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UNCLOS TRIBUNALS AND THE DEVELOPMENT OF THE OUTER CONTINENTAL SHELF REGIME

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Abstract Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS) sets out the legal regime governing the novel 'continental shelf beyond 200 nautical miles' or 'the outer continental shelf'. As Article 76 contains a complex interface between law and science, its interpretation and application raises intricate issues, with which no international court or tribunal had dealt with substantively before 2012. The UNCLOS dispute settlement bodies were the first international tribunals to provide answers to long-standing questions surrounding the meaning and application of several important, but ambiguous or controversial, legal terms employed under Article 76. As such, the decisions rendered by the UNCLOS tribunals have been seen as playing an important role in elucidating the legal regime of the outer continental shelf. This article queries this assessment by critically examining whether and to what extent the relevant pronouncements made by UNCLOS tribunals have contributed to clarifying and developing the law governing the outer continental shelf regime under UNCLOS.

Keywords: Public international law, Annex VII arbitral tribunal, Article 76 UNCLOS, Commission on the Limits of the Continental Shelf, continental shelf beyond 200 nautical miles, International Tribunal for the Law of the Sea, UNCLOS.

I. INTRODUCTION

The concept of the 'continental shelf' is not new to the United Nations Convention on the Law of the Sea (UNCLOS).[1] It was already the subject matter of the 1958 Convention on the Continental Shelf, and prior to that, the Truman Proclamation.[2] However, while the continental shelf under UNCLOS is still described as the seabed and subsoil of the submarine areas beyond the

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[1] United Nations Convention on the Law of the Sea (10 December1982) 1833 UNTS 396.

[2] Proclamation No. 2667 of September 28, 1945 'Policy of the United States with Respect to the Natural Resources of the Subsoil of the Sea Bed and the Continental Shelf <http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf>.

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coastal State's territorial sea similar to the 1958 Convention,[3] UNCLOS introduced fundamental changes to the criteria for determining the seaward limits of the continental shelf. According to Article 76(1) UNCLOS, the continental shelf can extend to: (i) a distance of 200 nautical miles (nm) from the baseline from which the breadth of the territorial sea is measured (the distance criterion) or (ii) the limit of the outer edge of the continental margin (the geological criterion). If the outer edge of the continental margin extends beyond 200 nm, the limits of the continental shelf are determined in accordance with the technical requirements in paragraphs (4) to (6) of Article 76. When establishing the limits of the outer continental shelf, the coastal State is required, under Article 76(8), to submit information relating to the limits of the continental shelf to a technical body established under UNCLOS called the Commission on the Limits of the Continental Shelf ('CLCS' or 'the Commission'). The CLCS's main function is to consider the data and other material submitted by coastal States and to make recommendations regarding where the outer limits are located. The different paragraphs of Article 76, which introduced the notion of 'the continental shelf beyond 200 nm' or 'the outer continental shelf', have been described as combining 'influences of geography, geology, geomorphology and jurisprudence'.[4] Due to this interface between law and science, as well as the functions that the Convention assigns to the CLCS, the new legal regime governing the outer continental shelf under Article 76 becomes highly complex.

No disputes arising from the interpretation and application of Article 76 itself have been brought to international adjudication or arbitration. However, this article has come up, to varying degrees, in cases concerning the delimitation of the continental shelf beyond 200 nm before the International Court of Justice (ICJ),[5] ad hoc arbitral tribunals,[6] the International Tribunal for the

[3] Art 1 of the 1958 Convention on the Continental Shelf defines the continental shelf as 'the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea'. See *1958 Convention on the Continental Shelf* (29 April 1958) 499 UNTS 311.

[4] DM Johnston, *The Theory and History of Ocean Boundary-Making* (McGill-Queen's University Press 1988) 91.

[5] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) 17 March 2016 <http://www.icj-cij.org/files/case-related/154/154-20160317-JUD-01-00-EN.pdf>, *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) 2 February 2017 <http://www.icj-cij.org/files/case-related/161/161-20170202-JUD-01-00-EN.pdf>. In *Nicaragua v Colombia* (2016), the Court found that it had jurisdiction to declare the course of the maritime boundary in the area beyond 200 nm. Similarly, in *Somalia v Kenya*, the ICJ confirmed that it had jurisdiction draw a single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200nm. However, the judgments on the merits have yet to be delivered. The judgments on the merits of these two cases have not, however, been issued.

[6] *Delimitation of Maritime Areas between Canada and France* (10 June 1992) RIAA Volume XXI 265–341.

Law of the Sea (ITLOS) and the ad hoc arbitral tribunals established pursuant to Annex VII of UNCLOS (Annex VII arbitral tribunals). To date, only ITLOS and Annex VII arbitral tribunals (collectively 'UNCLOS tribunals') have proceeded with delimiting the outer continental shelf in three cases,[7] namely in the cases that involved three adjacent States in the Bay of Bengal, *Bangladesh/Myanmar*,[8] *Bangladesh/India*,[9] and most recently, in *Ghana/Côte d'Ivoire*.[10]

There has been a great amount of academic interest in the cases relating to the outer continental shelf. However, most of the relevant writings have concentrated on the delimitation aspects of the cases under Article 83 UNCLOS, quite unsurprisingly as the main purpose of the cases was indeed maritime delimitation.[11] The few that have touched upon Article 76 have primarily either focused on individual cases or have been insufficiently critical in their analysis of the decisions.[12] In other words, little attention has

[7] The Annex VII arbitral tribunal confirmed jurisdiction to delimit the outer continental shelf in *Barbados v Trinidad and Tobago* in 2007, but it did not proceed to delimit the outer continental shelf after finding that 'the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad, there is no single maritime boundary beyond 200 nm'. See *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* (11 April 2006) XXVII RIAA 147–251 [368].

[8] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2002] ITLOS Rep 4.

[9] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)* (7 July 2014) <http://www.pcacases.com/web/sendAttach/383>.

[10] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment) 23 September 2017 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf>.

[11] See, eg, B Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation' (2007) 22(1) International Journal of Coastal and Marine Law 7; R Churchill, 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1(1) CJICL 137; B Kunoy, 'The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf' (2013) 83(1) BYBIL 61; T McDorman, 'The Continental Shelf Beyond 200 NM: A First Look at the Bay of Bengal (Bangladesh/Myanmar) Case' in MH Nordquist, JN Moore, A Chircop and R Long (eds), *The Regulation of Continental Shelf Development: Rethinking International Standards* (Brill 2013) 89; S Lin and C Schofield, 'Lessons from the Bay of Bengal ITLOS case: Stepping Offshore for a "Deeper" Maritime Political Geography' (2014) 180(3) The Geographical Journal 260; M Kaldunski, 'A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal' (2015) 28 (4) LJIL 799; AG Oude Elferink, 'ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the *Bangladesh/Myanmar* Case: Theoretical and Practical Difficulties' in R Wolfrum, M Seršić and TM Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2016); X Liao, Evaluation of Scientific Evidence by International Courts and Tribunals in the Continental Shelf Delimitation Cases (2017) 48(2) Ocean Development and International Law 136.

[12] C Schofield, A Telesetsky and S Lee, 'A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case' (2013) 444 Ocean Development and International Law 363; H Yao and L Xuexia, 'Natural Prolongation and Delimitation of the Continental Shelf Beyond 200 nm: Implications of the Bangladesh/Myanmar Case' (2014) 4(2) AsianJIL 281; BM Magnusson, *The Continental Shelf Beyond 200 nm: Delineation, Delimitation and Dispute Settlement* (Brill 2016).

been paid to critically and comprehensively analysing the contributions of judicial decisions concerning Article 76 itself. This article aims to fill this gap. It seeks to provide a more comprehensive assessment regarding whether and to what extent the decisions of international court and tribunals—with a particular focus on those of the UNCLOS tribunals in the Bay of Bengal cases—have contributed to elucidating ambiguous legal concepts which underpin the regime of the outer continental shelf under Article 76 UNCLOS. In particular, it examines the significance, or lack thereof, of judicial decisions and their reasoning in clarifying the following three issues: (i) the coastal State's entitlement to an outer continental shelf, (ii) the relationship between the UNCLOS tribunals and the CLCS and (iii) the legal basis of the grey area. These issues will be addressed in Parts II, III and IV respectively. Part V offers some final conclusions.

II. ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NM

Coastal States do not need to make an express claim to a continental shelf, unlike the exclusive economic zone (EEZ), in order to enjoy the rights within this maritime zone. As the ICJ made clear in the *North Sea Continental Shelf* cases, the rights of the coastal States in the continental shelf 'exist ipso facto and ab initio, by virtue of its sovereignty over land'.[13] Article 77(3) confirms this by providing that 'the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'. The UNCLOS tribunals have repeatedly stated that 'there is in law only a single continental shelf, rather than an inner continental shelf and a separate outer continental shelf'.[14] This statement would suggest that the coastal State's entitlement to an outer continental shelf beyond 200 nm also exists ipso facto and 'by virtue of sovereignty over land'. Yet ITLOS itself in *Bangladesh/Myanmar* acknowledged that 'not every coast generates entitlements to a continental shelf extending beyond 200 nm'.[15] This raises the question as to what constitutes the legal basis of a coastal State's entitlement to a continental shelf beyond 200 nm. Further, in cases of disagreement or uncertainty regarding whether a coastal State has entitlement to an outer continental shelf, what suffices as evidence of such entitlement? This Part examines these two issues in turn and considers whether the decisions of the UNCLOS tribunals, and those of other international courts, have satisfactorily provided answers to these questions.

[13] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [19].

[14] *Barbados v Trinidad and Tobago* (n 7) [213]. See also: *Bangladesh/Myanmar* (n 8) [362]; *Bangladesh/India* (n 9) [77]; *Ghana/Côte d'Ivoire* (n 10) [490].

[15] *Bangladesh/Myanmar* (n 8) [439].

A. The Legal Basis of Entitlement to an Outer Continental Shelf

1. The meaning of 'natural prolongation'

Since it was first introduced by the ICJ in the *North Sea Continental Shelf* cases, 'natural prolongation' has long been accepted as the basis of entitlement to a continental shelf.[16] However, in the establishment of a continental shelf that extends beyond 200 nm within the UNCLOS framework, the concept of 'natural prolongation' is used alongside that of 'the outer edge of the continental margin' under Article 76(1) UNCLOS, whose location is, in turn, identified using the formulae provided for under Article 76(4). The emergence of the concept of the 'outer edge of the continental margin' raises two important questions: (i) what does 'natural prolongation' mean under Article 76 and (ii) what is the relationship between 'natural prolongation' and the concept of 'outer edge of the continental margin'?

These were the issues that divided the parties in *Bangladesh/Myanmar*. Bangladesh interpreted the term 'natural prolongation of its land territory' as referring to the need for geological and geomorphological continuity between the land mass of the coastal State and the seabed beyond 200 nm.[17] Myanmar, on the other hand, held the view that the existence of a geological discontinuity in front of the coast of Myanmar was irrelevant to the case. Instead, Myanmar argued that the controlling concept was not natural prolongation but that of the 'outer edge of the continental margin', which is defined by the two formulae provided in Article 76(4).[18]

ITLOS agreed with Myanmar on this issue. It held that while Article 76(1) mentions the term 'natural prolongation', it is clear from the wording of this article that 'the notion of "the outer edge of the continental margin" is an essential element in determining the extent of the continental shelf'.[19] Moreover, while the notion of 'the outer edge of the continental margin' is elaborated in paragraphs 3 and 4 of Article 76 UNCLOS,[20] no such definition or elaboration of 'natural prolongation' could be found in any other paragraphs of Article 76.[21] Finding further support in the *North Sea Continental Shelf* cases before the ICJ,[22] the negotiating records of UNCLOS,[23] and the test of appurtenance adopted in The Scientific and Technical Guidelines on the Limits of the Continental Shelf by the CLCS,[24] ITLOS found that the notions of 'natural prolongation' and 'continental margin', under Article 76, paragraphs 1 and 4 respectively, are closely interrelated and they refer to the same area.[25] This means that entitlement to a continental shelf beyond 200 nm should be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with the formulae provided in Article 76(4).[26]

[16] *North Sea Continental Shelf Cases* (n 13) [19]. See also A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos, 2017) 590.
[17] *Bangladesh/Myanmar* (n 8) [426]. [18] ibid [427]. [19] ibid [429]. [20] ibid [430].
[21] See also: Proelss (n 16) 592. [22] *Bangladesh/Myanmar* (n 8) [432]. [23] ibid [433].
[24] ibid [436]. [25] ibid [434]. [26] ibid [437].

ITLOS thus concluded that natural prolongation did not constitute an independent, separate criterion for the establishment of entitlement to an outer continental shelf.[27] Before the *Bangladesh/Myanmar* judgment was handed down, one scholar had argued that:

> Article 76 does not indicate a formula or method to prove natural prolongation. The wording of the introductory sentence of paragraph 4 suggests that the formulae are to be applied by a coastal State to determine its limits only after a determination that there is natural prolongation up to the outer limit of the continental margin beyond 200 nm. There is nothing in the legislative history to suggest that the formulae in paragraph 4 are the same formulae that must be used to indicate proof of natural prolongation.[28]

ITLOS's holding, however, shows that there is in fact a close connection between paragraphs (1) and (4) of Article 76, in the sense that the latter provides the technical formulae to define the concept of 'natural prolongation' contained in the former.

ITLOS's dismissal of the requirement of 'natural prolongation' in the establishment of entitlement to outer continental shelf was criticized by Judge Gao in his Separate Opinion in *Bangladesh/Myanmar*, as well as by some other scholars.[29] Judge Gao opined that 'natural prolongation retains its primacy over all other factors and that legal title to the continental shelf is based solely on geology and geomorphology, at least as far as the continental shelf beyond 200 nm is concerned'.[30] Judge Gao seemed to have interpreted ITLOS's decision as rejecting the relevance of the concept of 'natural prolongation' altogether in establishing the outer continental shelf. However, a closer look at the ITLOS judgment shows that such a reading is not justified. ITLOS did not state that 'natural prolongation' had no role to play whatsoever in the establishment of the outer continental shelf, as construed by its critics. It only rejected the argument that in addition to identifying the outer edge of the continental margin pursuant to Article 76(4), a coastal State would also have to show that there is geological and/or geomorphological continuity between the land mass and the continental shelf. In other words, ITLOS's conclusion was simply that 'natural prolongation' could not constitute an *additional* criterion to those contained under Article 76(4) in order to establish entitlement to the outer continental shelf.

ITLOS was surely correct in rejecting 'natural prolongation'—interpreted as requiring continuity from the land territory to the seabed area—as a separate

[27] ibid [435].

[28] SV Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of Their Establishment* (Springer 2008) 151.

[29] H Yao and L Xuexia (n 12); BB Jia, 'The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?' (2013) 12 ChineseJIL 87.

[30] *Bangladesh/Myanmar*, Separate Opinion of Judge Gao [91] <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16_ZG.pdf>.

criterion for the establishment of an outer continental shelf.[31] Nowhere under Article 76 UNCLOS or the CLCS Technical Guidance is there a requirement of proof of similarities in the geological or geomorphological condition in the seabed of the coastal State from its landmass to the outer continental margin. Moreover, the negotiating records of the Third Conference for the Law of the Sea show that the concept of 'natural prolongation' was discussed in relation to three main issues: (i) in defining the continental shelf, inspired by the judgment of the *North Sea Continental Shelf* cases;[32] (ii) as a criterion for the establishment of the outer limits of the continental shelf, as opposed to the 'exploitability test' employed in the 1958 Geneva Convention, or the distance criterion or the bathymetric criterion as proposed by some States;[33] and (iii) as a basis for the argument that all States in the continent should be entitled to a continental shelf, not just the coastal State.[34] More importantly, the concept of 'natural prolongation' invoked in these discussions was understood with reference to the concept of 'the continental margin'.[35] The

[31] HJ Kim, 'Natural Prolongation: A Living Myth in the Regime of the Continental Shelf?' (2014) 45 Ocean Development and International Law 374, 379.

[32] *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 16th Meeting* A/CONF.62/C.2/SR.16, Statement of Bangladesh, para 13; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 17th Meeting* A/CONF.62/C.2/SR.17, Statement of Australia, paras 7–10, Statement of Republic of Korea, para 24; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 18th Meeting* A/CONF.62/C.2/SR.18, Statement of Venezuela, para 42, Statement of Uruguay, para 58; Statement of Trinidad and Tobago, para 88; Statement of Burma, paras 90–92; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 19th Meeting* A/CONF.62/C.2/SR.19, Statement of Thailand, para 55.

[33] *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 16th Meeting* A/CONF.62/C.2/SR.16. Statement of Honduras, para 25; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 18th Meeting* A/CONF.62/C.2/SR.18, Statement of El Salvador, para 10; Statement of Argentina, para 22; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 19th Meeting* A/CONF.62/C.2/SR.19, Statement of Ecuador, para 30; Statement of Iceland, para 51.

[34] *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 18th Meeting* A/CONF.62/C.2/SR.18, Statement of Singapore, para 29; Statement of Nepal, para 35.

[35] *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 18th Meeting* A/CONF.62/C.2/SR.18, Statement of Uruguay, paras 61–62, Statement of Trinidad and Tobago, para 86; Statement of Burma, para 91; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 19th Meeting* A/CONF.62/C.2/SR.19, Statement of Switzerland, para 26; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 20th Meeting* A/CONF.62/C.2/SR.20, Statement of Jamaica, para 95.

negotiating texts of UNCLOS, therefore, do not lend support to the argument that 'natural prolongation' constituted an independent requirement upon the fulfilment of which States would be entitled to an outer continental shelf. [36]

Furthermore, as ITLOS acknowledged, the term 'natural prolongation' originated from the *North Sea Continental Shelf* cases. In those cases, the ICJ was not concerned with the issue of the establishment of the outer limits of the continental shelf, but with that of whether the equidistance/special circumstances method of delimitation for the continental shelf embodied in Article 6 of the *1958 Convention on the Continental Shelf* reflected a rule of customary international law.[37] The notion of 'natural prolongation' was invoked by the Court to reject the argument put forward by Denmark and the Netherlands that 'continental shelf entitlement was based on proximity, which implied a direct link between entitlement and delimitation between neighbouring states by application of equidistance'.[38] The concept of natural prolongation used by the ICJ in the *North Sea Continental Shelf* cases was not meant to impose a condition based on which entitlement for the outer continental shelf could be established, but 'to justify the appurtenance of the continental shelf to the coastal State'.[39] It follows, therefore, that an interpretation of 'natural prolongation' as a separate criterion to establish entitlement to an outer continental shelf finds no basis either under the Convention or the history of development of the shelf.

In short, the concept of 'natural prolongation', as Evans correctly noted, performs multiple functions including 'a basis of title, a means of delimitation, an equitable principle of delimitation, a criterion for delimitation and as a relevant circumstance'.[40] This concept has been discussed in several cases before other dispute settlement bodies,[41] but mainly in relation to continental shelf delimitation, not as the basis of title to an outer continental shelf within the UNCLOS framework. The UNCLOS tribunals through their decisions have made important contributions to clarifying the meaning of this concept, long considered to be 'a source of mystery and confusion'[42] or 'a semi

[36] See ST Gudlaugsson, 'Natural Prolongation and the Concept of the Continental Margin for the Purposes of Article 76' in MN Nordquist, JN Moore and T Heidar, *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 69.

[37] *North Sea Continental Shelf Cases* (n 13) [66]–[69].

[38] AG Oude Elferink, 'Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning Its Interpretation from a Legal Perspective' (2006) 21(3) International Journal of Marine and Coastal Law 269, 273.

[39] B Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 11.

[40] MD Evans, *Relevant Circumstances and Maritime Delimitation* (Clarendon Press 1989) 100.

[41] *Delimitation of the Anglo-French Continental Shelf Arbitration (UK/France)*, (First) Decision, 30 June 1977, RIAA XVIII:3, 63; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)* (Judgment) [1984] ICJ Rep 246; *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (Judgment) [1985] ICJ Rep 13.

[42] Schofield, Telesetsky and Lee (n 12) 375.

sacred expression'[43] in establishing entitlement to a continental shelf. The UNCLOS tribunals made clear that 'natural prolongation' under Article 76 did not mean geological or geomorphological continuity or similarity between the land mass and the seabed. The Bay of Bengal decisions ultimately mean that within the UNCLOS framework, geological or geomorphological continuity does not constitute a condition for entitlement to the continental shelf in its entirety. For shelves that do not extend beyond 200 nm, entitlement is based on distance, thus a discontinuity between the landmass and the seabed within 200 nm is irrelevant. Beyond 200 nm, 'natural prolongation' is defined with reference to the outer edge of the continental margin as determined by the formulae under Article 76(4).

2. The relationship between entitlement and the outer limits of the continental shelf

In *Bangladesh/Myanmar*, Myanmar objected to ITLOS exercising its jurisdiction to delimit the outer continental shelf on the basis that the Tribunal could not determine entitlements to an outer continental shelf, as this task belonged to the CLCS. This objection may at first glance seem only to pertain to procedural issues. However, given that the tasks of the CLCS involve reviewing and giving recommendations to coastal States regarding the location of the outer limits of the continental shelf, in essence, Myanmar's objection implied that a coastal State's entitlement to an outer continental shelf depended on the establishment of the outer limits of the shelf.

In response to Myanmar's objection, ITLOS drew a clear a distinction between the notions of 'entitlement to the continental shelf beyond 200 nm' and 'the outer limits of the continental shelf'.[44] ITLOS was adamant that the coastal State's entitlement to an outer continental shelf 'does not depend on' the establishment of the outer limits of the continental shelf.[45] It further held that the procedures set out under Article 76(8), whereby States are required to submit information to the CLCS and then to wait for the latter's recommendation regarding the outer limits, did not imply that entitlement to the continental shelf depended on any procedural requirements.[46] In ITLOS's view, Article 77(3) confirms that the existence of entitlement does not depend on the establishment of outer limits but only on 'the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present'.[47]

There are merits in ITLOS's view regarding the independent relationship between the establishment of 'entitlement' to and the identification of the 'outer limits' of the continental shelf. A coastal State does not need to have established its outer limits in order to prove that it has entitlement to a continental shelf beyond 200 nm. Under UNCLOS, entitlement is determined

[43] Kim (n 31) 374.
[44] *Bangladesh/Myanmar* (n 8) [406].
[45] ibid [409].
[46] ibid [408].
[47] ibid [409].

with reference to the outer edge of the continental margin, which is ascertained in accordance with Article 76(4).[48] On the other hand, the outer limits of the continental shelf, pursuant to Article 76(5), are drawn 'in accordance with paragraph 4(a)(i) and (ii)' *and* subject to the technical requirements under paragraphs (5), (6) and (7) of the same article. It is clear that the identification of the line indicating the outer edge of the continental margin is only the starting point of the delineation process to determine the outer limits of the shelf. Further, the 'test of appurtenance' set out by the CLCS, which requires that a coastal State must first prove that it has a continental shelf entitlement that extends beyond 200 nautical miles before it is permitted to delineate the outer limits of the shelf, affirms that the establishment of entitlement to an outer continental shelf precedes and predicates the identification of the outer limits of the shelf. [49] In other words, in addition to identifying the outer edge of the continental margin, the coastal State would have to take further steps and consider all of the requirements under paragraphs (5), (6) and (7) in order to establish the outer limits of the continental shelf. Entitlement to an outer continental shelf, therefore, does not depend on the establishment of the outer limits of the shelf.

In short, the Bay of Bengal cases clarified three important issues. First, the basis of a coastal State's entitlement to an outer continental shelf is the existence of a juridical continental margin as defined under Article 76(3) that extends beyond 200 nm, ascertained pursuant to Article 76(4). Second, natural prolongation is still relevant to the establishment of an outer continental shelf, but not in the sense that there has to be geological or geomorphological continuity between the land territory and the seabed area beyond 200 nm. 'Natural prolongation' is defined with reference to Article 76(4), which means that the natural prolongation of a coastal State's territory is the seabed area that extends to the outer edge of the continental margin as determined by Article 76(4). Third, the establishment of the outer limits of the continental shelf does not constitute the basis for entitlement. A coastal State does not need to identify the exact scope of the continental shelf—or the limits of its entitlement—in order to establish that it has entitlement beyond 200 nm.

B. Evidence for Entitlement to an Outer Continental Shelf

Based on the independent relationship between the determination of entitlement to an outer continental shelf and the establishment of the outer limits of the

[48] ibid [437].

[49] See also: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower [55] <http://www.icj-cij.org/files/case-related/154/judgment-17-march-2016-joint-dissenting-opinion.pdf>.

continental shelf, the tribunals in the Bay of Bengal cases confirmed that the determination of entitlement to an outer continental shelf fell within their jurisdiction, whereas any tasks relating to the identification of the outer limits belonged to the CLCS. This, however, raises an interesting question regarding the evidence that a party seeking to establish an outer continental shelf should present to an international court or tribunal in order to prove its entitlement. The decisions rendered by international decisions have not to date definitively disposed of this question.

In the 2012 maritime delimitation case between Nicaragua and Colombia, in which Nicaragua requested the ICJ to delimit the outer continental shelf as part of a request for the delimitation of the maritime boundary with Colombia, Nicaragua had only submitted 'Preliminary Information' indicative of the limits of the continental shelf to the CLCS, not a full submission with complete information.[50] The Court found that the Preliminary Information 'falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles' to be submitted by the coastal State to the Commission in accordance with Article 76(8) of UNCLOS.[51] In its judgment, rendered after *Bangladesh/Myanmar*, the ICJ declined to delimit the boundary between Nicaragua and Colombia in the area in which Nicaragua claimed an outer continental shelf entitlement. Even though the Court acknowledged the decision of ITLOS, it distinguished the case from that of ITLOS on the basis that both Bangladesh and Myanmar had made full submissions to the CLCS,[52] whereas 'Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast'.[53] In the operative paragraph, the Court declared that it 'cannot uphold' Nicaragua's claim to an outer continental shelf. This decision may create the impression that information in Preliminary Information to the CLCS would not be sufficient to prove entitlement to an outer continental shelf.

However in 2016, when Nicaragua again invited the ICJ to delimit its maritime boundary with Colombia in an area beyond 200 nm from Nicaragua's mainland coast, the ICJ explained that in 2012 it neither made a decision on whether or not Nicaragua had an entitlement beyond 200 nm, nor on 'the substantive legal standards which Nicaragua had to meet to prove entitlement beyond 200 nm'.[54] During the proceedings in the new case, the parties disagreed on the meaning of the term 'cannot uphold' that the Court had used in the operative paragraph in its 2012 judgment. Nicaragua argued

[50] *Nicaragua v Colombia* (2012) (n 5) [127]. [51] ibid. [52] ibid [125].
[53] ibid [129]. Note, however, that the Court did not comment on the overlap between Nicaragua's entitlement to a continental shelf beyond 200 nm and the Colombian islands.
[54] *Nicaragua v Colombia (2016)* (n 5) [82].

that this term simply meant that the ICJ refused to rule on the request because a procedural and institutional requirement had not been fulfilled,[55] while Colombia contended that 'cannot uphold' must be interpreted as a 'straightforward dismissal of Nicaragua's request for lack of evidence'.[56] The ICJ agreed with Nicaragua and held that:

> While the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.[57]

The Court, therefore, made clear in the 2016 *Nicaragua v Colombia* judgment that the Court's decision in 2012 was based on a procedural requirement. In the 2012 judgment, the Court did not 'consider it necessary to decide the substantive legal standards which Nicaragua had to meet if it was to prove vis-à-vis Colombia that it had an entitlement to a continental shelf beyond 200 nautical miles from its coast'.[58] The Court's judgment in 2016 clarified that the 2012 *Nicaragua v Colombia* judgment could not be construed as providing any guidance on the evidential threshold required of a State to prove its entitlement to an outer continental shelf.

In the 2016 *Nicaragua v Colombia* case, the ICJ interpreted its 2012 Judgment requiring Nicaragua to submit its information to the CLCS 'as a *prerequisite* for the delimitation of the continental shelf beyond 200 nautical miles by the Court'.[59] Nicaragua had in fact, following the 2012 Judgment, furnished complete information and documentation to the CLCS, although the Commission had yet to issue its recommendation. The ICJ then found that it had jurisdiction to delimit the maritime boundary within the area in which Nicaragua argued that it had an outer continental shelf entitlement.[60] Bearing in mind that delimitation could only be conducted if the parties have entitlement to the area in question and these entitlements overlap,[61] this confirmation of jurisdiction could be read to mean that the full submission to the CLCS was implicitly accepted by the ICJ as evidence of Nicaragua's entitlement beyond 200 nm.

In *Bangladesh/Myanmar* and *Bangladesh/India*, all three States had made submissions to the CLCS in respect of their claims beyond 200 nm. In both cases, the UNCLOS tribunals acknowledged that the parties had an entitlement to an outer continental shelf and thus proceeded to delimitation. Again, this would seem to suggest full submissions to the CLCS were considered necessary and sufficient evidence for entitlement. In fact, one commentator argued that 'in order to continue the delimitation beyond 200

[55] ibid [74]. [56] ibid. [57] ibid [84]. [58] ibid [82]. [59] ibid [105]. (emphasis added)
[60] ibid [85]. [61] *Bangladesh/Myanmar* (n 8) [397].

nautical miles, it was crucial that the parties had each made their submissions to the Commission'.[62]

However, on closer inspection, interpreting the approaches taken by the UNCLOS tribunals and the ICJ in the above cases as establishing an evidentiary threshold for coastal States' entitlement beyond 200 nm is arguably mistaken. Nowhere in the 2016 *Nicaragua v Colombia* judgment did the ICJ attempt to deal with the question of whether Nicaragua had met the legal threshold to prove entitlement by virtue of a full submission to the CLCS, or whether Nicaragua had entitlement to an outer continental shelf. This was perhaps partly due to the fact that Colombia's objection to the Court's jurisdiction was not grounded on the insufficiency of Nicaragua's evidence to prove its claim to entitlement.[63] Instead, Colombia relied on the argument that 'the CLCS has not made the requisite recommendation concerning Nicaragua's Submission, nor has it "consider[ed] and qualif [ied]" it according to Article 5(a) of Annex I to its Rules of Procedure'.[64] Colombia's objection thus related to procedural issues, in particular to the fact that Nicaragua had not obtained the CLCS's recommendation. The Court did not, therefore, have to address the question relating to evidence of entitlement in order to deal with Colombia's objections. It only needed to follow the approach taken by the UNCLOS tribunals in the Bay of Bengal cases—albeit without once acknowledging it—to reject the importance of procedural requirements in establishing entitlement. In any case, it is worth noting that, while the Court might have been silent on the issue, seven judges in their Joint Dissenting Opinion put forward the view that 'information submitted to the CLCS pursuant to Article 76(8) of UNCLOS will not necessarily be regarded as sufficient to establish the existence of an extended continental shelf'.[65]

In the Bay of Bengal cases, the UNCLOS tribunals were eager to proceed with delimitation because, based on available scientific evidence to which neither party objected, they were certain that the parties had entitlements to

[62] Ø Jensen, 'Maritime Boundary Delimitation beyond 200 Nautical Miles: The International Judiciary and the Commission on the Limits of the Continental Shelf' (2015) 84 NordJIntlL 580, 587.

[63] This can be contrasted with the position that Colombia took in *Nicaragua v Colombia* (2012), in which one of the main arguments that it employed to object to Nicaragua's claim to an outer continental shelf was that 'the so-called "evidence" that Nicaragua has adduced […] is woefully deficient, and would not even begin to satisfy the Commission on the Limits of the Continental Shelf'. See *Verbatim Record of the Public sitting held on Friday 27 April 2012, at 10 a.m., at the Peace Palace in the case concerning the Territorial and Maritime Dispute (Nicaragua v Colombia)* p 53, para 46. <http://www.icj-cij.org/files/case-related/124/124-20120427-ORA-01-00-BI.pdf>.

[64] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections of the Republic of Colombia, Volume I [7.12] <http://www.icj-cij.org/files/case-related/154/18778.pdf>.

[65] Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower (n 49) [56].

an outer continental shelf. In other words, it was not the submission *per se* that assured the tribunals that they should exercise jurisdiction, it was the availability of uncontested scientific evidence which removed any doubt as to the existence of the outer continental shelf. The fact that the parties had made their submissions was not the 'crucial' element in this case. Therefore, a general conclusion that submissions to the CLCS constitute conclusive evidence of entitlement cannot be drawn from these two cases.

In the latest *Ghana/Côte d'Ivoire* case decided by the Special Chamber of ITLOS, both parties had lodged their submissions with the CLCS, and Ghana, for its part, had received the recommendation from the CLCS. Neither party contested the entitlement of the other party to a continental shelf beyond 200 nm,[66] thus the question of uncertainty regarding the existence of entitlement did not arise in this case. Ghana, however, questioned the scope of Côte d'Ivoire's entitlement,[67] arguing that the latter's Revised Submission to the CLCS in 2016 indicated an overlap between the entitlements of the two States which had not existed previously.[68] Ghana's objection to the Revised Submission was based on 'normal principles of litigation'[69]—as the Revised Submissions were made after the proceedings before the Chamber had commenced—as well as the claim that this was a tactic for Côte d'Ivoire to 'discard and set aside seven years of common practice and agreement' in relation to the delimitation line.[70] It could be seen that Ghana's doubts regarding Côte d'Ivoire's scope of entitlement beyond 200 nm had little to do with the sufficiency of the Revised Submission or the fact that it had not been considered by the CLCS. As Ghana was more focused on procedural issues, the Special Chamber eventually dismissed this objection on the basis that 'Côte d'Ivoire invoked this fact before the closure of the written proceedings'.[71] The Chamber's decision thus did not provide new insights into the question of evidence of entitlement to the outer continental shelf.

In the end, international courts, including both the ICJ and the UNCLOS tribunals, have not definitively disposed of the question regarding what constitutes sufficient evidence of entitlement to an outer continental shelf in cases in which there is uncertainty regarding the existence of such an entitlement.

III. THE RELATIONSHIP BETWEEN DELIMITATION AND DELINEATION

In the context of the outer continental shelf, 'delimitation' refers to the establishment of a boundary that divides overlapping entitlements lying

[66] *Ghana/Côte d'Ivoire* (n 10) [503], [507]. [67] ibid [498]. [68] ibid [504].
[69] ibid [505].
[70] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Reply of Ghana <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/pleadings/Reply_of_Ghana__Vol._I_.PDF>.
[71] *Ghana/Côte d'Ivoire* (n 10) [515].

beyond 200 nm from the baselines of one or more States, whereas delineation refers to the establishment of the limits of the continental shelf. While there has been some confusion relating to the use of these two terms,[72] ITLOS made clear in *Bangladesh/Myanmar* that delineation and delimitation are two distinct concepts.[73] Delimitation does not depend on delineation, meaning that delimitation can be carried out regardless of whether the outer limits of the continental shelf have been identified; it only requires that the parties' entitlements to an outer continental shelf exist and that those entitlements overlap.[74] On the basis of this distinction, UNCLOS tribunals in the two *Bangladesh/Myanmar* and *Bangladesh/India* cases clarified the much debated relationship between the UNCLOS tribunals and the CLCS.[75] This Part examines the soundness of UNCLOS tribunals' approach in this regard and questions whether their decisions could be considered to have settled the relationship between UNCLOS dispute settlement bodies and the CLCS.

A. The relationship between the UNCLOS tribunals and the CLCS

ITLOS stated that, as a dispute settlement body, it has the legal expertise to interpret and apply the provisions of the Convention whereas the CLCS deals with scientific and technical issues.[76] When faced with the question of entitlement to the outer continental shelf under Article 76, ITLOS held that as Article 76 contains both elements of law and science, its proper interpretation and application required both legal and scientific expertise.[77] Therefore, as 'the question of the Parties' entitlement to a continental shelf beyond 200 nm raises issues that are predominantly legal in nature', ITLOS was in a position to examine this issue under Article 76.[78]

With regard to the interaction between the tasks of the two bodies, ie between delimitation and delineation, ITLOS noted that there was nothing in the Convention, the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constituted an impediment to the performance by the Commission of its functions.[79] In the same vein, the CLCS is mandated only to consider coastal States' submissions relating

[72] Several scholars have used the terms 'delimitation' and 'delineation' interchangeably; in particular, 'delimitation' has been used in place of 'delineation' when referring to the procedures under art 76 UNCLOS. See, eg, R Macnab, 'The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76' (2004) 35 Ocean Development and International Law, 1; V Marotta Rangel, 'Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals' (2006) 21(3) International Journal of Marine and Coastal Law 347.

[73] *Bangladesh/Myanmar* (n 8) [376].

[74] ibid [397]–[399].

[75] See B Kunoy, 'The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate' (2012) 25(1) LJIL 109; AG Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement' in AG Oude Elferink and D Rothwell, *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004) 118.

[76] *Bangladesh/Myanmar* (n 8) [411].

[77] ibid.

[78] ibid [413].

[79] ibid [377].

to the limits of continental shelf, an exercise of technical nature, and it should do so 'without prejudice to questions of delimitation' as required under Article 76 (10). ITLOS thus adopted the view, which was subsequently followed by the Annex VII arbitral tribunal in *Bangladesh/India* that the absence of a CLCS recommendation relating to the limits of the continental shelf beyond 200 nm could not prevent it from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.[80]

The clarification of the interrelated but independent relationship between the two institutions has a significant bearing on the temporal order in which delimitation and delineation are to be carried out. Before the Bay of Bengal decisions, some scholars had argued that delimitation should not and could not be conducted prior to delineation.[81] The case law produced by UNCLOS tribunals has, however, rejected this absolute view. Their decisions mean that, as one scholar notes, '[s]tates are free to choose whether they first delineate the outer continental shelf or first delimit it with their neighbouring states'.[82] Even though it is possible that in some cases, as will be further analysed below, international courts should be cautious in delimiting the outer continental shelf in the absence of a CLCS recommendation, what is at least clear is that there is no set temporal order between delineation and delimitation, in which delineation must necessarily precede delimitation in all cases.

The decisions of ITLOS and the Annex VII arbitral tribunal in the Bay of Bengal cases regarding the relationship between a dispute settlement body and the CLCS stand in contrast with earlier decisions by other international courts and tribunals. In particular, in the delimitation case between *Canada/France* arbitration in 1992, the arbitral tribunal declined to recognize any rights of the parties over the outer continental shelf in the absence of a determination as to where their entitlements ended, because 'it is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist'.[83] In *Nicaragua v Honduras* in 2007, the ICJ held that 'any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder'.[84] It is worth noting, however, that in this case, neither party had requested the Court to delimit the outer continental shelf. Thus, the Court's *obiter dictum* should not be construed

[80] *Bangladesh/India* (n 9) [410].

[81] B 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' (2010) 25 International Journal of Marine and Coastal Law 237.

[82] BM Magnússon, 'Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?' (2013) 28 International Journal of Marine and Coastal Law 465, 483.

[83] *Canada/France* (n 6) [81].

[84] *Nicaragua v Honduras* (n 5) [319].

as establishing a relationship between itself and the CLCS, nor did the Court say that the recommendation of the CLCS was a precondition for delimitation. It does, however, signal a certain level of reluctance on the part of the Court to deal with the question of delimitation beyond 200 nm in the absence of a CLCS recommendation. An explicit refusal to proceed with the delimitation of the outer continental shelf by the ICJ only came in *Nicaragua v Colombia* in 2012.[85] It can be seen that following the 2012 *Nicaragua v Colombia* case, there was disparity in the view of the UNCLOS tribunals and that of other international dispute settlement bodies concerning the relationship between a court or tribunal and the CLCS, as well as the impact of this relationship on the jurisdiction of a court or tribunal to delimit the outer continental shelf in the absence of a CLCS recommendation.

However, the 2016 *Nicaragua v Colombia* judgment presented an important shift in the approach of the ICJ to the relationship between itself and the CLCS. In determining 'whether a recommendation made by the CLCS, pursuant to Article 76, paragraph 8, of UNCLOS, is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua',[86] the ICJ essentially adopted the view of the UNCLOS tribunals in the Bay of Bengal cases regarding the relationship between delineation and delimitation and that between the CLCS and international tribunals [87] Moreover, both Nicaragua and Colombia relied extensively on the two Bay of Bengal cases in their pleadings to advance their arguments.[88] Even when Colombia urged the ICJ not to confirm jurisdiction to delimit the outer continental shelf beyond 200 nm, it did not argue that the conclusions of the Bay of Bengal tribunals were wrong or unreasonable. It merely contended that the factual circumstances of the case before the Court differed substantially from those of the Bay of Bengal cases, so that the UNCLOS tribunals' conclusions were not applicable to the case.[89] This illustrates that the significance of the UNCLOS tribunals' decisions transcended the two cases in which they were delivered. With the 2016 *Nicaragua v Colombia* judgment, the approach of international courts and tribunals regarding the relationship between a dispute settlement body and the CLCS, along with its implications on the former's jurisdiction to delimit the outer continental shelf seems to have converged.

[85] The ICJ cited the above statement in *Nicaragua v Honduras*. Note, however, that Judge Donoghue interpreted this citation as an implicit confirmation on the part of the Court that delimitation is precluded before the outer limits have been established. See: *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Separate Opinion of Judge Donoghue [25] <http://www.icj-cij.org/files/case-related/124/124-20121119-JUD-01-05-EN.pdf>.

[86] *Nicaragua v Colombia* (2016) (n 5) [106].

[87] ibid [112].

[88] *Nicaragua v Colombia*, Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia (19 January 2015) [2.25], [2.27], [2.29], [2.31] <http://www.icj-cij.org/files/case-related/154/18780.pdf>.

[89] *Nicaragua v Colombia*, Preliminary Objections of the Republic of Colombia, Volume I (14 August 2014) [5.68], [7.16] <http://www.icj-cij.org/files/case-related/154/18778.pdf>.

B. Does Delimitation Effected by an International Court or Tribunal Prejudice the Work of the CLCS?

In distinguishing between the functions of the CLCS and dispute settlement bodies, UNCLOS tribunals were adamant in stating that their work could not be seen as an impediment to the performance by the Commission of its functions. ITLOS grounded this statement on an analogy with the requirement under Article 76(10) that the determination of the extent of the continental shelf is 'without prejudice' to the question of its delimitation. Indeed, if delineation occurs before delimitation, that is, if the CLCS issues a recommendation regarding the location of the outer limits of a coastal State's entitlement before a tribunal determines the maritime boundary between that State and its neighbour, such a recommendation will be unlikely to prejudice the maritime boundary to be drawn by the tribunal. This is because delineation makes no presumption about where the boundary will lie, nor does it determine the course of the boundary. Article 76(10) ensures that the Article 76 process of defining the outer limits of the continental shelf 'is not intended to coincidentally settle in any way delimitations of overlapping areas of continental shelf'.[90]

However, a different scenario emerges when an international court or tribunal is requested to delimit the outer continental shelf *before* the CLCS has adopted final recommendations regarding the outer limits of the continental shelf. Even though ITLOS took pains to show that 'delimitation by an international tribunal would not prejudice the work of the CLCS',[91] such a statement might not be true for all cases.

First, a statement that 'delimitation' does not depend on the identification of the 'outer limits of the continental shelf' was true in the Bay of Bengal cases, but might not necessarily be so in other cases. The three States in the Bay of Bengal cases are adjacent to each other. When delimitation is between States with adjacent coasts, as Evans argued, 'it is perfectly possible to project a delimitation line seawards in accordance with the favoured methodology and allow for the terminus to be determined at some later date when the precise delineation of the outer limit might be determined'.[92] In cases where the two States have opposite coasts, such as Nicaragua and Colombia, it may be difficult for a tribunal to determine whether there are overlapping entitlements

[90] C Johnson and AG Oude Elferink, 'Submissions to the CLCS in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the LOS Convention' (2006) 21 International Journal of Marine and Coastal Law 461.

[91] *Bangladesh/Myanmar* (n 8) [379].

[92] MD Evans, 'Maritime Boundary Delimitation: Whatever Next?' in J Barrett and R Barnes, *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 77. In the recent *Ghana/Côte d'Ivoire* case, the Special Chamber of ITLOS also proceeded with delimitation in the absence of a recommendation for Côte d'Ivoire. Similar to the Bay of Bengal cases, both Ghana and Côte d'Ivoire are adjacent States, and neither contested the other's entitlement to a continental shelf beyond 200 nm.

without knowing where the limits of the entitlement end. This was, in fact, the argument used by Colombia in its Written Pleadings to distinguish the case brought by Nicaragua to the ICJ in 2016 from the Bay of Bengal cases.[93]

Moreover, ITLOS and the Annex VII arbitral tribunal were faced with a much less controversial situation as the Bay of Bengal is quite unique. The sea floor of the Bay of Bengal is covered by a thick layer of sediment some 14 to 22 kilometres deep originating in the Himalayas and the Tibetan Plateau,[94] which covers practically the entire floor of the Bay of Bengal. In fact it was due to the sediment in the Bay of Bengal that the formula based on sediment thickness was introduced into UNCLOS, at Sri Lanka's proposal, to take into account the right of coastal States in South Asia to a continental shelf.[95] Bangladesh, Myanmar and India had made their submissions to the Commission, in which three parties included data indicating that their entitlement to the continental margin extending beyond 200 nm was based on the thickness of sedimentary rocks pursuant to the formula contained in Article 76(4)(a)(i) of the Convention.[96] Therefore, it was beyond any doubt that the parties had entitlement to an outer continental shelf based on the thickness of the sediment on its floor even when the CLCS had not issued its recommendations.

In areas which do not have the same characteristics as the Bay of Bengal, the delimitation effected by a dispute settlement body before the outer limits have been identified may in fact encroach on the work of the CLCS. In particular, first, delimitation must be based on overlapping entitlements.[97] Therefore, by agreeing to proceed with delimitation, a tribunal implicitly recognizes that at least one, or both parties, has entitlements beyond 200 nm and that these entitlements overlap. Supposing that the CLCS later finds that one or both of the parties' entitlements does not extend beyond 200 nm, or that their entitlements do not extend so far as to create overlapping entitlements, what remains of the delimitation effected by the international court? For this reason, Judge Ndiaye, in his Separate Opinion in *Bangladesh/Myanmar* believed that ITLOS 'should have referred the matter to the Commission at

[93] Preliminary Objections of the Republic of Colombia (n 64) [7.16]. Note, however, that the ICJ did not address this point in its Judgment on Preliminary Objections, nor did any of the judges in their Dissenting and Separate Opinions share their view on this issue.

[94] *Bangladesh/Myanmar* (n 8) [444].

[95] Informal Suggestion by Sri Lanka to Amend the Irish Proposal, NG6/5, 4 April 1979, R Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents*, Vol 9 (Oceana Publications 1982) 374. See also *Nicaragua v Colombia* (2012) (n 5) [125].

[96] Continental Shelf Submission of Union of Myanmar, 3 <http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf>; Submission by the People's Republic of Bangladesh to the Commission on the Limits of the Continental Shelf, para 6.5 <http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/Executive%20summary%20final.pdf>; The Indian Continental Shelf, Partial Submission to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Appendix 1 <http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf>.

[97] *Bangladesh/Myanmar* (n 8) [397].

this stage in the proceedings […] since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case'.[98]

Second, the tribunals' recognition of the coastal State's entitlements beyond 200 nm may encourage the latter to use the outer limit lines contained in its submission even when they have not been validated by the CLCS. In *Bangladesh/Myanmar*, although ITLOS referred to the fact that submissions of Bangladesh and Myanmar to the Commission clearly indicated an overlap of entitlements in the area in dispute, the CLCS had neither confirmed nor rejected the scientific information contained in the submissions made. The claimed entitlements were, in Judge Ndiaye's words, 'founded more on presumptions than proof'.[99] As a result, contrary to what ITLOS insisted, its decision could in fact have the effect of legitimizing a claim to an outer continental shelf—a task that belongs to the Commission—and therefore, encroach on the functions of the Commission.[100] As one commentator observed, in such cases, 'the role of the Commission is somehow literally being reduced to declarative recommendations which would not necessarily correspond to an ordinary meaning of LOSC Article 76(8) in conjunction with Article 7 of Annex II to the LOSC'.[101]

Third, to justify its contention that its exercise of jurisdiction would not 'be seen as an encroachment on the functions of the CLCS',[102] ITLOS drew an analogy between delimitation of the outer continental shelf affected through adjudication or arbitration and delimitation reached through negotiation. ITLOS said the latter would 'not be seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations'.[103] In the same vein, the exercise of its jurisdiction to delimit the outer continental shelf could not be seen as an encroachment on the functions of the Commission. ITLOS's analogy, however, does not stand up to examination as it overlooked the fundamental difference between dispute settlement through negotiation and through third-party settlement—flexibility and political compromises.[104] When States negotiate their boundary for the outer continental shelf, they may agree to set aside the absence of established outer limits and/or the lack of a recommendation of the Commission.[105] In the course of negotiation, it is

[98] *Bangladesh/Myanmar*, Separate Opinion of Judge Ndiaye [107] <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16.sep_op_Ndiaye.TR.E.pdf>. [99] ibid [119].
[100] T McDorman, 'The Continental Shelf' in D Rothwell, AG Oude Elferink, KN Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 192.
[101] Kunoy (n 81) 248. [102] *Bangladesh/Myanmar* (n 8) (n 15) [393] [103] ibid.
[104] See Magnusson (n 12) 138.
[105] See, eg, the following maritime boundary agreements Mexico–United States, Trinidad and Tobago–Venezuela, Australia–France (New Caledonia), Australia–Solomon Islands, Australia–New Zealand, Australia (Heard and McDonald Islands)–France (Kerguelen Islands), Ireland–United Kingdom, Denmark–Iceland–Norway. See C Lathrop, 'Continental Shelf Delimitation beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf' in DA Colson and RW Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff 2005) 4149.

likely that the parties will have agreed to put in place some arrangement to deal with the absence of the outer limits, such as allowing for the subsequent identification of the terminus of the boundary,[106] or adjustments to the boundary when the outer limits are identified at a later time.[107] For example, when Iceland, Norway and Denmark (Faroes) negotiated the three maritime boundaries prior to filing submissions to the CLCS, the agreed minutes of the negotiations provide that if one or more of the States is unable to demonstrate 'that the area of its continental shelf beyond 200 nautical miles corresponds in size, as a minimum, to the area that falls to the same State according to the agreed boundaries', the boundaries would be adjusted on the basis of previously agreed terms also found in the minutes.[108] The possibility of adjustment ensures that effect will be given to the recommendation of the CLCS, thus the parties' agreement will not preempt the recommendation to be issued by the CLCS.

It is true that the flexibility found in negotiation may extend to a certain degree to cases in which the parties only request the court or tribunal to advise them on the principles to be applied to effect a maritime boundary, like the *North Sea Continental Shelf* cases. A court or tribunal could in such an instance take into account the potential changes which could be brought about by the CLCS recommendation concerning area of the seabed to which the States are entitled and provide guidance on how to these changes might affect the boundary to be established. However, in cases in which the court or tribunal is requested to delimit the actual maritime boundary, the course of the boundary is fixed and the boundary becomes 'final and binding'.[109] The court or tribunal in question could theoretically leave open the possibility of boundary adjustment; or the parties may, if they so wish, negotiate an agreement to adjust the boundary established by the international court in the event that the CLCS's recommendation subsequently renders the boundary inequitable. Even then, in many cases, the court cannot draw a precise boundary without determining the extent of the entitlement in the first place, thus treading into what should be the CLCS's realm of expertise.

One could argue that nothing prevents the CLCS from issuing a recommendation on the outer limits of the continental shelf which contradicts the court's finding on the scope of entitlement. This is true from a technical point of view; however, such practice would not be conducive to the implementation

[106] For example, the 1975 Gambia–Senegal Agreement. See Magnusson (n 12) 187.

[107] For example, the 1982 Australia–France Agreement, the 1988 Ireland–UK Agreement, the 1990 Trinidad and Tobago–Venezuela Agreement, the 2004 Australia–New Zealand Agreement. See Magnusson (n 12) 211.

[108] Lathrop (n 105) 4150.

[109] Arts 59 and 60 of ICJ Statute provide that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case' and that '[t]he judgment is final and without appeal […]' respectively. Art 296 UNCLOS also provide that '[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute' and '[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute'.

of UNCLOS and should thus be avoided. The Preamble of the Convention clearly states that the goal of UNCLOS is to establish 'a legal order for the seas' in order to 'promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'. The UNCLOS tribunals and the CLCS are new institutions set up with a view to realizing these goals, ie maintaining a legal order at sea. Discrepancies in the advice given to States by different treaty institutions on the same matter clearly do not serve this purpose. That is not to say that an international court or tribunal should never proceed to delimitation in the absence of a CLCS recommendation. The UNCLOS tribunals in the Bay of Bengal were correct in finding that under certain geographical circumstances, delimitation effected by a court or tribunal would not prejudice the tasks of the CLCS. However, while delimitation effected by an UNCLOS tribunal might not technically prevent the CLCS from performing its function, it may lead to inconsistencies in the interpretation and application of the Convention, which runs counter to the object and purpose of UNCLOS.

One could also argue that when a tribunal delimits a maritime boundary beyond 200 nm, its role is merely to advise the parties about the course of their boundary in the event that the CLCS eventually confirms their entitlements beyond 200 nm. In other words, the tribunal helps to indicate, not to conclusively determine the area in which a State can exercise their rights and obligations vis-à-vis the neighbouring States. This argument is, however, not tenable. In such a case, the existence of overlapping entitlements is still hypothetical. An international court or tribunal could advise States on the law regulating a certain issue in an abstract manner or in hypothetical situations, but this is in the context of advisory proceedings. In a contentious proceeding, the court or tribunal is asked to settle a 'dispute',[110] and the fact that the 'dispute' between the parties may or may not exist, depending on whether they have entitlements beyond 200 nm, should render the case inadmissible and the court or tribunal should not exercise jurisdiction in such cases.[111]

In the two Bay of Bengal cases, the involvement of the CLCS might not have been crucial since the scientific evidence was clear and uncontested, enabling the UNCLOS tribunals to determine that the parties had entitlement to an outer continental shelf. Therefore, the UNCLOS tribunals could have proceeded to delimitation before the issuance of the CLCS's recommendation

[110] Art 288(1) UNCLOS states that 'A court or tribunal referred to in article 287 shall have jurisdiction over *any dispute* concerning the interpretation and application of this Convention which is submitted to it in accordance with this Part'. (emphasis added)

[111] The ICJ in the *Northern Cameroons* cases declined to exercise jurisdiction over Cameroon's request, stating that 'The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.' See: *Case Concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 [33]–[34].

without much controversy. ITLOS itself admitted in *Bangladesh/Myanmar* that it 'would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question'.[112] This statement illustrates the awareness on the part of the tribunal of the special circumstances of the case before it.

The UNCLOS tribunals have provided an answer to the long-debated relationship between the two newly established institutions of UNCLOS, the dispute settlement bodies and the CLCS, thereby clarifying to a certain extent the application of Article 76(10) UNCLOS. However, while the approach adopted by the UNCLOS tribunals was enlightening, the decisions reached were limited to the factual circumstances of the cases. Consequently, caution should be exercised when attempting to generalize the tribunal's conclusions in the Bay of Bengal cases to all other situations.

IV. THE GREY AREA

The delimitation of the continental shelf beyond 200 nm in both of the Bay of Bengal cases gave rise to an area known as the 'grey area', in which sovereign rights over the seabed and the superjacent water belong to two different States. The grey area resulted from a situation in which the delimitation line which was not an equidistance line reached the outer limit of one State's EEZ and continued beyond it in the same direction, until it reached the outer limit of the other State's EEZ.[113] In *Bangladesh/Myanmar*, which was the first case in which such an area was created by an international tribunal, this grey area was located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.[114] Similarly, in *Bangladesh/India*, the grey area was beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of India, but again on the Bangladesh side of the delimitation line.[115]

As the Bay of Bengal cases were the first instances in which a grey area was created by an international tribunal, the legal basis of such an area needed some clarification. ITLOS and Annex VII tribunal adopted the same approach to explaining the legal basis for the 'grey area', as well as for the rights and obligations of the parties therein. With regard to the former, both tribunals invoked Article 56(3) which provides that 'the rights set out in this Article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI' and Article 68 which excludes sedentary species from the provisions relating to the EEZ.[116] By relying on Articles 56(3) and 68, the tribunals seemed to have been saying that the Convention already envisioned the separation of the

[112] *Bangladesh/Myanmar* (n 8) [443]. [113] ibid [464]. [114] ibid [463].
[115] *Bangladesh/India* (n 9) [498].
[116] *Bangladesh/Myanmar* (n 8) [473]; *Bangladesh/India* (n 9) [504].

water column and the seabed within 200 nm. Further, ITLOS and the Annex VII arbitral tribunal called on the parties to exercise their rights and perform their duties with due regard to the rights and duties of the other States pursuant to the principle reflected in the provisions of Articles 56, 58, 78 and 79.[117]

It is worth noting that both Bangladesh and Myanmar were against the creation of a grey area.[118] Bangladesh argued that the differentiation of water-column rights and continental-shelf rights could cause great practical inconvenience, which was why 'differential attribution of zone and shelf has hardly ever been adopted in State practice'.[119] Myanmar contended that '[a]ny allocation of area to Bangladesh extending beyond 200 [nm] off Bangladesh's coast would trump Myanmar's rights to EEZ and continental shelf within 200 [nm]', which was 'contrary to both the Convention and international practice'.[120] In response, ITLOS merely noted that in a situation involving concurrent EEZ and continental shelf rights, each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other.[121] ITLOS in the end left it to parties to determine the measures that they consider appropriate for this purpose. [122] Similarly, the Annex VII tribunal also expressed its confidence that 'the Parties will act, both jointly and individually, to ensure that each is able to exercise its rights and perform its duties within this area'.[123]

It is clear that the grey area was not favoured by the parties to the case; it was merely a by-product of the method of delimitation chosen by the UNCLOS tribunals. In creating the grey area, the UNCLOS tribunals practically severed Myanmar's and India's subsoil and seabed in the EEZ from their respective superjacent water, and allowed Bangladesh' 'outer' continental shelf to extend into what would have been the other two parties' 'inner' continental shelf. The implication of the tribunals' decisions is twofold: (i) the regimes of EEZ and continental shelf are separable within 200 nm; and (ii) a State's entitlement to an area beyond 200 nm can encroach on another State's entitlement to continental shelf within 200 nm of its coastal baselines. These implications are highly significant for the long-standing debate on the relationship between the EEZ and the continental shelf, as well as that between the 'inner' and 'outer' continental shelf. They also suggest that the UNCLOS tribunals implicitly endorsed the primacy of the continental shelf

[117] *Bangladesh/Myanmar* (n 8) [475], *Bangladesh/India* (n 9) [507]. Note that UNCLOS tribunals did not give any guidance on the obligation to have 'due regard' under the Convention entailed. It was not until the *Chagos Marine Protected Area* case that the contours of the obligation to give 'due regard' under art 56(2) was clarified. See *Chagos Marine Protected Area Arbitration* (Mauritius v United Kingdom), Award (18 March 2015) [518]–[519] <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>.

[118] Note, however, that in the subsequent *Bangladesh/India*, Bangladesh changed its position regarding the grey area and endorsed the approach adopted by ITLOS in *Bangladesh/Myanmar*. India in this case did not address the question of the grey area. See *Bangladesh/India* (n 9) [501]–[502].

[119] *Bangladesh/Myanmar* (n 8) [467].

[120] ibid [468].

[121] ibid [475].

[122] ibid [476].

[123] *Bangladesh/India* (n 9) [508].

over the EEZ regime. However, as will be shown below, the tribunals' scarce and unsatisfactory reasoning in support of the grey area seems to have raised more questions than provided answers.

With regard to the relationship between the EEZ and the continental shelf, Article 56(1) states that the EEZ includes the exploration and exploitation of resources both 'of the waters superjacent and *the seabed and its subsoil'*. It follows that when a coastal State has claimed an EEZ, the seabed and subsoil form an integral part of the EEZ. Since Article 56(3) provides that the rights in seabed and subsoil of the EEZ 'shall be exercised in accordance with Part VI', the EEZ and continental shelf regimes overlap within 200 nm.[124] Within 200 nm, as the ICJ in *Libya/Malta* acknowledged, the two institutions are 'linked together in modern law' and '[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.[125] In his partial Dissenting Opinion in *Bangladesh/India*, Judge Rao also opined that, 'the sovereign rights of a coastal State over the water column and the seabed and its subsoil are considered as two indispensable and inseparable parts of the coastal State's rights in the EEZ'.[126] Moreover, the rules governing the rights of the coastal States in the adjacent waters and the seabed are to a large extent uniform. For example, the coastal State's sovereign rights over living and non-living resources, its rights and jurisdiction with regard to artificial islands, marine scientific research, as well as its obligations regarding environmental matters in the EEZ and continental shelf are almost identical.[127] All of the above point to the argument that the EEZ and continental shelf regimes constitute an integral system of rights and obligation within 200 nm.

As mentioned, ITLOS and the Annex VII arbitral tribunal suggested that the regimes for the superjacent water and for the seabed and subsoil within 200 nm are already separated by virtue of Articles 56(3) and 68. It is true that the regimes regulating the waters and seabed and subsoil within 200 nm are provided for in different parts of UNCLOS. However, paragraph (3) of Article 56 cannot be read in isolation. It should instead be interpreted within the context of Article 56 as a whole, including paragraph (1) and taking into account international jurisprudence which emphasizes the similarities, even homogeneity, of regimes within the 200 nm zone.[128] Article 56(3) was put in place in order to 'remove the potential for confusion between the [EEZ] and the continental

[124] Proelss (n 16) 421.

[125] *Libya/Malta* (n 41) [34].

[126] *Bangladesh/India*, Concurring and Dissenting Opinion of Dr PS Rao [31] <http://www.pcacases.com/web/sendAttach/384>.

[127] For example, art 246 regulates coastal State's competence over marine scientific research in both the EEZ and continental shelf, arts 60 and 80 relating to artificial islands, installations and structures are exactly the same, Part XII on the protection and preservation of the marine environment applies to all maritime zones.

[128] SP Sharma, 'The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone' (1987) 2 IJECL 203.

shelf'.[129] This provision also highlights that notwithstanding the introduction of the EEZ, which significantly impacted the way the limits of the continental shelf are determined under UNCLOS as well as the delimitation method adopted by international tribunals within 200 nm, and despite the interconnectedness between the two regimes within 200 nm, the EEZ and continental shelf are still two distinct maritime zones. The EEZ regime does not cause the continental shelf regime to cease to exist, nor does the EEZ regime subsume the continental shelf regime.[130] Article 56(3) thus protects the rights of the coastal States over the seabed within 200 nm under Part VI in cases in which a coastal State has not claimed an EEZ.[131] It cannot serve as the legal basis for the separation and distribution of the waters to one State and the seabed and subsoil within 200 nm to another. In the only Dissenting Opinion rendered in *Bangladesh/Myanmar*, Judge Lucky also argued that 'a strict interpretation of the law set out in Parts V and VI of the Convention prohibits the allocation of waters superjacent to the seabed and its subsoil, ie the continental shelf, to two different States.'[132]

Furthermore, by allowing Bangladesh's continental shelf to extend into the seabed within 200 nm of the other two parties, the UNCLOS tribunals seem to have provided a negative answer to the questions regarding whether there is a hierarchy of claims between the 'inner' and 'outer' continental shelf, and, as Evans queried, whether the 200 nm 'inner' shelf could be considered 'an absolute entitlement, incapable of being encroached upon by the "outer" continental shelf of another State?'[133] The UNCLOS tribunals repeatedly used the argument that 'there is only one continental shelf' as the basis for

[129] MH Nordquist (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol II (Martinus Nijhoff 1985) 826.

[130] The Exclusive Economic Zone, Working Sessions, ILA 61st Conference, 26 August–1 September 1984; P Allot, 'Power Sharing in the Law of the Sea' (1983) AJIL 1, 14; DP O'Connell, *The International Law of the Sea*, Vol II (Clarendon Press 1984) 580; U Leanza and MC Caracciolo, 'The Exclusive Economic Zone' in D Attard, M Fitzmaurice and NA Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law,* Vol I: *The Law of the Sea* (Oxford University Press 2014) 208.

[131] While a coastal State is entitled to the rights in the continental shelf independent of any express declaration, it may only exercise its rights in the EEZ after a specific declaration to that effect has been made. Although UNCLOS does not expressly provide for this declaration, it emerges from *a contrario* reading of art 77(3). See Leanza and Caracciolo (n 130) 185. As of 2011, there are 16 States which have not claimed an EEZ or a Fisheries Zone, namely Albania, Bahrain, Benin, Bosnia and Herzegovina, Ecuador, El Salvador, Greece, Iraq, Jordan, Kuwait, Monaco, Montenegro, Peru, Saudia Arabia, Somalia and Sudan. <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf>.

[132] See *Bangladesh/Myanmar*, Dissenting Opinion of Judge Lucky, at 56 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16.diss_op.Lucky.rev.E.pdf>.

[133] MD Evans (n 92) 71. See also MD Evans, 'Maritime Boundary Delimitation' in Rothwell *et al.* (n 100) 265. It is worth recalling that in *Barbados v Trinidad and Tobago*, Trinidad argued that its right to a continental shelf could not be 'trumped' by Barbados' claim to an EEZ.[133] Similarly, in *Nicaragua v Colombia* (2012), Nicaragua also argued that 'an entitlement to continental shelf based on the distance criterion does not take precedence over an entitlement based on the criterion of natural prolongation'.[133] The arbitral tribunal and ICJ did not address these questions.

their decisions. However, this 'one continental shelf' argument does not seem to stand up to scrutiny. While it is true that physically speaking, a continental shelf does not stop when it reaches the 200 nm limit, the continental shelf that is regulated under UNCLOS is one of a juridical nature. As a result, there are in fact differences in the legal regime that governs the 'inner' and 'outer' parts of the shelf. Judge Rao, in *Bangladesh/India*, disagreed with the majority's view that 'no distinct inner and outer continental shelf exist' and contended that this was true only 'insofar as the resources the shelf encompasses and any regulation that goes with them'.[134] Judge Rao's comment is certainly correct, but only up to a point. As far as the regulation over resources is concerned, there are still differences in UNCLOS provisions regarding the coastal State's rights over resources located on the seabed within and beyond 200 nm. For example, Article 82 UNCLOS requires the coastal State to 'make payments or contributions in kind with respect to the exploitation of non-living resources of the continental shelf beyond 200 nm' while no such requirement is in place for activities conducted within 200 nm. In addition, while the coastal State has the discretion to regulate marine scientific research conducted on the continental shelf within 200 nm, in accordance with Article 246(6), the coastal State may not withhold consent for research undertaken beyond 200 nm. The discrepancies in the legal regimes regulating the continental shelf within and beyond 200 nm show that there might be one natural physical continental shelf in a scientific sense, but not one continental shelf in a legal sense as provided for under UNCLOS. Consequently, the UNCLOS tribunals' use of the continental shelf unity to override the EEZ and continental shelf unity within 200 nm may not be tenable from a legal point of view.

In sum, the UNCLOS tribunals' decisions to draw a delimitation line which separated Myanmar's and India's seabed and subsoil from the adjacent waters within 200 nm of their coasts paid little attention to the theory of parallelism between the EEZ and continental shelf which has received widespread support since the entry into force of UNCLOS.[135] Instead, the UNCLOS tribunals gave more weight to preserving the continental shelf regime. Even though the Bay of Bengal decisions appear to have at first sight resolved the difficult issue regarding the relationship between the EEZ and continental shelf regimes, the rather simplistic explanation that the tribunals provided did not satisfactorily address the concerns raised above.

Apart from raising doctrinal and legal questions, the separation of the water column and the seabed within 200 nm also creates practical difficulties for the parties in exercising their rights and jurisdiction within the grey area. It should be recalled that Barbados, in objecting to the arbitral tribunal's jurisdiction to hear

[134] Concurring and Dissenting Opinion of Dr RP Rao (n 126) [32].

[135] For a summary of the different theories regarding the nature of the relationship between the EEZ and the continental shelf, see MD Evans, 'Delimitation and the Common Maritime Boundary' (1993) 64(1) BYBIL 283, 286–93.

Trinidad's claim to an outer continental shelf in *Barbados v Trinidad and Tobago* argued that a grey area would create 'an unprecedented and unworkable situation of overlap between seabed and water column rights'.[136] Although Barbados did not elaborate on what 'unworkable situation' it had in mind, it is not difficult to contemplate a few such situations in the grey area. For example, supposing Bangladesh placed a mobile oil rig in the waters of Myanmar's EEZ for the purposes of exploring and exploiting its oil resources in the seabed and the latter alleged that this oilrig in conducting its activities on the seabed was causing pollution to its waters, would Article 208 relating to pollution from seabed activities or Article 211 relating to pollution from vessels apply? Article 208 would mean that Bangladesh had the jurisdiction over the vessel, while Article 211 would confer jurisdiction on Myanmar in accordance with Article 220. Likewise, India, under Article 60, has the exclusive right and jurisdiction over artificial islands, installations and structure in its EEZ. But supposing that the construction of those structures involved the dredging of the seabed, which damaged the living resources on the continental shelf of Bangladesh, which State would have enforcement power in this case?

These are just some of the many difficulties that coastal States would face due to the bifurcation of rights and obligations in the EEZ and continental shelf within 200 nm. Within this distance, the effective exercise of many of the sovereign rights under UNCLOS to a certain extent depends on the fact that only one coastal State is exercising those rights. The arbitral tribunal in *Barbados v Trinidad and Tobago* held that a maritime boundary should be 'both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome'.[137] It seems evident that the UNCLOS tribunals in the Bay of Bengal cases were occupied with adopting the method of delimitation deemed to bring an equitable outcome for the parties,[138] while overlooking the impractical consequences of their decisions.

Finally, the problems raised above may not be so significant if the States have actually agreed to the separation of their rights in the grey area. Some States have in practice agreed, in their maritime boundary delimitation treaties, to an area in which the EEZ belongs to one State and the continental shelf to another. These treaties, however, always include arrangements regarding the exercise of the States' rights and jurisdiction in such areas.[139] Where jurisdiction is

[136] *Barbados v Trinidad and Tobago* (n 7) [180].
[137] ibid [244].
[138] *Bangladesh/Myanmar* (n 8) [498].
[139] For example, the Torres Strait Treaty between Australia and Papua New Guinea requires that residual jurisdiction, ie jurisdiction over the seabed or fisheries not related to the exploration and exploitation of these areas, is shared by the parties in the area of overlap and neither party can exercise this jurisdiction without the concurrence of the other. The Australian–Indonesia Maritime Boundary Treaty also recognizes areas in which the Australian continental shelf overlapping with the Indonesian EEZ, and art 7 provides for the regulation of this area. See S Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1998) 19 AustYBIL 49.

separated, 'the arrangements are heavily dependent upon the goodwill and active cooperation of the State parties'.[140] In the Bay of Bengal cases, not only did the parties object to the creation of a grey area, they also resorted to adjudication and arbitration in the hope of definitively settling long-standing disputes. Instead, Bangladesh, Myanmar and India have now been directed back to the negotiation table to find a solution for unprecedented tribunal-created areas of waters. The UNCLOS tribunals seem to have ignored the fact that it was precisely because negotiations had failed to produce any tangible results in the past decades that the parties resorted to third-party settlement. As the grey area was not envisioned by the parties when submitting the cases, it would have been more desirable if the tribunal had acknowledged the difficulties in exercising of rights in the grey area and provided some guidance for the States concerned to deal with them. Both Judge Lucky and Judge Rao regarded the decisions to leave the issues involving the grey areas unresolved and to refrain from offering any comment or suggestions to the parties to resolve the matter 'a failure on the part of the UNCLOS tribunals to definitively resolve the disputes brought before them'.[141] Although there are no provisions under UNCLOS to govern the situation where the regimes overlap, Judge Lucky argued that '[w]here the law is not clear or there are no specific provisions, a judge must be innovative […] If the law does not specify a solution, then the judge must, by applying the law, find one.'[142] Judge Lucky's opinion regarding the role of the judge in developing the law is perhaps not without controversy. However, there are merits in his argument that as the UNCLOS tribunals had gone far enough to create a zone for which the legal basis under UNCLOS is murky, they should also have spelled out the manner in which such a zone should be regulated.

V. CONCLUSION

The UNCLOS tribunals were the pioneers in examining issues concerning the legal regime of the outer continental shelf—an issue which had been avoided, or only superficially examined, by other international courts or tribunals. As such, they gave substance to Article 76, specifically its paragraphs 1, 4 and 10, thereby answering questions which lie at the heart of the outer continental shelf regime. In particular, ITLOS's analysis of the term 'natural prolongation' provides authoritative guidance on the meaning of this undefined term in establishing entitlement to the outer continental shelf. Also, by establishing a close

[140] Kaye (n 139) 71.
[141] Concurring and Dissenting Opinion of Dr RP Rao (n 126) [35]–[36].
[142] Dissenting Opinion of Judge Lucky (n 132) 56–60. Judge Lucky's argument relating to the power of the judge to find a legal solution in the absence of the law follows the broad approach he adopted in the *Advisory Opinion on IUU Fishing*, in which he used the argument of 'UNCLOS as a living treaty' to conclude that ITLOS had advisory jurisdiction even when UNCLOS does not explicitly provide for such jurisdiction.

connection between paragraphs (1) and (4) of Article 76, ITLOS confirmed that under UNCLOS, entitlement for an outer continental shelf is based on the existence of a continental margin as defined under Article 76(3) beyond 200 nm. This further underlines the fact that the concept of the continental shelf under UNCLOS is largely of juridical nature. Second, the distinction between delimitation and delineation removes the confusion surrounding these two concepts and allows the UNCLOS tribunals to elucidate on the relationship between UNCLOS dispute settlement bodies and the CLCS. The fact that the ICJ in the 2016 *Nicaragua v Colombia* case adopted a similar approach to that of the UNCLOS tribunals, despite having refused to do so in 2012, may signify that some sort of judicial dialogue between different courts has taken place.[143] What could have been perceived as fragmentation of the law of the sea did not in the end persist.

On the other hand, one ought to be careful about drawing broad implications from or generalizing the findings in the Bay of Bengal cases. Some of the UNCLOS tribunals' pronouncements should be assessed against an important caveat—the uniqueness of the Bay of Bengal. ITLOS's conclusion regarding the non-prejudicial nature of the interaction between the UNCLOS tribunals and the CLCS, for example, may not hold true in cases in which the States involved have opposite coasts; or the requirement for evidence of entitlement to an outer continental shelf may have to be more stringent where scientific evidence regarding the existence of an outer continental shelf is not so clear-cut. Further, the creation of the grey area raises questions both doctrinally and practically. The jurisprudential value and enduring significance of several aspects of the UNCLOS tribunals' decisions may thus be cast into doubt.

In sum, the UNCLOS tribunals have contributed to the development of the outer continental shelf regime by making the first foray into clarifying important, but ambiguous or controversial, legal concepts under Article 76. Such contributions are significant in that they laid the first building blocks to understanding Article 76 and lent authority to certain interpretations of the legal concepts under Article 76 amidst various competing ways to understanding them. In consequence, the relevant pronouncements of the UNCLOS tribunals have the potential normative power to influence the future development of the outer continental shelf regime. In other words, even with the limitations, they have set out a course for the law regulating the outer continental shelf to develop and take shape. It now remains to be seen whether that course will be followed by other international actors; the first signs from the ICJ, at least at the jurisdictional phase, seems to be in the positive.

[143] Judge Golitsyn, President of ITLOS, indicated that when the delegation of ICJ judges, including President Peter Tomka, Judges Owada, Trindade, Xue, Gaja and Sebutinde, visited the Tribunal on 26 and 27 January 2015, one of the issues which the ICJ judges were interested in discussing with ITLOS judges was the delimitation of the outer continental shelf. See Judge Golitsyn, Expert Roundtable 'ITLOS at 20: Impacts of the International Tribunal for the Law of the Sea' London Centre for International Law and Practice, London (23 May 2016), Q&A Session (author's notes).