the Beagle Channel (18 February 1977), RIAA vol. XXII, 53-264, para. 176.

[57] *Beagle Channel (18 February 1977)*, para. 176.

[58] Argentina's Declaration of Nullity to Her Britannic Majesty's Award of 1977, (25 January 1918), 17 ILM, 738, 738.

boundaries defined in the TPF for the disputed area of 1977 remained unchanged regarding the islands (boundaries set in Art. 7 (2) TPF). Consequently, Argentina's endorsement of the TPF implies an acceptance of the terms established in the 1977 arbitration, including the rejection of the bioceanic principle. In conclusion, Chile can, at least in relation to the alleged bioceanic principle, assert its CS rights on the east side of the meridian.

Nevertheless, the TPF's EEZ-limits may potentially restrain Chile from asserting CS rights southeast of Point F. Notably, Chile's EEZ extends only within the western side of the meridian, even south of Point F. While this could indicate that the TPF seeks to limit not only Chile's EEZ but also its CS, such explicit constraints are not articulated in the TPF. EEZ and CS are distinguishable.[59] The treaty specifically regulates the EEZ in Art. 7 (5) TPF but remains silent about the CS. Moreover, Chile's earlier nautical chart no. 8, established in 1993, nearly a decade after signing the TPF, solely delineated Chile's EEZ in the disputed area – with no mention of the CS.[60] Chile's nautical charts no. 6 and 7 include the description "EEZ+CS".[61] Had the old nautical chart no. 8 included such a description exclusively to the west of the meridian, it would have been challenging to rebut an explicit waiver of CS rights to the east of the meridian. However, the depiction solely of the EEZ in the old nautical chart no. 8, left the possibility of claiming CS entitlement east of the meridian. Consequently, the delimitation of Chile's EEZ in the TPF does not correlate with a waiver of its rights on CS entitlements. Chile's updated nautical chart no. 8 of 2021 now not only outlines the EEZ but also incorporates the CS.[62] While the EEZ limits remain unchanged, the CS extends southeast of Point F.



(Chile's nautical map no. 6 and 7)

Argentina's border claim

Another factor potentially restricting Chile from asserting its CS rights southeast of Point F is the border that Argentina delineated in its submission to the CLCS in 2009. This border encompasses the entire "Outer Crescent", defined by points RA-3840, RA-3839, and RA-

[59] See under section *"Separability of CS from EEZ, Chile (CS within 200 nm)"*.

[60] Chile, Nautical Chart No. 8, 1993.

[61] Chile, Nautical Chart No. 6, 2000 and No. 7, 2000.

[62] Chile, Nautical Chart No. 8, 2021.

3458.[63] Similar to the meridian up to Point F, this border could preclude Chile from claiming CS entitlement on Argentinian sovereign territory.

The TPF delineates the boundary between Argentina and Chile, extending up to Point F.[64] The segment between point RA-3839 and point RA-3840 is a southern elongation of the border up to Point F, while the segment between RA-3839 and RA-3458 connects the "Outer Crescent" to Argentina's territory. Therefore, these limits are not part of the delimitation effected by the TPF in Art. 7. According to Art. 14 (2) TPF, the established boundaries are deemed final and irrevocable. Furthermore, Art. 14 (3) TPF prohibits the presentation of claims or interpretations contradictory to the TPF's provisions. Consequently, Argentina cannot unilaterally claim new boundaries south of Point F. Additionally, Argentina's decision to submit a border claim to the CLCS raises questions, as the CLCS is solely empowered to make recommendations regarding the CS. Therefore, the outer limits of Argentina's ECS do not constitute a "boundary between the respective sovereignties".[65]

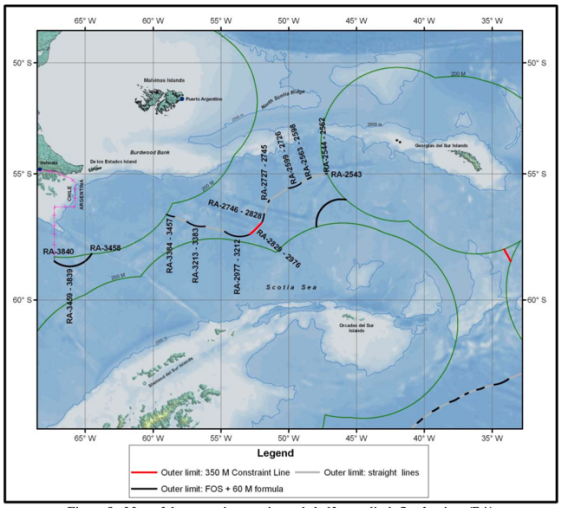


Figure 5 - Map of the argentine continental shelf outer limit fixed points (RA) in the combined continental margin – north Scotia ridge.

Final and binding ECS limits

Chile's claim of having an entitlement to CS southeast of Point F may be partially constrained if Argentina's ECS limits, encompassing partly the same area as Chile's claim, are deemed final and binding upon Chile in a delimitating way. According to Art. 76 (8) S. 3 UNCLOS, the limits of the ECS established by a coastal State on the basis of the recommendations of the CLCS shall be final and binding. In 2020, the National Congress of Argentina approved the demarcation of the outer limit of its ECS, based on the recommendations issued by the

[63] "Boundary between the respective sovereignties on the sea, seabed and subsoil of the Republic of Argentina and the Republic of Chile", Argentine Submission to the CLCS, Executive Summary, 21 April 2009, 14.

[64] TPF, Art. 7 (1), (5).

[65] Argentine Submission to the CLCS, Executive Summary, 21 April 2009, 14.

CLCS.[66] Hence, these limits became final and binding, in accordance with Art. 76 (8) S. 3 UNCLOS.

These limits could have become final and binding upon Chile. Art. 76 (8) UNCLOS does not explicitly specify whether the outer limits established accordingly are final and binding for the coastal State, other States Parties, or both. Some posit that only the submitting State is legally bound, and other States retain their legal right to dissent and challenge the established outer limit of another State (McDorman, 2002: 315; Heidar, 2004: 32). Other interpretations suggest that Art. 76 (8) UNCLOS implies the limits will become obligatory *erga omnes* (United Nations, 1993: 29 para. 86; Nelson, 1998: 585; Lupinacci, 1983: 546; Mao and others, 2023: 2). As the CLCS is an UNCLOS body, the boundaries set on the basis of the CLCS recommendations will at least have to be final and binding upon UNCLOS parties (Heidar, 2004: 32). As Chile is a UNCLOS party, Argentina's ECS limits, set on the basis of the CLCS recommendation, became final and binding upon Chile.

Secondly, these limits could be final and binding upon Chile in a delimitating way. However, according to Art. 76 (10) of and Annex II, Art. 9 to UNCLOS, the actions of the CLCS shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. This underscores that Art. 76 UNCLOS is concerned with the entitlement to and establishment of the outer limits of the CS rather than the delimitation of overlapping entitlements.[67] Annex I to the CLCS's Rules of Procedure further acknowledges that the competence regarding disputes arising from the establishment of the CS outer limits lies with States.[68] Hence, other States should accept the CLCS's consideration of and recommendations to a submission raising CS delimitation issues, as these will not prejudice their rights (Johnson and Oude Elferink, 2006: 467). In the case of delimitation of overlapping CS entitlements, Art. 83 UNCLOS is applicable, whose dispute settlement mechanism does not involve the CLCS (Nelson, 2002: 1239; Proelß/Serdy, 2017: Annex II, Art. 9, para. 10).[69]

In conclusion, the ECS limits established on the basis of CLCS recommendations are final and binding only in a scientifical and geophysical way regarding CS entitlement – not in a legal sense to delimitate CS.[70] Consequently, the stipulations in Arts. 76 (8)-(9) UNCLOS, cannot be invoked against another State in matters pertaining to the delimitation of the CS (Johnson and Oude Elferink, 2006: 464). The demarcation of the outer limit of Argentina's ECS, based on the CLCS recommendations, is not final and binding in a delimitating way upon Chile. These recommendations do not preclude Chile from asserting its CS rights in the same area. Any potential overlap of CS entitlements would then constitute a bilateral conflict between Argentina and Chile, a matter outside the purview of the CLCS.

Contradicting Chilean opposition to Argentina's CLCS submission

Chile could have lost their rights on CS entitlement southeast of Point F due to the principle of estoppel, because of a contradicting opposition to Argentina's submission to the CLCS.

[66] Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021; Argentina, Law No. 27.557 on Maritime Spaces of 4 August 2020.

[67] See with the additional systematic arguments, Virginia Commentary, Vol. II: 883 and 1017; see also Johnson and Oude Elferink, 2006: 463-464.

[68] CLCS, Rules of Procedure, Annex I, para. 1.

[69] ILA, First Report, 23.

[70] UNCLOS, Annex II, Art. 2 (1). This corresponds to the composition of the CLCS, which consists only of scientific and not legal experts.

Estoppel prevents a party from asserting a right if they have acted in a way contradictory to it, and another party has relied on those actions to their detriment (MacGibbon, 1958: 468-469). Chile opposed parts of Argentina's claims on various occasions.[71] Argentina asserts that, within these oppositions, Chile declared Argentina's ECS entitlement claim in the "Outer Crescent" unopposable, only to subsequently claim a CS entitlement within the same area.[72] This argument is substantiated by the formulation in Chile's note to Argentina in 2020, where they stated that "the legal status of the outer continental shelf claimed by Argentina in that sector [the 'Outer Crescent'] is governed by international law, and it may not be modified unilaterally by Argentina. Therefore, the 'outer limit' on the basis of which Argentina attempts to establish a delimitation to which Chile has not given its consent is unopposable to the Republic of Chile".[73]

While it may initially appear that Chile's statements oppose Argentina's ECS entitlement, this interpretation might be misconstrued. Upon reviewing both Chile's second note of May 2020,[74] as well as the notes from 2016 and 2021, it becomes evident that these communications do not contest Argentina's ECS claim, but solely Argentina's border claim.[75] The references to points RA-3839 and RA-3840 are frequently followed by applying the same line of argument to points RA-3458 and RA-3839.[76] This combination of arguments seems to be incorporated in the quoted note from 2020, although in ambiguous formulation. Moreover, the contention against Argentina's decision being taken "unilaterally" holds relevance solely within the framework of a territorial boundary and not in relation to an ECS, as the latter does not constitute a bilateral matter in the entitlement phase.[77] Therefore, while the formulation might be unfavorable, Chile did not contradict itself. Hence, the right to its CS entitlement southeast of Point F is not lost due to the principle of estoppel. In any case, even contradicting statements most likely would not deprive Chile of its right on CS, as CS can only be delimited by express consent.[78]

Overlapping the "Area"

Lastly, the viability of Chile's claim to its legal CS entitlement could hinge on the non-extension over the "Area".[79] Art. 1 (1) UNCLOS defines the "Area" as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The "Area" and its resources constitute common heritage of mankind.[80] Therefore, States are prohibited from

[71] See Permanent Mission of Chile to the UN, Note No. 93/2016, 25 May 2016; Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020; Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021.

[72] Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

[73] Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020.

[74] Permanent Mission of Chile to the UN, Note No. 022/2020, 26 May 2020.

[75] Permanent Mission of Chile to the UN, Note No. 93/2016, 25 May 2016; Permanent Mission of Chile to the UN, Note No. 022/2020, 26 May 2020; Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021.

[76] See, among others, Ministry of Foreign Relations Chile, Note No. 3218/2020, 11 May 2020.

[77] Rather the submission to the CLCS is considered a unilateral matter, *Cf.* Art. 76 (8) UNCLOS. When delimiting entitlements to a CS, the matter is obviously bilateral.

[78] See under section *"Waived rights to CS entitlement south of Point F due to TPF"*.

[79] Allegation by Argentina in 'Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

[80] UNCLOS, Arts. 136 and the following.

claiming or exercising sovereignty or sovereign rights over any part of the "Area" or its resources, which belong to humanity as a whole and whose administration falls to the International Seabed Authority (ISA).[81] However, as Chile has not given express consent to a delimitation of its legal CS, the seabed and ocean floor and subsoil thereof are within the limits of Chile's jurisdiction. Hence, they do not qualify as the "Area".[82] Consequently, the Chilean legal CS southeast of Point F does not constitute an exercise of sovereignty or sovereign rights over any part of the "Area" or its resources.

Interim conclusion

Hence, both Argentina and Chile have entitlements to their CS. The Argentine entitlement regards an ECS, the Chilean a legal CS.

Overlapping entitlements to CS

Introduction

Maritime entitlements do not preclude the possibility of the co-existence of other valid entitlements over the same marine space (Antunes, 2003: 137). In disputes involving overlapping entitlements to two legal CSs or two ECSs, historical precedent indicates that the equivalence of entitlements has led to negotiated agreements or the invocation of jurisdiction between the involved parties, pursuant to Art. 83 (1)-(2), Part XV of UNCLOS. This delimitation process has commonly relied on the equidistance principle, equitable considerations, or a combined three-step approach (Tanaka, 2021: 48-; Proelß/Tanaka, 2017: Art. 74 paras. 4-9).[83] However, the overlapping CS entitlements between Chile and Argentina introduce a nuanced challenge, as it may not involve legally equivalent entitlements – Chile asserts its rights on its legal CS, while Argentina asserts its rights on its ECS. The legal significance of this distinction is a subject of contentious debate.

First Opinion: Entitlements to ECS and legal CS can overlap

According to one perspective, a State's ECS entitlement may extend into the legal CS entitlement of another State.[84] Under this view, there exists a single CS, implying that claims of both legal CS and ECS are considered equal (Baumert, 2017: 832; Liao, 2018: 85).[85] Within and beyond the 200 nm limit, there is purportedly no legal distinction between a State's entitlement to a CS based on the natural prolongation criterion and one based on the distance

[81] UNCLOS, Art. 137; Permanent Mission of Argentina to the UN, Note ENAUN No. 616/2021, 3 September 2021.

[82] Permanent Mission of Chile to the UN, Note No. 74/2021, 25 October 2021.

[83] *North Sea Continental Shelf*, paras. 4, 6, 85; Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246, paras. 157–158; Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p. 38, paras. 46–56; the first time the ICJ applied the three-stage approach under Arts. 74, 83 was in the Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, paras. 119-122; followed by *Bay of Bengal*, para. 240.

[84] *Bay of Bengal*, Separate Opinion of Judge Cot, 190.

[85] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Robinson, para. 5.

criterion (Kunoy, 2019: 338). Consequently, the resolution of overlapping ECS and legal CS entitlements should follow the same methods and principles as any other delimitation of overlapping CS entitlements.[86]

The CS régime traces its origins to the concept of natural prolongation. The ICJ, in the *North Sea Continental Shelf* cases, affirmed that every coastal State possesses sovereign rights over the exploitable natural resources of the seabed, constituting a natural prolongation of its land territory into and under the sea.[87] This perspective argues that this foundational basis of the CS regime, also set in the Truman Proclamation and the Convention of the CS, remains unaltered under the framework of UNCLOS and is not supplanted or surpassed by the distance criterion.[88]

Moreover, the overlapping of ECS and legal CS entitlements was neither addressed during the UNCLOS III negotiations nor does UNCLOS include a rule prohibiting it.[89] This could imply that UNCLOS does not preclude an overlapping area with shared rights among concerned States.[90] The introduction of the distance criterion in Art. 76 UNCLOS lacked wording suggesting hierarchy (Liao, 2018: 84); Art. 83 UNCLOS, addressing CS delimitation, also does not differentiate between various types of CS (Liao, 2018: 87)[91] Hence, some even suggest that the distance criterion is a mere exception for States unable to rely on the prolongation criterion (Lloyd, 1991: 570; Charney, 2002: 1024). A hierarchy could also run counter to the principle of Art. 77 (3) UNCLOS, affirming the *ipso facto* and *ab initio* status of the CS.[92]

According to this perspective, international jurisprudence acknowledges the existence of a single CS and accepts the overlap of ECS and legal CS entitlements.[93] Consequently, the CS entitlements of Argentina and Chile would be considered equal. Delimitation methods such as the equidistance principle, equitable principles, or the three-step approach would be applied to partition the disputed area and resolve the dispute.

Second Opinion: No overlap of ECS and legal CS entitlements

In alignment with an alternative perspective, a State's entitlement to an ECS may not extend into the 200 nm zone of another State (Evans and Ioannides, 2023: 1-2; Ferrada, 2021: 8). This viewpoint is predicated on the distinction between entitlement and delimitation when

[86] See under section *"Overlapping entitlements to CS, Introduction"*.

[87] *North Sea Continental Shelf*, para. 19.

[88] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 14; Truman Proclamation, 66, 67 ('an extension of the land-mass [...] naturally appurtenant to it'). It also recognized that the CS may extend 'to the shore of another State', 66, 67. A decade later, the 1958 Geneva Convention defined the CS in terms of depth or exploitation of resources, See CSC, Art 1.

[89] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Tomka, para. 28.

[90] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 17.

[91] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Robinson, para. 5; *Bay of Bengal*, para. 361.

[92] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 15.

[93] Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, UNRIAA XXVII pp. 147-251, para. 213; *Bay of Bengal*, para. 361; Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, p. 4, para. 490; *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Tomka, para. 16, further referring to ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*.

contemplating the concept of a single CS (Woker, 2023: 10). While the substantive content of the CS regime generally remains consistent within and beyond 200 nm from a state's baselines, the basis of entitlement to the single CS is not itself singular (Evans and Ioannides, 2023: 2). The criteria for determining CS entitlement diverge based on the distance criterion within 200 nm and the natural prolongation criterion beyond 200 nm (Mossop, 2016: 241; Woker, 2023: 12).[94] Consequently, the notion of a singular CS becomes irrelevant during the entitlement to CS.[95]

Moreover, according to this view, the conditions for determining the ECS limits aim to prevent unwarranted overlap on the "Area".[96] The wording of Art. 76 UNCLOS, particularly the rules in para. 4 - 7, the role designated to the CLCS in para. 8, and the obligation to deposit charts and relevant information in para. 9, might suggests that States envisioned the ECS extending only into regions otherwise falling within the "Area" (Evans, 1989: 51; Baumert, 2017: 848).[97] This is corroborated by the primary role of the CLCS, preventing the CS from encroaching on the area and its resources (ICJ, *Nicaragua v. Colombia* (2016), para. 109). Additionally, Art. 82 (1) UNCLOS establishes provisions for payments or contributions through the ISA concerning the exploitation of the non-living resources of the CS beyond 200 nm from the baselines. This provision could lose its intended purpose if the ECS of one State extended within 200 nm from the baselines of another State (Woker, 2023: 12-13; Evans, 2016: 75; Baumert, 2017: 835; Virginia Commentary, Vol. II: 834–835; Salas and Valdivia, 2023: 100).[98] Notably, there is no indication in the *travaux préparatoires* of UNCLOS that the possibility of one State's ECS extending within 200 nm from the baselines of another State was deliberated during UNCLOS III (Oude Elferink, 2004: 116, fn. 35).

Furthermore, the ECS must be proven to be opposable to third States, whereas the CS does not require proof. Therefore, this viewpoint contends that, under Art. 76 (1) UNCLOS, the *legal* CS entitlement is the minimum extent of CS available to all coastal States, safeguarded against any claims of maritime entitlements beyond 200 nm by other States (Treves, 1989: 725-; Evans, 1989: 51; Evans and Ioannides, 2023: 2; Kunoy, 2019: 373).

Lastly, Art. 56 (3) of Part V UNCLOS (EEZ), stipulates that the rights related to the seabed and its subsoil are to be exercised in accordance with Part VI UNCLOS (CS). Consequently, this opinion believes the rules of Part VI to be incorporated by reference into the legal regime governing the EEZ, establishing that an EEZ cannot exist without a legal CS and therefore cannot be overlapped by an ECS (Allott, 1983: 14). However, this argument cannot be applied in the case of Argentina and Chile, as Chile does not have an EEZ in the disputed area due to Art. 7 TPF. While the EEZ's interrelation with the CS would have certainly been an argument in favor of this position, its absence does not preclude the position. The other arguments supporting this perspective remain valid. Therefore, according to this viewpoint, Argentina's and Chile's entitlements are not equal. Chile would have a right to its legal CS entitlement, while Argentina would not retain any rights to their ECS in the "Outer Crescent".[99]

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[94] UNCLOS, Art. 76 (1); *Nicaragua v. Colombia (2023)*, para. 75.

[95] *Nicaragua v. Colombia (2023)*, para. 65.

[96] *Nicaragua v. Colombia (2023)*, para. 76. The "area" being the sea-bed, ocean floor, and subsoil beyond national jurisdiction, recognized as the "common heritage of mankind" (UNCLOS, Arts. 1 (1), 136).

[97] *Nicaragua v. Colombia (2023)*, para. 76.

[98] *Nicaragua v. Colombia (2023)*, para. 76.

[99] A CS on the other hand *can* exist without an EEZ, see under section *"Separability of CS from EEZ, Chile (CS within 200 nm)"*.

Third Opinion: Rule in Customary International Law

Provided that the issue might not be solved by interpreting UNCLOS, a third opinion relies on customary law. This perspective asserts the existence of a customary law rule whereby a State's ECS entitlement should not encroach within the legal CS entitlement of another State.[100] The existence of a rule of customary law requires a general State practice together with a belief in its obligatory nature (*opinio juris*) (Kunz, 1953: 666).[101] Given that Art. 76 (1) UNCLOS is regarded as customary law,[102] the inquiry revolves around whether States have aligned themselves with either of the prior opinions in a manner that reflects general State practice and *opinio juris*.

State Practice

In its recent Nicaragua v. Colombia (2023) decision, the ICJ observed that the vast majority of UNCLOS States, in practice, refrained from asserting outer limits of their ECS within 200 nm of another State's baselines in submissions to the CLCS.[103] However, doubts persist regarding the existence of a consistent State practice.[104] Some argue that several States, like Argentina, have claimed ECS entitlements that encroach within 200 nm of another State's baselines, in their submissions to the CLCS.[105]

Nonetheless, the ICJ clarified in its Military and Paramilitary Activities judgement that a rule to be established as customary does not necessitate strict adherence in practice.[106] Rather, it is sufficient if the general conduct of States aligns with the rule, and instances of deviation are viewed as breaches rather than recognition of a new rule.[107] Hence, a few States pursuing an approach extending their ECS entitlements into the legal CS of third States, thereby requiring appropriate delimitation, does not preclude the development of a contrary customary international rule (Kunoy, 2019: 359-360).[108]

Out of all Submissions and preliminary information transmitted to the CLCS, 51 out of 55 submissions by coastal States with the geomorphological potential to extend their CS within

[100] *Nicaragua v. Colombia (2023)*, para. 77. Note that the dispute between Chile and Argentina differs from this case because Colombia was not party to UNCLOS, hence, the solution was based on customary law.

[101] *North Sea Continental Shelf*, para. 77.

[102] See under section *"Definitions, CLCS"*.

[103] *Nicaragua v. Colombia (2023)*, para. 77.

[104] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Tomka, paras. 42-50.

[105] Tomka, in para. 45 of his dissenting opinion, refers to, among others, Bangladesh, CLCS Submission, 11; Cameroon, CLCS Preliminary Information, 4; China, CLCS Submission East China Sea, 7, fig. 2; France, CLCS Partial Submission, Part 1, 5, fig. 2; Korea, CLCS Partial Submission, 9, fig. 1; Russia, CLCS Submission, map 2; Somalia, CLCS Submission, 9, fig. 2; Argentine Submission to the CLCS, Executive Summary, 21 April 2009.

[106] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, para. 186.

[107] *Military and Paramilitary Activities in and against Nicaragua*, para. 186.

[108] Tomka lists much more apparent cases in his Dissenting Opinion than, for example, Kunoy, 2019: 350, Robinson's Dissenting Opinion in Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast, and the Counter-Memorial of Colombia, Annex 50, in that same case, hence, undermining the credibility of Tomka's list to some extent.

the 200-nm zones of other States, refrained from asserting these limits.[109] Additionally, in the Nicaragua v. Colombia (2023) case, the ICJ noted that in the cases where an ECS within a legal CS was claimed, objections were raised by the affected States.[110] Hence, State practice concerning the interplay of criteria under Art. 76 (1) UNCLOS illustrates a widespread understanding that, in cases of potential overlap, the distance criterion takes precedence over the natural prolongation criterion. This understanding serves as a deterrent for most States from asserting ECS entitlements that would encroach into the legal CS entitlement of other States. Consequently, although States like Argentina have claimed an ECS entitlement overlapping with another State's legal CS entitlement, the practice of States can be deemed adequate for the identification of a customary law rule.

Opinio Iuris

The State practice would further have to represent a belief of legal obligation.[111] For such law to materialize, the practice must be both widespread and representative, as well as consistent.[112]

However, according to an opposing view, the ICJ does not detect explicit expressions of *opinio juris* but rather attempts to infer it from the negative practice of certain States.[113] Furthermore, no instance exists where a State explicitly renounced its entitlement to an ECS based on the belief that it cannot overlap with the legal CS of another State.[114] According to this view, the concerned third States in their responses to the other State's claim did not indicate such a principle. Instead, responses emphasized the necessity for delimitation between the involved States.[115]

Moreover, States might exercise restraint due to factors such as potential disputes preventing the CLCS from considering their submission, to avoid diplomatic conflicts or because of claims in areas deemed unworthy (Jun and Haiwen, 2013: 91; Jensen, 2016: 82).[116] Consequently, it remains unclear whether States, when limiting their claims in submissions,

[109] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Robinson, para. 12; Counter-Memorial of Colombia, Annex 50; These numbers diverge by one State from those provided by Kunoy (Kunoy, 2019: 350).

[110] *Nicaragua v. Colombia (2023)*, para. 77; see, among others, Permanent Mission of Canada to the UN, Note No. 0666, 9 November 2009; Permanent Mission of the Republic of Equatorial Guinea to the UN, Note 090/C-1/10, 22 December 2009.

[111] *North Sea Continental Shelf*, para. 77.

[112] ILC, Draft conclusions on identification of customary international law, Conclusion 8 (1); *Gulf of Maine*, para. 111; *Nicaragua v. Colombia (2023)*, para. 77. In the latter case, the ICJ regards States' practice before the CLCS as indicative of opinio juris (para. 77).

[113] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Tomka, para. 52; Dissenting Opinion of Judge Robinson, para. 20; Separate Opinion of Judge Xue, paras. 10, 48.

[114] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 47.

[115] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, paras. 42-43, only referring to Japan in response to 'Korea, CLCS Partial Submission' and 'China, CLCS Submission East China Sea', see, for example, Permanent Mission of Japan to the UN, Note SC/12/372, 28 December 2012. Moreover, this case is unfeasible as an argument, as the coasts are less than 400 nm opposite of each other, evidently needing a delimitation.

[116] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 38; Dissenting Opinion of Judge Tomka, para. 53. Rule 5(a) of Annex I to the CLCS, Rules of Procedure seems to allow third States that have adjacent or opposite coasts with the submitting coastal State to obstruct the CLCS from considering submissions made under Article 76(8) and Article 4 of Annex II to UNCLOS.

believed such restraint was legally required or merely guided by policy considerations.[117] Hence, some contend that the State practice is neither widespread nor consistent.[118]

Conversely, others argue that States typically do not restrain themselves when they believe they have a right.[119] If an issue falls under international law and States abstain from actions against their interests, it suggests that their restraint is due to a sense of legal obligation.[120] While considerations regarding successful submissions to the CLCS could have been a factor, it's notable that many submissions not only show abstention from extending ECS claims into 200-nm zones of third States but also include fixed points of outer limits intersecting with relevant 200-nm points of third States (Kunoy, 2019: 360).[121] Moreover, explicit renunciation of CS rights within 200 nm of another State is not essential for customary law, as long as States acted under a perceived legal obligation. An explicit waiver of CS rights is also unfavourable, as there remains the possibility that other States allow another ECS to overlap with their legal CS. Furthermore, the perceived indications of support can be refuted, as the majority of States have objected to submissions that would permit another State to explore its ECS within their own legal CS.[122] Additionally, since legal CS rights do not necessitate assertion because of their inherent nature, there is no time limit for coastal States to contest the ECS rights of other States (Álvarez, 2021: 16). Conclusively, the second viewpoint appears more persuasive. Despite potential other influences, the substantial number of States adhering to the same rule consistently over an extended duration is adequate to be regarded as a legal obligation.

Interim Conclusion

Therefore, a rule of customary law exists, whereby a State's ECS entitlement should not encroach within the legal CS entitlement of another State. The third opinion thus concurs with the second, albeit rooted in customary law. Accordingly, Chile would have a right to its legal CS, while Argentina would not retain any ECS rights in the "Outer Crescent."

Resolution

Given the divergent conclusions, a resolution is necessary to address the dispute. The first opinion correctly asserts the prolongation criterion as the historical foundation of the CS. However, the law of the CS has evolved (Salas and Valdivia, 2023: 98). The distance criterion is not just a mere exception for States with a CS shorter than 200 nm, it is a second basis for entitling CS (Virginia Commentary, Vol. II: 846; Salas and Valdivia, 2023: 100).[123] Since the entry into force of UNCLOS, entitlement to a CS within 200 nm is contingent upon distance, while entitlement beyond 200 nm relies on natural prolongation.[124] Nevertheless, the parity in

[117] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 38; Dissenting Opinion of Judge Robinson, para. 14.

[118] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Xue, para. 47.

[119] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Iwasawa, para. 12.

[120] *Nicaragua v. Colombia (2023)*, Separate Opinion of Judge Iwasawa, para. 12.

[121] See, illustratively, Pakistan, CLCS Submission, Executive Summary, Fig. 1.

[122] See, among others, Permanent Mission of Canada to the UN, Note No. 0666, 9 November 2009; Permanent Mission of the Republic of Equatorial Guinea to the UN, Note 090/C-1/10, 22 December 2009.

[123] *Nicaragua v. Colombia (2023)*, para. 75.

[124] *Nicaragua v. Colombia (2023)*, para. 75.

entitlement does not inherently imply complete equality in delimitation (Salas and Valdivia, 2023: 99).[125] Jurisdictions cited by the first opinion neither mentioned a single CS when addressing delimitation issues (Bernard, 2022: 101; Woker, 2023: 3-4; Salas and Valdivia, 2023: 92),[126] nor did they pertain to contexts of ECS and legal CS overlap (Woker, 2023: 4).[127] Hence, the concept of a single CS is no argument to support equal titles of CS in delimitation.

The first and second opinion concur that an ECS should not encroach upon the "Area". The wording and heading of Art. 82 UNCLOS could suggest that this prohibition does not necessarily preclude the possibility of an overlap of ECS and legal CS.[128] Art. 82 UNCLOS might be invoked as needed, ensuring the protection of the "Area" remains intact.[129] However, this interpretation conflicts with the CLCS's intended role of safeguarding against ECS infringement upon the "Area". Allowing overlaps between ECS and legal CS entitlements would render the CLCS partially redundant, as ECS limits in overlapping parts cannot infringe upon the “Area”. Additionally, neither the wording of Art. 82 nor the structure of Art. 76 suggest the possibility of such an overlap.

Moreover, the concept of a legal CS was introduced to afford coastal States a minimum entitlement framework. This equality mechanism in maritime law would be compromised if the ECS could overlap another State’s legal CS. Nevertheless, it can be contended that in the specific case of Chile, its entitlement, despite falling within the 200 nm radius, should be treated akin to an ECS due to the absence of a surrounding EEZ. The two entitlements resemble the typical ECS scenario – asserting rights to a CS in high seas. However, CS and EEZ are separable. Therefore, by waiving its rights on an EEZ in the “Outer Crescent” in the TPF, Chile has not waived its rights to its legal CS. This argument is also not precluded by Argentina’s *inherent* right to their ECS. If this inherent right were immune to limitations, delimitation processes would be impossible.

The third perspective echoes the conclusion of the second. It could even be argued that the element of State practice in customary law falls under the purview of "subsequent practice" as defined in Art. 31(3)(b) VCLT, thus aiding the interpretation of Art. 76 UNCLOS in favor of the second opinion. This further reinforces the notion that a State's ECS entitlement cannot overlap another State's legal CS, rendering it the more compelling perspective overall. Consequently, Argentina's and Chile's CS entitlements are not deemed equal. Chile's can exercise its legal CS rights, while Argentina does not retain any rights to their ECS in the "Outer Crescent".

Dispute settlement mechanisms

Dispute settlement mechanism of UNCLOS or the TPF

For this dispute, two potential settlement mechanisms could be invoked. Given that the contested area falls under the jurisdiction of UNCLOS, the dispute settlement mechanism for

[125] *Nicaragua v. Colombia (2023)*, para. 65.

[126] *Nicaragua v. Colombia (2023)*, paras. 71-75.

[127] *Nicaragua v. Colombia (2023)*, para. 72.

[128] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Robinson, para. 21.

[129] *Nicaragua v. Colombia (2023)*, Dissenting Opinion of Judge Robinson, para. 21.

overlapping CS entitlements outlined in Art. 83, Part XV UNCLOS may be applicable. However, in this specific case, the TPF also includes a dispute settlement mechanism.[130]

In the similar Kenya v. Somalia case, Kenya raised preliminary objections before the ICJ, challenging the court's jurisdiction and the admissibility of Somalia's application by emphasizing the existence of a bilateral agreement that provided an alternative dispute resolution mechanism.[131] The ICJ's consideration of these objections highlighted the importance of respecting existing bilateral treaties and their dispute resolution frameworks, even when broader mechanisms under UNCLOS are available.[132]

Moreover, the Pact of Bogotá obliges signatory states to resolve disputes through peaceful means, including arbitration and judicial settlement, reflecting the parties' commitment to agreed-upon procedures.[133]

Both examples underscores that a specific bilateral treaty's dispute resolution mechanism may supersede general international law provisions when such treaties are in place. Accordingly, the TPF, as a bilateral treaty between the parties involved, holds the status of *lex specialis* in relation to UNCLOS (Koskenniemi, 2004: 6). Consequently, the TPF's dispute settlement mechanism takes precedence over the UNCLOS mechanism.

TPF

Dispute settlement mechanism of the TPF

The TPF delineates multiple means of dispute settlement. Initially, direct negotiations between the countries are mandated, Art. 4 (1) TPF. If, in the judgment of either Party, direct negotiations fail to yield a satisfactory result, either Party may invite the other to pursue a solution through peaceful settlement, chosen by mutual agreement, Art. 4 (2) TPF. If, within four months, direct negotiations do not result in an agreement, a resolution shall be sought through a conciliation process conducted by the Argentine-Chilean Permanent Conciliation Commission, as stipulated in Art. 5 of and Annex I, Chapter I to the TPF. If the parties do not accept the settlement terms proposed by the Conciliation Commission, they can, in accordance with Art. 6 TPF, submit the dispute to the arbitral procedure established in Annex I, Chapter II TPF (Lindsley, 1987: 449). While Art. 4 (2) TPF allows for the possibility of utilizing any settling means, including the ICJ, the structure of the TPF's annexes implies that Argentina and Chile are likely to primarily resort to negotiations, conciliation, and arbitration.

Possible outcomes

Both negotiations and conciliation operate outside the purview of a tribunal, providing the parties with the flexibility to sign agreements that need not strictly adhere to established international law practices (Remiro et al., 2010: para. 454). Therefore, even though Chile possesses a legal CS entitlement that substantively surpasses Argentina's ECS entitlement, an agreement could be negotiated incorporating methods such as an equidistance line, equitable

[130] TPF, Arts. 2 - 6, Annex I, Chapter I – II.

[131] International Court of Justice, Judgment, 2 February 2017, Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, I.C.J. Reports 2017, p. 4.

[132] *Somalia* v. *Kenya,* Order of 9 October 2015, I.C.J. Reports 2015, pp. 659-660.

[133] American Treaty on Pacific Settlement (Pact of Bogotá), April 30, 1948, 30 UNTS 55.

principles, or a combined three-step approach to delimit the overlapping zone. While international tribunals would probably not come to this conclusion, it could be deemed the "morally equitable" solution in the interest of peace and friendship. Chile would further retain the remainder of its CS entitlement – a substantially larger area than the overlapping portion. Such an agreement could even grant Argentina its full claim in the “Outer Crescent”, while Chile would “only” obtain the remainder of its claim. This could mitigate potential conflicts and potentially aligns with Chile's more significant geopolitical interest concerning Antarctica.

Contrastingly, arbitration, despite offering flexibility in selecting arbitrators and determining the location, is bound to adjudicate based on international law, as per Annex I, Chapter II, Art. 33 TPF, unless otherwise agreed by the Parties (Remiro et al., 2010: para. 469). Consequently, the likely outcome of an arbitration would favour Chile's claim with respect to the overlapping area.

Conclusion

In conclusion, the maritime boundary dispute between Argentina and Chile concerning their respective claims to CS entitlements in the Sea of the southern zone favours Chile's position. This dispute, evolving since Argentina's submission to the CLCS in 2009, gained momentum in 2021 when Chile asserted its legal CS entitlements, partly overlapping with Argentina's outlined ECS outer limits in the same area. Regarding Chile's claim, this paper firstly argues for the separate recognition of the interconnected concepts of legal CS and EEZ. Subsequently, the assertions of both countries hinge significantly on the interpretation of the TPF. Arts. 7 and 14 TPF should be construed in a broad sense concerning claims of CS entitlement south of Point F, as CS entitlement is not inherently linked to boundaries. Furthermore, Chile has the right to claim entitlement east of the meridian outlined in the TPF. Argentina's multiple arguments fail to withstand scrutiny against Chile's inherent and compellingly reserved right to a legal CS entitlement. Hence, both countries possess CS entitlements southeast of Point F.

One viewpoint of the discussion concerning overlapping legal CS and ECS entitlements advocates for equality in delimitation, primarily based on the concept of a single CS. Another viewpoint opposes this, referencing differing interpretations of a unified CS during delimitation. Additionally, this opinion examines the significance of Art. 82 UNCLOS and the relationship between the EEZ and legal CS. The latter viewpoint is further bolstered by a third opinion, asserting a customary law rule prohibiting ECS from overlapping with another State's legal CS. Consequently, the arguments favouring the second and third opinion outweigh those in favour of the first. As a result, Chile's legal CS entitlement takes precedence over Argentina's ECS entitlement.

However, as this dispute is likely to be resolved in accordance with the TPF, negotiations and conciliation offer potential pathways to a solution that respects the interests of both parties. The outcome of this case will not only impact the diplomatic relations between Chile and Argentina but will also serve as a significant precedent concerning the roles of ECS and legal CS within the realm of maritime law. Furthermore, a potential delimitation of Antarctica will likely hinge on the resolution of the current case. It remains to be hoped that these resolutions will occur in the spirit of the TPF: fostering peace and friendship.

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