

**DELIMITING THE CONTINENTAL SHELF BEYOND 200
NAUTICAL MILES AT THE INTERNATIONAL COURT OF
JUSTICE: THE *NICARAGUA V. COLOMBIA* CASES**

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Abstract

In both *Nicaragua v. Colombia* cases, the International Court of Justice upheld that international tribunals may delimit the continental shelf beyond 200 nautical miles prior to the establishment of the continental shelf's outer limits. However, both the 2012 judgment on the merits and the 2016 judgment on preliminary objections raise a number of controversial issues. This article discusses the contentious aspects of the ICJ's judgments in both *Nicaragua v. Colombia* cases. First, it argues that the ICJ's decisions should have more strongly upheld that overlapping entitlements are a necessary precondition to maritime delimitation both within and beyond 200 nautical miles, with reference to the evaluation of evidence of entitlement provided by the parties. Second, it examines the persuasiveness of the "practical impasse" argument invoked by Nicaragua.

I. The ICJ and delimitation beyond 200 nautical miles

1. Delimiting maritime boundaries is the order of the day at the International Court of Justice (ICJ or the Court). Maritime delimitation has been a central part of the Court's activity since the 1969 judgment in *North Sea Continental Shelf*.¹ Since 2000, the ICJ handed down six judgments on the merits in

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¹ *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, 3.

disputes including a maritime delimitation aspect,² and at the time of writing there are three maritime delimitation cases pending before the Court.³

2. Despite the ICJ's extensive delimitation activity, it is only in the two recent judgments between Nicaragua and Colombia that the Court was requested to delimit the continental shelf beyond 200 nautical miles (nm). Nicaragua initiated the first case by unilateral application in 2001, requesting the ICJ *inter alia* to "determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia".⁴ In the written proceedings, Nicaragua amended its claim and asked the Court to delimit the overlapping continental shelves of the two parties, owing to the fact that the parties' mainland coasts lay more than 400 nm apart and Nicaragua's continental shelf extended beyond 200 nm.⁵ The Court addressed this claim in its judgment of 19 November 2012, finding that "Nicaragua [...] has not

² Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, ICJ Reports 2001, 40; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Merits, ICJ Reports 2002, 303; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, 61; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, 624; Maritime Dispute (Peru v. Chile), Judgment, ICJ Reports 2014, 3.

³ Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), filed 16 September 2013 (<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=02&case=154&code=nicolb>); Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), filed 28 August 2014 (<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=SK&case=161&k=00>); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), filed 25 February 2014 (<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=crnic&case=157&k=0f>). A further maritime delimitation dispute is currently pending before a Special Chamber of the International Tribunal for the Law of the Sea, see Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), filed 3 December 2014 (<https://www.itlos.org/cases/list-of-cases/case-no-23/case-no-23-merits/>).

⁴ Application instituting Proceedings (6 December 2001), 8, para.8 (<http://www.icj-cij.org/docket/files/124/7079.pdf>).

⁵ Reply of Nicaragua (18 September 2009), 66, para.2.10 (<http://www.icj-cij.org/docket/files/124/16971.pdf>).

established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf".⁶ Therefore, the Court did not delimit the continental shelf beyond 200 nm in 2012.

3. The second case was filed by Nicaragua against Colombia in 2013, as a follow-up to the 2012 Judgment. Nicaragua requested the Court to establish "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012".⁷ In other words, Nicaragua requested the Court to establish the maritime boundary beyond 200 nm from Nicaragua's own coast. Although this case is still pending, the Court has already rejected Colombia's preliminary objections in its judgment of 17 March 2016, in which it made two crucial findings. First, it found that the 2012 judgment was not *res judicata* in respect of the delimitation of the continental shelf beyond 200 nm. Second, it held that maritime boundaries beyond 200 nm can be delimited even if the continental shelf's outer limits have not been delineated, as in the case of Nicaragua's continental shelf beyond 200 nm.⁸ The dispute is due to proceed to the merits stage.⁹

4. The 2012 *Nicaragua v. Colombia* judgment (*Nicaragua v. Colombia* (2012)) raised a number of maritime delimitation issues, which have been exhaustively addressed in the literature.¹⁰ This article deals with a question that such

⁶ *Nicaragua v. Colombia* (2012), above n.2, 669, para.129. On the 2012 judgment, see section III.A below.

⁷ Application instituting Proceedings (16 September 2013), 8, para.12, (<http://www.icj-cij.org/docket/files/154/17532.pdf>).

⁸ While "delineation" is the establishment of the continental shelf's outer limits, "delimitation" designates the process of establishing maritime boundaries between neighbouring States. ITLOS made this distinction clear in *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, 4, 99, para.376.

⁹ On the 2012 judgment, see section III.B below.

¹⁰ Naomi Burke, *Nicaragua v. Colombia at the ICJ: Better the Devil you Don't?*, 2 Cambridge JICL (2013), 314; Lucie Delabie, *Le Fragile Équilibre entre Prévisibilité Juridique et Opportunité Judiciaire en Matière de Délimitation Maritime: l'Arrêt de la Cour Internationale de Justice dans l'Affaire du Différend Territorial et Maritime (Nicaragua c. Colombie)*, 58 AFDI (2012), 223; Serena Forlati, *Delimitazione dei Confini Marittimi e Stati Terzi: il Caso Nicaragua c. Colombia*, 96 Rivista di Diritto Internazionale

contributions have not discussed: the delineation of the continental shelf's outer limits as a precondition for delimitation beyond 200 nm. This article also discusses the 2016 preliminary objections judgment in the second *Nicaragua v. Colombia* case (*Nicaragua v. Colombia* (2016)). The discussion focuses on Colombia's fifth preliminary objection concerning the relationship between delimitation and delineation of the continental shelf's outer limits. This article argues that, concerning continental shelf delimitation beyond 200 nm, the ICJ's 2012 and 2016 decisions are not entirely convincing.

5. Section II briefly sets out the role of overlapping maritime entitlements as a precondition to delimitation, both within and beyond 200 nm. Section III outlines the ICJ's decisions in the 2012 and 2016 judgments. With reference to the 2012 judgment, Section IV discusses whether the submission of information to the Commission on the Limits of the Continental Shelf (CLCS or the Commission) should be considered a precondition to continental shelf delimitation beyond 200 nm. With respect to the 2016 judgment, Section V analyses whether the CLCS's recommendations on the continental shelf's outer limits should be considered a precondition to continental shelf delimitation beyond 200 nm. Section VI concludes. This article does not discuss the appropriateness of using the three-stage delimitation process in delimitation beyond 200 nm.¹¹

II. Overlapping entitlements as the *sine qua non* of delimitation

6. There can be no maritime boundary delimitation without neighbouring States having overlapping entitlements over maritime areas adjacent to their coasts.¹² In *Black Sea*, the ICJ held that "the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned".¹³ The ICJ referred to "overlapping claims", not to "overlapping entitlements". According to Evans, this "is not entirely accurate", since "just because a State claims that it has an entitlement does not

(2013), 135; Jianjun Gao, A Note on the *Nicaragua v. Colombia* Case, 44 *Ocean Development & Int'l L* (2013), 219; Joanna Mossop, *The Continental Shelf Beyond 200 Nautical Miles – Rights and Responsibilities* (2016), 77-80; Yoshifumi Tanaka, Reflections on the Territorial and Maritime Dispute between Nicaragua and Colombia before the International Court of Justice, 26 *Leiden JIL* (2013), 909.

¹¹ The Court first set forth the three-stage delimitation process in the 2009 *Black Sea* judgment. See *Black Sea*, above n.2, 101-103, paras.115-122.

¹² The coasts of neighbouring States could be either opposite or adjacent.

¹³ *Black Sea*, above n.2, 89, para.77.

mean that it does”.¹⁴ However, in *Peru v. Chile* the Court stated that it would “proceed with the delimitation of the overlapping maritime entitlements of the Parties”.¹⁵ In *Peru v. Chile* the Court showed awareness of the difference between claims and entitlements, rectifying its previous statement in *Black Sea*.

7. The existence of overlapping entitlements is a precondition for the delimitation of any maritime zone.¹⁶ As the term suggests, maritime entitlements are a function of the basis of title over the maritime zones established under the 1982 UN Convention on the Law of the Sea (UNCLOS or the Convention).¹⁷ Concerning the maritime zones within 200 nm, the basis of title is considered to be distance from a State’s coast. The territorial sea is defined under Article 3 UNCLOS as a function of distance from the coast;¹⁸ the same applies both to the EEZ under Article 57 UNCLOS,¹⁹ and to the continental shelf under Article 76 UNCLOS.²⁰ Owing to the influence of

¹⁴ Malcolm Evans, Maritime Boundary Delimitation, in: Donald Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 254, 261.

¹⁵ *Peru v. Chile*, above n.2, 67, para.189.

¹⁶ Jensen wrote that “Articles 76 and 83 are [...] connected in the sense that delimitation of the continental shelf presupposes the existence of a shelf to delimit”. See Øystein Jensen, *Maritime Boundary Delimitation Beyond 200 Nautical Miles: The International Judiciary and the Commission on the Limits of the Continental Shelf*, 84 *Nordic JIL* (2015), 580, 583.

¹⁷ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 3.

¹⁸ Under Art. 3 UNCLOS, “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”. Under Art. 5 UNCLOS, the normal baseline coincides with the low-water line on a State’s coast, unless the coastal State has implemented a straight baseline system in accordance with Art. 7 UNCLOS. See Prosper Weil, *Des Espaces Maritimes aux Territoires Maritimes: Vers une Conception Territorialiste de la Délimitation Maritime*, in: *Le Droit International au Service de la Paix, de la Justice et du Développement – Mélanges Michel Virally* (1991), 501, 504.

¹⁹ Art. 57 UNCLOS provides that “[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”. See *Continental Shelf (Libya/Malta)*, Judgment, ICJ Reports 1985, 13, 33, para.34.

²⁰ Art. 76(1) UNCLOS states that “[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is

North Sea Continental Shelf, some doubts persisted concerning the basis of title over the continental shelf within 200 nm. However, the ICJ dispelled such doubts in its 1985 *Libya/Malta* judgment, by stating that “for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone”.²¹

8. Article 76(1) UNCLOS provides that “[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin”. Article 76 entails that if the geomorphological continental margin protrudes into the sea further than 200 nm from the coast, the coastal State is entitled to exercise continental shelf rights beyond 200 nm. Accordingly, the basis of title over the continental shelf beyond 200 nm is linked to the existence of a physical continental margin extending beyond 200 nm from the coast.²² Paragraphs 4 to 8 of Article 76 UNCLOS create a complex procedure for delineating the outer limits of the continental shelf beyond 200 nm. This procedure requires the identification of such outer limits by the coastal State concerned in accordance with the criteria set forth in paragraphs 4 to 7. Paragraph 8 provides that:

[i]nformation on the limits of the continental shelf beyond 200 nautical miles [...] shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf [...]. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. At a minimum, Article 76 UNCLOS is silent on the precise relationship between delimitation and delineation. Coastal States delineate the continental shelf's outer limits. However, such limits become “final and binding” only after the CLCS has ascertained a coastal State's entitlement beyond 200 nm by delivering a recommendation on the matter.²³ In *Bangladesh/Myanmar*, the first

measured where the outer edge of the continental margin does not extend up to that distance”.

²¹ *Libya/Malta*, above n.19, 33, para.34.

²² Donald Rothwell and Tim Stephens, *The International Law of the Sea* (2nd ed., 2016), 114-115.

²³ On the delineation process, see Bjarni Már Magnússon, *The Continental*

case involving the delimitation of the continental shelf beyond 200 nm, the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) was requested to delimit the continental shelf beyond 200 nm in a situation in which neither State party had established the continental shelf's outer limits in accordance with Article 76 UNCLOS. ITLOS held that "in order to fulfil its responsibilities under [...] the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm".²⁴ ITLOS's statement entails that the Convention does not require delineation prior to delimitation. This decision was later adopted in *Bangladesh v. India*.²⁵ However, this approach is not uncontroversial, which may call into question the persuasiveness of the decisions in *Bangladesh/Myanmar* and *Bangladesh v. India*.²⁶ This issue was indirectly at stake in both *Nicaragua v. Colombia* cases.

III. The 2012 and 2016 *Nicaragua v. Colombia* judgments

10. In both *Nicaragua v. Colombia* cases, Colombia argued that the Court could not delimit the continental shelf beyond 200 nm from Nicaragua's coast. On one hand, Nicaragua had not obtained the CLCS's recommendation on its continental shelf's outer limits in accordance with Article 76 UNCLOS. On the other hand, Colombia was not a party to UNCLOS, and it was therefore not bound by Article 76. The Court addressed such arguments both in the 2012 judgment and in the 2016 judgment.

Shelf Beyond 200 Nautical Miles – Delineation, Delimitation and Dispute Settlement (2015), 40-116.

²⁴ Bangladesh/Myanmar, above n.8, 103, para.394. As explained in section III below, the ICJ followed suit in subsequent cases.

²⁵ Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award of 7 July 2014, 167 ILR 1, 32, para.80.

²⁶ For instance, Kunoy argues that delineation is a precondition to delimitation. See Bjørn Kunoy, The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf, 25 Int'l J Marine & Coastal L (2010), 237. Magnússon supports the view that international tribunals can delimit the continental shelf beyond 200 nm absent the establishment of the shelf's outer limits. See Bjarni Már Magnússon, Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?, 28 Int'l J Marine & Coastal L (2013), 465.

III.A. *The 2012 judgment on the merits*

11. In *Nicaragua v. Colombia* (2012), Nicaragua's request for delimitation of the continental shelf beyond 200 nm arose out of its own oversight. Both in the Application and in the Memorial, Nicaragua asked the Court to delimit a single maritime boundary dividing the EEZ and continental shelf enclosed between the Nicaraguan and the Colombian mainland.²⁷ Colombia argued that Nicaragua had not realised that the two mainland coasts lay further than 400 nm from each other, stating that "the geographic situation does not give rise on the legal plane to an issue of delimitation as between the mainland coasts of the Parties".²⁸ In the Reply, Nicaragua submitted that its continental shelf entitlement extended beyond 200 nm from its coast, thus overlapping with Colombia's continental shelf entitlement. Nicaragua argued that its continental shelf entitlement beyond 200 nm overlapped with Colombia's continental shelf entitlement within 200 nm of Colombia's own mainland coast.²⁹ According to Nicaragua, delimitation should thus also be effected between the parties' continental shelves.³⁰ However, Colombia argued that there could not be delimitation beyond 200 nm without a recommendation from the CLCS concerning the outer limits of Nicaragua's continental shelf, as "Nicaragua's purported rights to the extended continental shelf out to the outer edge of the continental margin beyond 200 nautical miles have never been recognized or even submitted to the [CLCS]".³¹

12. Colombia saw the filing of a submission to the CLCS as the means to provide the Commission with the necessary evidence to ascertain the

²⁷ Application, above n.4, 8, para.8; Memorial of Nicaragua (28 April 2003), 191, para.3.15, (<http://www.icj-cij.org/docket/files/124/13870.pdf>).

²⁸ Counter-memorial of Colombia (11 November 2008), 314, para.7.12, (<http://www.icj-cij.org/docket/files/124/16969.pdf>).

²⁹ Reply of Nicaragua (18 September 2009), 66, para.2.10, (<http://www.icj-cij.org/docket/files/124/16971.pdf>).

³⁰ Ibid., 59, para.1. Nicaragua also discussed delimitation in the continental shelf and EEZ generated by its own mainland coast and by the coast of Colombia's islands in the San Andrés Archipelago, arguing for Colombia's islands to be enclaved. See *ibid.*, 103-139, paras.4.1-5.27. By the time the Court handed down its 2012 judgment on the merits, it had already partially upheld Colombia's preliminary objection, finding that it had no jurisdiction to adjudicate the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Reports 2007, 875-876, para.142.

³¹ *Nicaragua v. Colombia* (2012), above n.2, 667, para.122.

existence of sovereign rights over the continental shelf beyond 200 nm. Colombia argued that the evidence submitted to the CLCS by Nicaragua failed on its merits, being insufficient to prove entitlement to a continental shelf beyond 200 nm. At the time of the 2012 judgment, Nicaragua had only submitted “preliminary information” to the CLCS on the outer limits of its continental shelf in the Caribbean Sea.³² In Colombia’s view, this meant that Nicaragua had not yet demonstrated the existence of overlapping continental shelf entitlements beyond 200 nm of its coast.

13. At the outset, the ICJ held that Nicaragua’s modification of its initial claim as lodged in the Application instituting proceedings did not render the request for delimitation beyond 200 nm from its coast inadmissible.³³ Although the Court found that this request “is a new claim in relation to the claims presented in the Application and the Memorial”,³⁴ it held that Nicaragua’s “claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute”.³⁵ Therefore, it stated that Nicaragua’s claim for delimitation beyond 200 nm was admissible.

14. Subsequently, the Court discussed whether it could accede to Nicaragua’s request to delimit the continental shelf beyond 200 nm. According to the Court, “the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law”,³⁶ and was thus binding on Colombia. Nicaragua sought to rely on *Bangladesh/Myanmar* in support of its argument that coastal States need not obtain a recommendation from the CLCS before requesting an international tribunal to delimit the continental shelf beyond 200 nm.³⁷ However, the Court

³² Ibid., 669, para.127. See Preliminary Information of Nicaragua Indicative of the Outer Limits of the Continental Shelf and Description of the Status of Preparation of Making a Submission to the Commission on the Limits of the Continental Shelf (7 April 2010) (http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/nic_preliminaryinformation2010.pdf).

³³ Nicaragua v. Colombia (2012), above n.2, 662-665, paras.104-112. This decision was criticised by Judge Owada in his dissenting opinion. See *ibid.*, 721-729 (Dissenting Opinion Owada).

³⁴ Ibid., 664, paras.108.

³⁵ Ibid., 665, para.111.

³⁶ Ibid., 666, para.118. Colombia was not a party to UNCLOS.

³⁷ C.R. 2012/9, 30, para.49 (Lowe); *ibid.*, 33, para.64 (Lowe); C.R. 2012/15, 17-33, paras.1-97 (Lowe). Colombia also sought to rely on *Bangladesh/Myanmar* in

stated that:

in view of the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presents a unique situation and that this fact had been acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea.³⁸

The Court seemed to recognise the exceptional character of the *Bangladesh/Myanmar* decision, and continued by emphasising that “both parties in the *Bay of Bengal* case were States parties to UNCLOS and had made full submissions to the [CLCS]”.³⁹ The Court found that:

since 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, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia [...].⁴⁰

The Court considered that it was necessary for Nicaragua to establish “that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf”.⁴¹

15. Immediately before making such a finding, the Court observed that “Nicaragua submitted to the [CLCS] only ‘Preliminary Information’ which [...] falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which ‘shall be submitted by the coastal State to the Commission’ in accordance with paragraph 8 of Article 76 of UNCLOS”.⁴² It seems that, while not explicitly saying it, the Court believed that establishing entitlement would require Nicaragua to provide scientific evidence that the continental margin extends beyond 200

its counter-argument. See C.R. 2012/12, 53-62, paras.45-84 (Bundy); C.R. 2012/16, 51-52, paras.77-85 (Bundy).

³⁸ Nicaragua v. Colombia (2012), above n.2, 668, para.125.

³⁹ Ibid., 668, para.126. The exceptional character of the Bay of Bengal cases is discussed in section V.A below.

⁴⁰ Nicaragua v. Colombia (2012), above n.2, 669, para.129.

⁴¹ Ibid.

⁴² Ibid., 669, para.127.

nm from its coast. However, this could not be achieved by only submitting “preliminary information” to the CLCS. For the Court, the question whether it could delimit the continental shelf beyond 200 nm depended not only on the *existence* of overlapping entitlements, but also on the *proof* that such entitlements existed. Nevertheless, the 2012 judgment left one wondering how entitlement could be definitively established. The 2016 judgment on preliminary objections provided the belated answer to this question.

III.B. *The 2016 judgment on preliminary objections*

16. Nicaragua made a full submission to the CLCS concerning the delineation of its continental shelf's outer limits on 24 June 2013, three months before filing the second case against Colombia on 16 September 2013.⁴³ On 14 August 2014, Colombia raised preliminary objections, two of which are relevant to the present discussion. In the third preliminary objection, Colombia argued that the Court had already settled the dispute concerning delimitation beyond 200 nm in 2012, which entailed that the new case initiated by Nicaragua in 2013 was barred by *res judicata* in accordance with Articles 59-60 of the Court's Statute.⁴⁴ Although this preliminary objection did not directly concern delimitation issues, the Court's remarks clarified the reasoning of the 2012 judgment on the dismissal of Nicaragua's request for delimitation beyond 200 nm. In the fifth preliminary objection, Colombia argued that the Court could not delimit the boundary beyond 200 nm because Nicaragua had not obtained a recommendation from the CLCS on the existence of its continental shelf entitlements beyond 200 nm.⁴⁵

17. Colombia's third preliminary objection centred on whether matters of delimitation beyond 200 nm from Nicaragua's coast had been “disposed of by

⁴³ Submission of Nicaragua to the Commission on the Limits of the Continental Shelf (24 June 2013) (http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm).

⁴⁴ Preliminary Objections of Colombia (14 August 2014), 83-135, paras.5.1-5.81 (<http://www.icj-cij.org/docket/files/154/18778.pdf>). Under Art. 59 of the ICJ's Statute, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. Article 60 of the ICJ's Statute provides that “[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”.

⁴⁵ Preliminary Objections of Colombia, above n.44, 161-168, paras.7.8-7.24.

the Court finally and definitively”⁴⁶ in the 2012 judgment. The Court held that the identity of the parties, object and legal ground of a claim is insufficient for the application of *res judicata*, since “it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed”.⁴⁷ In disposing of this preliminary objection, the Court made five main points. First, “although in its 2012 Judgment [the Court] declared Nicaragua’s submission to be admissible, it did so only in response to the objection to admissibility raised by Colombia that this submission was new and changed the subject-matter of the dispute”.⁴⁸ From the declaration that Nicaragua’s claim was not a “new claim”, and therefore admissible, it did not follow that “the Court ruled on the merits of the claim relating to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast”.⁴⁹ Second, and relatedly, “although the Parties made extensive submissions regarding the geological and geomorphological evidence of an extension of the continental shelf beyond 200 nautical miles submitted by Nicaragua, the [2012] Judgment contains no analysis by the Court of that evidence”.⁵⁰ Third, and as a consequence, the Court “did not [...] 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”.⁵¹ Fourth, “the Court [therefore] did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast”.⁵² Fifth, the Court did not delimit the continental shelf boundary beyond 200 nm from Nicaragua’s coast in 2012 since “delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles”.⁵³

18. Three points follow from the Court’s comments in respect of Colombia’s third preliminary objection. First, the Court conveyed that it did

⁴⁶ 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, Judgment of 17 March 2016, para.57 (<http://www.icj-cij.org/docket/files/154/18956.pdf>).

⁴⁷ Ibid., para.59.

⁴⁸ Ibid., para.72.

⁴⁹ Ibid.

⁵⁰ Ibid., para.82.

⁵¹ Ibid.

⁵² Ibid., para.83.

⁵³ Ibid., para.85.

not accede to Nicaragua's request for delimitation beyond 200 nm because Nicaragua itself had not made a submission to the CLCS for the delineation of its continental shelf's outer limits. Second, in deciding whether it could accede to Nicaragua's request for delimitation beyond 200 nm after having declared it admissible, the Court was mainly concerned with issues concerning evidence that Nicaragua had continental shelf entitlements beyond 200 nm. Third, the combination of these two elements suggests that the Court would, in assessing whether coastal States have continental shelf entitlements beyond 200 nm, refer to the evidence presented in a submission to the CLCS. In the 2016 judgment, the Court seemed to have dismissed Colombia's third preliminary objection because in the 2012 judgment it had not settled the merits of Nicaragua's request for delimitation beyond 200 nm owing to the lack of sufficient evidence.

19. In the fifth preliminary objection, Colombia's argued that Nicaragua had failed to prove its entitlement over a continental shelf beyond 200 nm before the Court, as it had not yet obtained a recommendation from the CLCS on delineation. This would have precluded delimitation beyond 200 nm. According to the Court, the 2012 judgment entailed "that Nicaragua had to submit such information [to the CLCS] as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles".⁵⁴ This 2016 statement clarified the condition that States must satisfy prior to making a request to the Court for delimitation of the continental shelf beyond 200 nm.

20. The Court subsequently discussed 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 in 2013".⁵⁵ The ICJ emphasised that:

[t]he procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.⁵⁶

The Court finally held that "since the delimitation of the continental shelf

⁵⁴ Ibid., para.105.

⁵⁵ Ibid., para.106.

⁵⁶ Ibid., para.112.

beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation”.⁵⁷ Accordingly, the Court rejected Colombia’s fifth preliminary objection.

21. However, it did so by 11 votes to five.⁵⁸ The joint dissenting opinion of Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower took issue with the Court’s decision on this point. The dissenting judges emphasised that coastal States have an obligation to submit information to the CLCS in order to obtain a recommendation only if such States prove that they have a continental shelf entitlement beyond 200 nm.⁵⁹ Nevertheless, “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”.⁶⁰ Therefore, it is the CLCS that decides whether a State has proven its continental shelf entitlement beyond 200 nm. In the dissenting judges’ words, “[t]he function of the CLCS is to examine the submission of the claimant State and to make recommendations to it on whether the description of its delineation meets the criteria laid down in Article 76”.⁶¹ The purpose of the CLCS’s recommendation is to validate a coastal State’s delineation,⁶² and a core part of this process is proving that the coastal State has continental shelf entitlements beyond 200 nm. Therefore, the dissenting judges found it

surprising that the majority should maintain that the submission of information [...] was considered a prerequisite by the Court in its 2012 Judgment [...], while concluding in the present Judgment that recommendations from the CLCS are “not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to

⁵⁷ Ibid., para.114.

⁵⁸ Judges Yusuf, Cançado Trindade, Xue, Bhandari and Robinson voted against the rejection of Colombia’s fifth preliminary objection. The Court also rejected all other preliminary objections raised by Colombia, and is thus due to hear the merits of the dispute in the forthcoming months. See *ibid.*, para.126.

⁵⁹ Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, para.55 (<http://www.icj-cij.org/docket/files/154/18970.pdf>).

⁶⁰ Ibid., para.56.

⁶¹ Ibid., para.57.

⁶² Ibid., para.58.

settle a dispute with another State over [...] delimitation”.⁶³

The dissenting judges deemed the CLCS’s recommendation to be the means through which a coastal State’s entitlement beyond 200 nm is established. Until the CLCS has delivered its recommendation, there is no certainty that a coastal State has proved its continental shelf entitlement beyond 200 nm in accordance with Article 76 UNCLOS. It would thus follow that delimitation beyond 200 nm is contingent upon the CLCS delivering such a recommendation.

IV. The submission to the CLCS as a precondition to delimitation beyond 200 nautical miles

22. In the 2016 judgment, the Court found that filing a submission with the CLCS is necessary for delimitation beyond 200 nm to be admissible. However, this clarification could be said to contradict the 2012 judgment. In 2012, the Court found Nicaragua’s claim for delimitation beyond 200 nm to be admissible, although Nicaragua had not made a submission to the CLCS. The joint dissenting opinion appended to the 2016 judgment criticised the Court for this contradiction.⁶⁴ This article does not examine this aspect in detail. The following discussion builds upon the view expressed by the Court in the 2016 judgment.

IV.A. The relevant legal provisions

23. A close reading of UNCLOS does not appear to support the ICJ’s 2016 decision on Colombia’s fifth preliminary objection. The only provision in the Convention’s text mentioning the CLCS and its functions is Article 76(8), which does not clarify the relationship between delimitation and delineation.⁶⁵ Annex II UNCLOS sets forth the legal framework for the CLCS’s work. Article 3 of Annex II UNCLOS states that the CLCS’s functions are:

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

⁶³ Ibid.

⁶⁴ Ibid., paras.40-51.

⁶⁵ Art. 76(8) UNCLOS is cited in section II above.

on the Law of the Sea;

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

24. Article 76(10) UNCLOS appears to address the relationship between delimitation and delineation. Under Article 76(10), the provisions of the previous paragraphs on delineation “are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”. Article 9 of Annex II UNCLOS contains a more specific provision, as it provides that “[t]he actions of the [CLCS] shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”. The *Bangladesh v. India* tribunal interpreted Article 9 to entail, with reference to the CLCS and international tribunals requested to delimit maritime boundaries, that “the mandates of these bodies complement one another”.⁶⁶ However, Article 9 only conveys that the CLCS’s actions concern the delineation of the continental shelf’s outer limits, and cannot amount to delimitation, which does not necessarily mean that delimitation and delineation are wholly distinct actions not impacting on each other.

25. Article 8 of Annex II UNCLOS envisages the case in which a coastal State disagrees with the CLCS’s recommendations. In that instance, “the coastal State shall, within a reasonable time, make a revised or new submission to the Commission”. Furthermore, Article 76(8) UNCLOS provides that “[t]he Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf”, and that “[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding”. Article 8 of Annex II UNCLOS and Article 76(8) UNCLOS suggest that the CLCS may refuse to uphold the conclusions presented in a coastal State’s submission on the outer limits of its continental shelf. This refusal could prompt a revised or new submission by that coastal State. Suarez argued that “[t]he fundamental nature of the relationship between the coastal State and the CLCS is, therefore, co-operative, and not competitive”.⁶⁷ The CLCS fulfils an advisory function with respect to a State seeking to establish its continental shelf’s outer limits.

⁶⁶ *Bangladesh v. India*, above n.25, para.80.

⁶⁷ Suzette Suarez, *The Commission on the Limits of the Continental Shelf and its Function to Provide Scientific and Technical Advice*, 12 Chinese JIL (2013), 339, 349.

26. However, the Convention makes it clear that the coastal State must establish the outer limits of its continental shelf beyond 200 nm “on the basis” of the CLCS’s recommendation.⁶⁸ Although the Commission’s recommendations are not binding, a coastal State must follow the CLCS’s recommendations in order for the outer limits of its continental shelf to become final and binding.⁶⁹ Accordingly, until the Commission and a coastal State reach a common position on entitlement beyond 200 nm and on the extent of that entitlement, there can be no absolute certainty concerning the existence and extent of entitlement beyond 200 nm. Until that moment a coastal State cannot establish the outer limits of its continental shelf in full accordance with UNCLOS, allowing it to make such outer limits opposable to third States.

IV.B. Interpreting the Court’s reasoning: the submission to the CLCS as an ipso facto proof of appurtenance

27. Before the *Nicaragua v. Colombia* cases, no international tribunal had found that a submission to the CLCS is a precondition for delimitation beyond 200 nm. In *Nicaragua v. Honduras*, the ICJ only found that “any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the [CLCS] established thereunder”.⁷⁰ ITLOS and the *Bangladesh v. India* tribunal merely *noted* that the parties had made a full submission to the CLCS.⁷¹ However, in *Nicaragua v. Colombia* (2012) the ICJ

⁶⁸ According to McDorman, the outer limits of the continental shelf can become “final and binding” under Art. 76(8) UNCLOS only if they have been established by the coastal State “on the basis” of the CLCS’s recommendation. See Ted McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 *Int’l J Marine & Coastal Law* (2002), 301, 315. McDorman also stated that the “‘on the basis of’ requirement implies a closer fit between a coastal state’s claimed outer limit and Commission recommendations than the alternative wording of ‘taking into account’ that was considered during the negotiations”. See *ibid.*, 314.

⁶⁹ Øystein Jensen, *The Commission on the Limits of the Continental Shelf: An Administrative, Scientific or Judicial Institution?*, 45 *Ocean Development & Int’l L* (2014), 171, 176-177. See also Suzette Suarez, *The Outer Limits of the Continental Shelf – Legal Aspects of their Establishment* (2008), 210-212; Kunoy, above n.26, 242-244.

⁷⁰ *Nicaragua v. Honduras*, above n.2, 759, para.319.

⁷¹ *Bangladesh/Myanmar*, above n.8, 115, para.445; *Bangladesh v. India*, above n.25, para.457.

seemed to imply that the filing of a full submission with the CLCS would amount to proving a coastal State's entitlement to a continental shelf beyond 200 nm. This was the crux of the 2012 judgment, yet the Court was not entirely clear in its reasoning.

28. A reading of the 2016 judgment, together with the individual opinions appended to it, could clarify the Court's reasons for its 2012 decision. In 2016, the Court emphasised "the obligation on Nicaragua, as a party to UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS".⁷² The Court found that:

It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129, that "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".⁷³

Nevertheless, the 2016 judgment does not clarify the reason for the 2012 decision that a submission to the CLCS allows the Court to consider a request for delimitation beyond 200 nm.

29. The joint dissenting opinion sheds light on this issue by underscoring a point that the 2012 and 2016 judgments did not mention directly. As mentioned above,⁷⁴ the dissenting judges wrote that the submission of information to the CLCS is "conditional on the fulfilment of the 'test of appurtenance', as set out in the Guidelines of the CLCS",⁷⁵ according to which "a coastal State must first prove that it has a continental shelf entitlement that extends beyond 200 nautical miles before it is permitted — indeed, obliged — to delineate the outer limits of the shelf".⁷⁶ The dissenting judges seem to share the same view as the Court on this point. Therefore, it seems that what the Court had in mind both in 2012 and in 2016 was that, once a coastal State files a submission with the CLCS, it is confident that it will be able to prove that it has a continental shelf entitlement beyond 200 nm. The joint dissenting opinion could be seen to clarify paragraphs 127-129

⁷² Nicaragua v. Colombia (2016), above n.46, para.82.

⁷³ Ibid.

⁷⁴ Section III.B.

⁷⁵ Joint Dissenting Opinion, above n.59, para.55

⁷⁶ Ibid.

of the 2012 judgment. However, it does not clarify the impact of the Court's thinking on the merits of a request for delimitation beyond 200 nm. On one hand, the Court could assess whether a coastal State has satisfied the "test of appurtenance" based on the scientific evidence contained in the submission to the CLCS. On the other hand, the Court could simply accept that a submission to the CLCS, which only States able to satisfy the "test of appurtenance" make, *ipso facto* proves that a State has a continental shelf entitlement beyond 200 nm.

30. The latter approach seems overly formalistic. If filing a submission with the CLCS *ipso facto* proved the existence of continental shelf entitlements beyond 200 nm, the Court would simply accept a coastal State's assertion that such entitlements exist. However, this approach would hardly encourage the presentation of compelling evidence before the Court relating to the existence of continental shelf entitlements beyond 200 nm. Moreover, this reading of the Court's 2012 judgment is not based on UNCLOS, but, as indicated in the 2016 joint dissenting opinion, on the CLCS's Scientific and Technical Guidelines. Paragraph 2.2.4 of the CLCS's Guidelines provides that if "a State does not demonstrate to the Commission that the natural prolongation of its submerged land territory [...] extends beyond the 200-nautical-mile distance criterion [...] [it does] not have an obligation to submit information on the limits of the continental shelf to the Commission".⁷⁷ The CLCS's Guidelines were adopted by the Commission itself, and not by the States parties to UNCLOS,⁷⁸ and only aim at "ensuring a uniform and extended State practice during the preparation of scientific and technical evidence submitted by coastal States".⁷⁹ They were not conceived to be binding on States. Referring to the non-binding CLCS's Guidelines to support the view that the "test of appurtenance" would be *ipso facto* satisfied by presenting a submission to the CLCS seems unpersuasive. It would be more compelling if such an approach were based on UNCLOS itself, which, as a treaty, could be part of the law applicable before the Court.

31. Furthermore, when filing a submission with the CLCS, a coastal State provides the Commission with detailed scientific evidence to prove that the outer limits of its continental shelf beyond 200 nm are identified in accordance with paragraphs 4 to 7 of Article 76 UNCLOS. ITLOS

⁷⁷ Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/11 (13 May 1999), 12, para.2.2.4.

⁷⁸ Ibid., para.1.2.

⁷⁹ Ibid., para.1.4.

underscored the “scientific and technical” character of the Commission in *Bangladesh/Myanmar*.⁸⁰ If the Court considered that the presentation of such scientific evidence to the CLCS in the form of a full submission satisfies the requirement to prove a coastal State’s entitlement to a continental shelf beyond 200 nm, the mere presentation of such a submission would enable the Court to establish the continental shelf boundary beyond 200 nm.⁸¹ However, under Article 8 of Annex II UNCLOS, the CLCS could reject the conclusions of a coastal State’s submission, whether partially or entirely, including with respect to the “test of appurtenance”. Therefore, filing a full submission with the CLCS, which would include scientific evidence on how to delineate the continental shelf’s outer limits, could not be seen as *ipso facto* proving a State’s entitlement to a continental shelf beyond 200 nm.⁸²

IV.C. Interpreting the Court’s reasoning: assessment by the Court of the evidence submitted to the CLCS

32. It seems more convincing for the Court to assess whether a coastal State has satisfied the “test of appurtenance” based on the scientific evidence identical to the one submitted to the CLCS. Nevertheless, this approach raises the issue concerning whether the evidence submitted to the ICJ for evaluation to prove entitlement beyond 200 nm should meet the same standard of proof as the evidence submitted to the CLCS for the same purpose. In the proceedings leading to the 2012 judgment, Colombia argued that Nicaragua, by requesting delimitation beyond 200 nm from its coast, “is not only asking the Court to substitute itself for the Commission, it is also requesting the Court to endorse its outer continental shelf claim based on incomplete, unannexed and ‘indicative’ materials that would never be acceptable to the Commission”.⁸³ For Colombia, a State requesting the ICJ to delimit a

⁸⁰ Bangladesh/Myanmar, above n.8, 107, para.411.

⁸¹ This situation would only concern either the case of two States having both filed a CLCS submission, or of only one State having filed a CLCS submission and whose entitlement beyond 200 nm overlaps with another State’s entitlement within 200 nm.

⁸² Kunoy wrote that submission to the CLCS “cannot be considered a source of title [...] which would form basis for determining the relevant area, the finding of which is part of the methodology of maritime delimitation”. See Bjørn Kunoy, *The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf*, 83 BYIL (2013), 61, 77.

⁸³ Rejoinder of Colombia (18 June 2010), 147, para.4.56, (<http://www.icj-cij.org/docket/files/124/16973.pdf>).

boundary beyond 200 nm should meet the same burden of proof it would have to satisfy before the CLCS in order to prove its entitlement beyond 200 nm.

33. By holding in 2012 that Nicaragua's request for delimitation beyond 200 nm was inadmissible, the Court seemed to implicitly agree with Colombia. However, in the 2016 judgment the Court asserted that in 2012 it "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".⁸⁴ Judge Donoghue elaborated on this question in her separate opinion appended to the 2012 judgment. According to her:

[i]f the information falls short of what is needed to permit factual conclusions by expert scientists [in the CLCS], surely it cannot be a sufficient basis for the Members of this Court to reach factual conclusions about the location of the outer limits of the continental shelf beyond 200 nautical miles of Nicaragua's coast.⁸⁵

34. Differently from Judge Donoghue, Judge *ad hoc* Mensah stated that:

[w]hile a full submission to the Commission should not necessarily be required in every case to enable a court or tribunal to delimit a continental shelf beyond 200 miles, information that would satisfy the Commission should normally also be sufficient to serve as a basis for the court or tribunal to delimit a continental shelf [...].⁸⁶

According to him, a submission to the CLCS is not always necessary for an international tribunal to delimit the continental shelf beyond 200 nm. The Court could thus delimit a boundary beyond 200 nm even if it were presented with information less thorough than the information that would be presented to the CLCS. He also added that:

the possibility should be left open that, in principle, a court or tribunal may be able and willing to adjudicate on a dispute relating to

⁸⁴ Nicaragua v. Colombia (2016), above n.46, para.82.

⁸⁵ Nicaragua v. Colombia (2012), above n.2, 754, para.12 (Separate Opinion Donoghue).

⁸⁶ Nicaragua v. Colombia (2012), above n.2, at 766, para.11 (Declaration Mensah).

delimitation of the continental shelf beyond 200 nautical miles depending on the information presented to it on the geology and geomorphology of the area in which delimitation is sought.⁸⁷

Judge *ad hoc* Mensah supported his views by reference to *Bangladesh/Myanmar*. However, *Bangladesh/Myanmar*, as well as *Bangladesh v. India*, should be considered exceptional cases, decided on their facts.⁸⁸ Therefore, resorting to *Bangladesh/Myanmar* does not seem wholly convincing. Judge *ad hoc* Mensah's words entail that an international tribunal requested to delimit the continental shelf beyond 200 nm would be in the position to appreciate whether the evidence submitted to it relating to the existence of overlapping maritime entitlements, even if less thorough than the evidence that would be presented to the CLCS, satisfies the "test of appurtenance". This view would enhance the Court's discretion to the detriment of higher certainty as to the existence of continental shelf entitlements beyond 200 nm. Furthermore, it might also discourage the submission to the Court of compelling evidence relating to the existence of such entitlements. The threshold under which only evidence identical to that presented to the CLCS could satisfy the Court that a coastal State has met the "test of appurtenance", endorsed by Judge Donoghue, appears more appropriate.

35. There is much force in Judge Donoghue's words. Although leaving the door open for the Court to decide whether the evidence submitted by a coastal State satisfies the high evidential threshold on a case-by-case basis, Judge Donoghue would limit the Court's discretion in appreciating whether the evidence submitted to it is sufficient to satisfy the "test of appurtenance". Her views suggest that the Court should meaningfully engage with the appraisal of complex scientific evidence of the same kind as the evidence submitted to the CLCS. In discharging this task, the Court should presumably refer to the CLCS's previous recommendations, in order to adopt the same standard of proof required for demonstrating the existence of entitlement beyond 200 nm. Although delineation and delimitation are distinct processes, they both rest on the existence continental shelf entitlements beyond 200 nm. By using the same standard as the CLCS in assessing the existence of such entitlements, the Court would promote a uniform approach to establishing whether a State is entitled to a continental shelf beyond 200 nm.

36. Stating that the ICJ may only consider a claim for delimitation beyond

⁸⁷ Ibid., 766, para.12 (Declaration Mensah).

⁸⁸ Section V.A below.

200 nm on the basis of the same data required by the CLCS for delineation raises some issues with respect to the Court's appraisal of evidence of entitlement beyond 200 nm.⁸⁹ The ICJ does not seem well-equipped to assess the kind of scientific evidence that States submit to the CLCS.⁹⁰ In their submissions to the CLCS, coastal States include data obtained with complex scientific techniques. For example, Spain's submission with respect to the Canary Islands was "prepared using multibeam echosounder data, as well as parametric echosounder profiles, multichannel seismic data, dredges and core samples [...] obtained over six oceanographic surveys".⁹¹ Spain's submission also included a bathymetric survey and "three multichannel seismic profiles".⁹² Furthermore, submissions to the CLCS present detailed geological data in order to support a coastal State's delineation of its continental shelf's outer limits.⁹³ Commenting on *Bangladesh/Myanmar*, Treves emphasised that "interpreting Article 76 [UNCLOS] requires scientific capability".⁹⁴ The Court

⁸⁹ With respect to the scientific evidence submitted by the parties in *Pulp Mills*, Judges Al-Khasawneh and Simma acknowledged that "[t]he Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties". See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 110, para.4 (Joint Dissenting Opinion Al-Khasawneh and Simma).

⁹⁰ Section IV of Annex III to the CLCS's Rules of Procedure is entirely dedicated to the "[m]ain scientific and technical examination of the submission" by the Commission, and mentions that the Commission shall examine a coastal State's submission in order to evaluate "the data and methodology" employed by the coastal State itself in order to determine a number of elements functional to establishing the continental shelf's outer limits. See also Øystein Jensen, *The Commission on the Limits of the Continental Shelf – Law and Legitimacy* (2014), 210-112.

⁹¹ Executive Summary – Partial Submission of Data and Information on the Limits of the Continental Shelf of Spain to the West of the Canary Islands pursuant to Part VI and Annex II of the United Nations Convention on the Law of the Sea (17 December 2014), 4, para.1.6 (http://www.un.org/depts/los/clcs_new/submissions_files/esp77_14/esp_2014_en.pdf).

⁹² *Ibid.*, 5, paras.1.8-1.9.

⁹³ See the reference in Executive Summary – Submission of the People's Republic of Bangladesh (25 February 2011), 10, para.6.4 (http://www.un.org/depts/los/clcs_new/submissions_files/bgd55_11/Executive%20summary%20final.pdf).

⁹⁴ Tullio Treves, *Law and Science in the Interpretation of the Law of the Sea Convention – Article 76 between the Law of the Sea Tribunal and the*

itself is unlikely to possess such capability.

37. Moreover, if the ICJ, or other international tribunals, assessed the same evidence submitted by a State to the CLCS, the result would be the implicit rejection of the complementary role that the Commission fulfils in relation to international tribunals, underscored in *Bangladesh v. India*.⁹⁵ International tribunals would in fact pre-empt the outcome of the Commission's recommendation. In addition, using the same standard of proof to evaluate the same evidence for the same purposes carries the risk of conflicting decisions by the Court and the CLCS. This would contradict the complementary functions exercised by the CLCS and international tribunals.⁹⁶

38. In order to avoid pre-empting the CLCS's recommendations and conflicting decisions, the ICJ could choose between two options: either the Court stays delimitation proceedings and refers the issue of entitlement to the CLCS for decision; or the Court refuses to delimit a boundary beyond 200 nm lacking a recommendation from the CLCS. Both options would soundly recognise the pre-eminence of the CLCS as a technical and scientific body. Absent an express legal provision allowing for a reference by the ICJ to the CLCS, the latter option appears more viable.⁹⁷ Nevertheless, the Court could base a reference procedure to the CLCS under Articles 30, 34 or 50 of its Statute. Under Article 50, the Court may "entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion". However, the Court has been historically reluctant to use its power under Article 50 of the Statute.⁹⁸

Commission on the Limits of the Continental Shelf, 3 Journal of International Dispute Settlement (2013), 483, 491.

⁹⁵ *Bangladesh v. India*, above n.25, para.80.

⁹⁶ In his declaration appended to *Nicaragua v. Colombia* (2016), Judge Bhandari mentioned "interinstitutional comity" as a reason not to delimit the continental shelf beyond 200 nm absent a recommendation from the CLCS. See Declaration of Judge Bhandari, para.7 (<http://www.icj-cij.org/docket/files/154/18980.pdf>).

⁹⁷ Whether the Court should await the CLCS's decision on delineation prior to delimiting a boundary beyond 200 nm is discussed in section V below.

⁹⁸ See Daniel Peat, *The Use of Court-appointed Experts by the International Court of Justice*, 84 BYIL (2013), 271, 272; Lucas Carlos Lima, *The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case*, 6 Journal of International Dispute Settlement (2015), 621, 622. The Court has recently appointed experts to assist it in identifying the starting point of the maritime boundary between Costa Rica and Nicaragua in the Caribbean Sea. See *Maritime Delimitation in the Caribbean Sea and the*

Moreover, if the CLCS were entrusted with giving an expert opinion on the existence of entitlement beyond 200 nm, the CLCS's expert opinion would not be binding on the Court.⁹⁹ Nonetheless, an expert opinion would expectedly be given considerable weight by the Court. In *Corfu Channel*, the Court stated that it "cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information".¹⁰⁰

39. Article 34(2) of the Statute provides that the Court "may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative". This provision could be the legal basis for the Court to request the CLCS to provide information concerning the existence of entitlements beyond 200 nm. However, Article 34(2) concerns access to the Court, and not information gathering by the Court.¹⁰¹ One could argue that, by being requested information under Article 34(2), the CLCS would be called upon to act on behalf of the international community. The reference to the CLCS could thus be seen to concern issues of access to the Court. Moreover, similarly to expert opinions under Article 50, information provided under Article 34(2) would seem not binding on the Court, although one may expect the Court to accord such information substantial weight. A provision in the Rules of Court specifically dealing with the effects of a request for information under Article 34(2) would seem appropriate to dispel any doubt. At present, Article 69(1) of the Rules of Court only repeats the provision of Article 34(2) of the Statute.

40. Another alternative for the assessment of complex scientific evidence of the kind presented to the CLCS is the Court's appointment of assessors under Article 30(2). Article 30(2) of the Statute states that "[t]he Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote". Article 9 of the Rules of Court provides

Pacific Ocean (Costa Rica v. Nicaragua), Appointment of Experts, Order of 16 June 2016 (<http://www.icj-cij.org/docket/files/157/19054.pdf>).

⁹⁹ Markus Benzing, Evidentiary Issues, in: Andreas Zimmermann et al. (eds.), *The Statute of The International Court of Justice – A Commentary* (2nd ed., 2012), 1234, 1268.

¹⁰⁰ *Corfu Channel* (United Kingdom v. Albania), Merits, ICJ Reports 1949, 4, 21.

¹⁰¹ Pierre-Marie Dupuy, Article 34, in: Andreas Zimmermann et al. (eds.), *The Statute of The International Court of Justice – A Commentary* (2nd ed., 2012), 586, 587-589.

that “[t]he Court may, either *proprio motu* or upon a request [...] decide, for the purpose of a contentious case or request for advisory opinion, to appoint assessors to sit with it without the right to vote”. Assessors are not adjudicators, and they are perceived as fulfilling “the important task of translating, for the adjudicative body, the technicalities of their own scientific domain”.¹⁰² Assessors are thus a means to assess scientific and technical evidence. This system would be different from requesting information to the CLCS by means of a reference procedure based on articles 34(2) or 50 of the Court’s Statute. However, it could be a powerful instrument enabling the Court to grapple with the complex scientific evidence submitted to the CLCS, at the same time ensuring a degree of consistency between the Court’s decision and the CLCS’s recommendation on continental shelf entitlement beyond 200 nm. One could express some reservations on the resort to assessors under Article 30(2) of the ICJ’s Statute since, differently from the reports of Court-appointed experts and information received by “public international organizations”, assessors would not provide pieces of evidence. Writing extrajudicially, Judge Gaja confirmed that the assessors’ opinion “would not be treated as evidence before the Court”.¹⁰³ Assessors would sit with the Court in deliberation, yet without a right to vote, which entails that the parties would not be able to comment on their views. Therefore, considerations of due process suggest caution in this regard.

V. The recommendation of the CLCS as a precondition to delimitation beyond 200 nautical miles

41. In the 2016 judgment, the Court rejected the argument that an international tribunal can delimit the continental shelf beyond 200 nm only if the CLCS has already issued a recommendation ascertaining entitlement to a continental shelf beyond 200 nm.¹⁰⁴ However, this finding raises some controversial issues.

V.A. The exceptional character of the Bay of Bengal cases

42. In *Nicaragua v. Colombia* (2016), Nicaragua argued that the Court need not wait for the CLCS’s recommendation before delimiting the continental shelf

¹⁰² Lucas Carlos Lima, Expert Advisor or Non-voting Adjudicator? The Potential Function of Assessors in the Procedure of the International Court of Justice, 99 *Rivista di Diritto Internazionale* (2016), 1123, 1139.

¹⁰³ Giorgio Gaja, Assessing Expert Evidence in the ICJ, 15 *Law and Practice of International Courts and Tribunals* (2016), 409, 418.

¹⁰⁴ Section III.B above.

boundary beyond 200 nm. Although it did not say so clearly, Nicaragua appeared to contend that the submission of information to the CLCS allows the Court to consider whether entitlement beyond 200 nm exists. If entitlement were found to exist, the Court could also delimit the continental shelf boundary beyond 200 nm. Nicaragua cited ITLOS's *Bangladesh/Myanmar* judgment and the *Bangladesh v. India* arbitral award in support of its argument.¹⁰⁵ According to ITLOS:

the fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.¹⁰⁶

The main reason for ITLOS's finding was that continental shelf rights exist *ipso facto* and *ab initio*, by virtue of Article 77(3) UNCLOS.¹⁰⁷

43. However, while it is correct to state that continental shelf rights exist *ipso facto* and *ab initio*, proving that such rights exist in accordance with the procedure under article 76 UNCLOS is a wholly different matter.¹⁰⁸ The inherency clause does not dispense with the problem of establishing the existence and extent of entitlement beyond 200 nm. With respect to the

¹⁰⁵ Written Statement of Nicaragua (19 January 2015), 61, para.5.22, and 63, para.5.25, (<http://www.icj-cij.org/docket/files/154/18780.pdf>).

¹⁰⁶ *Bangladesh/Myanmar*, above n.8, 107, para.410. Similarly, the *Bangladesh v. India* tribunals stated that “[t]here is a clear distinction in the Convention between the delimitation of the continental shelf under article 83 of the Convention and the delineation of its outer limits under article 76”, implying that one the latter was not a precondition for the former. See *Bangladesh v. India*, above n.25, para.80.

¹⁰⁷ Based on the inherency clause under Article 77(3) UNCLOS, Judge Golitsyn wrote that the use of the term “claims” in relation to the continental shelf is incorrect. States do not have “claims” over the continental shelf, as they are simply “entitled” to exercise their sovereign rights over it as a matter of international law. See Vladimir Golitsyn, *Continental Shelf Claims in the Arctic Ocean: A Commentary*, 24 *Int'l J Marine & Coastal L* (2009), 401.

¹⁰⁸ Eiriksson correctly stated that “article 77 paragraph 3, does not remove from the coastal State the burden of demonstrating its entitlement”. See Gudmundur Eiriksson, *The Case of Disagreement between the Coastal State and the Commission on the Limits of the Continental Shelf*, in: Myron H. Norquist et al. (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (2004), 251, 258.

continental shelf within 200 nm, both existence and extent of entitlement are certain. By contrast, with respect to the continental shelf beyond 200 nm both existence and extent of entitlement are uncertain before the CLCS's recommendation. This recommendation is necessary for the coastal State to establish the outer limits of its continental shelf in accordance with Article 76(8) UNCLOS. The inherent character of continental shelf rights beyond 200 nm entails that the CLCS's recommendations are not constitutive of entitlement. However, it does not also entail that such rights are opposable to the neighbouring States and to the international community as a whole. In order for continental shelf rights beyond 200 nm to be opposable, the CLCS must ascertain entitlement by delivering a recommendation pursuant to Article 76(8) UNCLOS.¹⁰⁹ Therefore, in respect of the continental shelf beyond 200 nm the CLCS not only ascertains a coastal State's pre-existing entitlement, but it also determines whether the extent of entitlement is established by a coastal State in conformity with Article 76 UNCLOS.

44. In *Bangladesh/Myanmar*, ITLOS made the right decision for unpersuasive reasons.¹¹⁰ The *Bay of Bengal* cases are exceptional, which could in principle justify the decision to delimit the continental shelf beyond 200 nm. At the Third UN Conference on the Law of the Sea (1973-1982), Sri Lanka demonstrated that the formula to delineate the continental shelf's outer limits under Article 76 UNCLOS would have been detrimental to the States abutting the Bay of Bengal. Owing to the region's geology, if the Article 76 formula were applied to the Bay of Bengal, a significant share of the continental margin would not fall under the jurisdiction of the coastal States concerned, including Bangladesh and Myanmar. The debates at the Third UN Conference on the Law of the Sea emphasised that, in the Bay of Bengal, both the thickness of the sedimentary rocks, and the location of the foot of the continental slope, would determine outer limits lying well beyond the maximum limits set in Article 76(5) UNCLOS.¹¹¹ Consequently, the Final Act

¹⁰⁹ See Kunoy, above n.82, 66-67.

¹¹⁰ ITLOS's decision to delimit the maritime boundary beyond 200 nm could be criticised on the grounds that not knowing where the continental shelf's outer limits lie does not allow it to ensure that an equitable solution is achieved. However, this issue falls beyond the scope of this article. See Malcolm Evans, *Maritime Boundary Delimitation: Whatever Next?*, in: Jill Barrett and Richard Barnes (eds.), *Law of the Sea – UNCLOS as a Living Treaty* (2016), 41, 70-77.

¹¹¹ Under Art. 76(5) UNCLOS, "[t]he fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with

of the Conference recognised that a different system could be used to delineate the continental shelf's outer limits in the Bay of Bengal and in areas with comparable geological features.¹¹²

45. The scientific evidence produced by Sri Lanka also proved that the States abutting the Bay of Bengal are certainly entitled to a continental shelf beyond 200 nm. Therefore, with respect to the Bay of Bengal entitlement to a continental shelf beyond 200 nm is certain. The only uncertainty concerns the exact location of the continental shelf's outer limit, and thus the extent of the coastal States' continental shelf rights. On these bases, the delimitation of the continental shelf beyond 200 nm in *Bangladesh/Myanmar*, as well as in *Bangladesh v. India*, was in principle justified. However, since the *Bay of Bengal* cases were decided on exceptional circumstances, it is unpersuasive to rely on them to support that continental shelf delimitation beyond 200 nm can be effected in *all* situations.

46. In *Bangladesh/Myanmar*, ITLOS held 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”.¹¹³ ITLOS found that, in order to delimit the continental shelf beyond 200 nm, international tribunals need not be absolutely certain that the States in dispute have maritime entitlements extending beyond 200 nm. ITLOS introduced a “lack of significant uncertainty” threshold, lower than a hypothetical “absolute certainty” one. Owing to the exceptional geology of the Bay of Bengal's seabed and subsoil, ITLOS and the *Bangladesh v. India* tribunal could nonetheless consider themselves certain that Bangladesh, India and Myanmar were all entitled to a continental shelf beyond 200 nm.

paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres”. See Figure 2 at Raghavendra Mishra, *The “Grey Area” in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution*, 47 *Ocean Development & Int'l L.* (2016), 29, 31.

¹¹² Doc. A/CONF.62/121 (27 October 1982), Official Records of the Third United Nations Conference on the Law of the Sea, vol XVII, at 148 (Annex II – Statement of Understanding concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin). See also M.C.W. Pinto, Article 76 of the UN Convention on the Law of the Sea and the Bay of Bengal Exception, 3 *Asian JIL* (2013), 215.

¹¹³ *Bangladesh/Myanmar*, above n.8, 115, para.443.

47. However, the “lack of significant uncertainty” threshold is likely not easily met in other cases in which States claim a continental shelf beyond 200 nm. Whether entitlement beyond 200 nm exists in other cases rests on the CLCS’s recommendations, which ascertain that the continental shelf’s outer limits would be established by the coastal State in accordance with Article 76 UNCLOS. A recommendation by the CLCS would meet the “lack of significant uncertainty” threshold, and even provide “absolute certainty” concerning the existence of entitlement beyond 200 nm. Nicaragua’s explicit, and the Court’s probable yet not explicit, reliance on the *Bay of Bengal* cases in *Nicaragua v. Colombia* (2016) seems therefore misplaced.

48. An additional problem is that the *Bay of Bengal* cases could be seen as generally permitting delimitation in all instances in which both parties fail to disagree on whether entitlement to a continental shelf beyond 200 nm exists. In fact, Bangladesh, India and Myanmar had all agreed that they were entitled to a continental shelf beyond 200 nm. This appears unconvincing, since the agreement of the parties could not be a valid substitute for a clear statement, based on the appreciation of scientific evidence by the CLCS, that entitlement actually exists. If agreement between States were a substitute for the CLCS’s recommendation, States could exclude parcels of continental shelf beyond 200 nm from the Area, to the detriment of the Common Heritage of Mankind.¹¹⁴

49. Differently from *Nicaragua v. Colombia* (2016), *Nicaragua v. Colombia* (2012) shows that the Court had noted the exceptional character of the *Bay of Bengal* cases. In 2012, the Court referred to

the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presents a unique situation and that this fact had been acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea.¹¹⁵

In her separate opinion appended to the 2012 judgment, Judge Donoghue also commented on the exceptional character of *Bangladesh/Myanmar*.¹¹⁶ She observed that:

[t]he *Bangladesh/Myanmar* case illustrates that where the existence of continental shelf in the relevant area is not in dispute and the methodology and geography do not require a court or tribunal to make

¹¹⁴ Art. 136 UNCLOS.

¹¹⁵ *Nicaragua v. Colombia* (2012), above n.2, 668, para.125.

¹¹⁶ At that time, *Bangladesh v. India* had not been decided yet.

any factual finding regarding the outer limits of the continental shelf, the “distinct” exercises of delimitation and delineation of the outer limits of the continental shelf may proceed in parallel, regardless of whether a State has established the outer limits of its continental shelf.¹¹⁷

By contrast, the case between Nicaragua and Colombia was different, as the available scientific evidence did not unassailably prove that continental shelf entitlements beyond 200 nm existed. Deciding the case between Nicaragua and Colombia “would require the Court to reach conclusions about the same question of fact that the technical experts comprising the Commission would also address after receiving a complete submission from Nicaragua”.¹¹⁸ Judge Donoghue showed full awareness of the peculiarities of the *Bay of Bengal* cases. However, in *Nicaragua v. Colombia* (2016) the Court regrettably failed to mention the exceptional circumstances underlying the *Bay of Bengal* cases, while presumably, yet not expressly, relying on them in reaching its decision to consider Nicaragua’s claim even in the absence of the CLCS’s recommendation.

V.B. Nicaragua’s “practical impasse” argument

50. Responding to Colombia’s fifth preliminary objection, Nicaragua invoked the “practical impasse” argument. This argument is based on paragraph 5(a) of Annex I to the CLCS’s Rules of Procedure. Under that provision:

[i]n cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.¹¹⁹

If Colombia’s argument that delimitation beyond 200 nm cannot be effected prior to delineation were accepted, according to Nicaragua “the result is an impasse: the [ICJ] would have to wait for the CLCS to act, and the CLCS

¹¹⁷ *Nicaragua v. Colombia* (2012), above n.2, 758, para.25 (Separate Opinion Donoghue).

¹¹⁸ *Ibid.*

¹¹⁹ Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/40/Rev.1 (17 April 2008), Annex I, 22.

would have to wait for the [ICJ] to act”.¹²⁰

V.B.i. The legal premise of the “practical impasse” argument

51. Nicaragua was presumably inspired by the *Bangladesh/Myanmar* proceedings, in which Myanmar raised the “practical impasse” argument and ITLOS discussed its implications.¹²¹ First, the Tribunal referred to paragraph 5(a) of Annex I to the CLCS’s Rules of Procedure.¹²² Second, ITLOS noted that the CLCS had decided to defer the consideration of the submissions of both Bangladesh and Myanmar due to the pending dispute between the two States concerning the delimitation of their continental shelf beyond 200 nm.¹²³ The Tribunal found that “[t]he consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved”.¹²⁴ ITLOS also emphasised that:

¹²⁰ Written Statement, above n.105, 63, para.5.29.

¹²¹ Reply of Myanmar (1 July 2011), 204-205, paras.A.18-A.19 (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Rejoinder_myanmar.pdf). On the “practical impasse” argument, see Xinjun Zhang, *The ITLOS Judgment in the Bay of Bengal Case between Bangladesh and Myanmar*, 12 Chinese JIL (2013), 255, 278-279; Robin Churchill, *The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation*, 1 Cambridge JICL (2012), 137, 148; Robin Churchill, *Dispute Settlement in the Law of the Sea: Survey for 2012*, 28 Int’l J Marine & Coastal L (2013), 563, 579-580; Bjarni Már Magnússon, *Judgement in the Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14 March 2012), 27 Int’l J Marine & Coastal L (2012), 623, 628-630; Robin Churchill, *Dispute Settlement in the Law of the Sea: Survey for 2014*, 30 Int’l J Marine & Coastal L (2015), 585, 609; Marcin Kaldunski, *A Commentary on the Maritime Boundary Arbitration between Bangladesh and India concerning the Bay of Bengal*, 28 Leiden JIL (2015), 799, 833-834.

¹²² *Bangladesh/Myanmar*, above n.8, 101, para.386.

¹²³ *Ibid.*, 102, paras.388-389. ITLOS referred to the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, UN Doc. CLCS/64 (1 October 2009), 9-10, paras.35-40; Progress of Work in the Commission on the Limits of the Continental Shelf – Statement by the Chairperson, UN Doc. CLCS/72 (16 September 2011), 6-7, paras.19-22.

¹²⁴ *Bangladesh/Myanmar*, above n.8, 102, para.390.

it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.¹²⁵

ITLOS considered itself bound to avoid the impasse that could result from paragraph 5(a) of Annex I to the CLCS's Rules of Procedure and a potential decision that delimitation could not take place absent delineation. The *Bangladesh v. India* tribunal endorsed ITLOS's decision.¹²⁶ This endorsement should not surprise, as three out of the five arbitrators had previously sat as ITLOS judges in *Bangladesh/Myanmar*.¹²⁷

52. The ICJ refrained from making any clear finding on the "practical impasse" argument both in the 2012 and in the 2016 judgments. Nevertheless, certain judges wrote on this question in their individual opinions, which may be indicative of the discussions within the Court. In her separate opinion appended to the 2012 judgment, Judge Donoghue stated that:

If an area is not delimited and therefore remains the subject of a dispute, the Commission will not make recommendations about the outer limits (absent the consent of all involved States). And if the outer limits have not been established on the basis of Commission recommendations, the Court [...] will not proceed with a delimitation. In effect, each institution holds the door open and waits for the other to walk through it.¹²⁸

In his declaration appended to the 2016 judgment, Judge Gaja wrote that "in most instances the delineation of the outer limits should come first, because it

¹²⁵ Ibid., 102, para.392. Magnússon strongly endorsed ITLOS's decision to uphold the "practical impasse" argument. See Magnússon, above n.26, 476-477.

¹²⁶ *Bangladesh v. India*, above n.25, para.82.

¹²⁷ The three arbitrators having sat as ITLOS judges in *Bangladesh/Myanmar* were Rüdiger Wolfrum (President of the arbitral tribunal), Jean-Pierre Cot and Thomas Mensah. The other two arbitrators were Vaughan Lowe and Ivan Shearer. See *ibid.*, paras.3-9.

¹²⁸ *Nicaragua v. Colombia* (2012), above n.2, 759, para.30 (Separate Opinion Donoghue).

would otherwise be difficult to pursue the ‘equitable solution’ required by Article 83 of UNCLOS”.¹²⁹ He thus suggested that the CLCS change its Rules of Procedure “and consider submissions also when the delimitation is under dispute”.¹³⁰

53. Although the Court did not refer to paragraph 5(a) of Annex I to the CLCS’s Rules of Procedure either in the 2012 or in the 2016 judgment, it expressly mentioned it in its 2017 preliminary objections judgment in *Somalia v. Kenya*.¹³¹ While in *Somalia v. Kenya* the Court made no finding concerning the “practical impasse” argument, the underlying idea of the decision on Kenya’s first preliminary objection was linked to that argument. Kenya argued that the Court lacked jurisdiction because the 2009 Kenya-Somalia Memorandum of Understanding (MOU)¹³² provided for an alternative dispute settlement means that, pursuant to Kenya’s reservation to the Optional Clause,¹³³ would take precedence over ICJ proceedings.¹³⁴ The Court found that the MOU’s object and purpose was “to constitute a no-objection agreement, enabling the CLCS to make recommendations notwithstanding the existence of a dispute between the Parties regarding the delimitation of the continental shelf”.¹³⁵ The MOU’s object and purpose thus was to overcome the obstacle created by paragraph 5(a) of Annex I to the CLCS’s Rules of Procedure. By recognising that the 2009 MOU’s object and purpose was to allow the CLCS to delineate the continental shelf’s outer limits despite a pending delimitation despite between Kenya and Somalia, the Court could be seen to have implicitly acknowledged the validity of the “practical impasse” argument.

V.B.ii. The possibility of partial recommendations from the CLCS

54. The “practical impasse” argument seems legally and logically sound. The

¹²⁹ Declaration of Judge Gaja (<http://www.icj-cij.org/docket/files/154/18978.pdf>).

¹³⁰ Ibid.

¹³¹ Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*), Preliminary Objections, Judgment of 2 February 2017, paras.68-69 (<http://www.icj-cij.org/docket/files/161/19330.pdf>).

¹³² 2599 UNTS 35.

¹³³ 531 UNTS 114. Kenya declared that it accepted the ICJ’s compulsory jurisdiction in all disputes other than “[d]isputes in regard to which the parties [...] have agreed or shall agree to have recourse to some other method or methods of settlement”.

¹³⁴ *Somalia v. Kenya*, above n.131, para.32.

¹³⁵ Ibid., para.97.

CLCS's Rules of Procedure contain a clear provision preventing the Commission from making recommendations in the presence of a "land or maritime dispute" and lacking the consent of the States involved in such a dispute.¹³⁶ However, paragraph 5(a) of Annex I to the CLCS's Rules of Procedure does not seem to necessarily entail that the Commission is prevented from making *any* recommendation in cases where a land or maritime dispute exists. If a coastal State's submission concerned both disputed areas and undisputed areas, it could be conceivable for the CLCS to only deliver a recommendation with respect to the latter. This solution could find its legal basis in paragraph 3 of Annex I to the CLCS's Rules of Procedure, under which:

A submission may be made by a coastal State for a portion of its continental shelf in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention.

This provision allows coastal States to make partial submissions to the CLCS. Similarly, it seems possible for the CLCS to make partial recommendations. These would ascertain, although not fully, the submitting States' entitlement to a continental shelf beyond 200 nm.

55. Partial recommendations could satisfy the "lack of significant uncertainty" threshold formulated by ITLOS in *Bangladesh/Myanmar*.¹³⁷ Although a partial recommendation would not conclusively establish entitlement beyond 200 nm in the area to be delimited, it could do so with respect to the areas falling outside any potential area of overlapping

¹³⁶ Jensen argued that one "must assume [...] that neighbouring States are unlikely in any other circumstances to apply Rule 5 in order to 'block' the Commission from processing submissions". This statement means that in most cases States involved in a "land or maritime dispute" would consent to the CLCS's consideration of a submission for delineation of the continental shelf's outer limits. See Jensen, above n.16, 590. However, it is unclear why one *must* make such an assumption, especially on account of the fact that it has not been uncommon for States to request the CLCS not to consider a submission due to the existence of a "land or maritime dispute" between them.

¹³⁷ Section V.A above.

entitlements. Therefore, a partial recommendation could significantly lower the level of uncertainty concerning the existence of entitlement beyond 200 nm. If entitlement beyond 200 nm existed in the maritime spaces adjacent to the delimitation area, it could be seen to be likely, from an evidential standpoint, that there would exist maritime entitlements beyond 200 nm also in the delimitation area. In ITLOS's words, the CLCS's partial recommendation could determine a "lack of significant uncertainty" with respect to the existence of entitlement beyond 200 nm.

56. The CLCS has already adopted partial recommendation, for example with respect to Argentina's continental shelf submission. Although a long-standing dispute exists between Argentina and the UK on sovereignty over the Falklands/Malvinas, Argentina made a submission to the CLCS showing the disputed islands under Argentinian sovereignty. The UK sent a note verbale to the UN Secretary-General, rejecting "those parts of Argentina's submission which claim rights over the seabed and subsoil of the submarine areas appurtenant to the Falkland Islands, South Georgia and the South Sandwich Islands, and requests that the Commission does not examine those parts of the Argentine submission [...]".¹³⁸ As a result, the Commission "decided that, in accordance with its rules of procedure, it was not in a position to consider and qualify those parts of the submission that are subject to dispute".¹³⁹ The CLCS's sub-commission was thus instructed to examine only the areas in which there were no overlapping entitlements generated by the coasts of Argentina and of the Falklands/Malvinas.¹⁴⁰ The CLCS submitted its recommendation to Argentina on 11 March 2016.¹⁴¹

57. Although the Falklands/Malvinas sovereignty dispute does not concern maritime delimitation, at least not directly, it is conceivable that the solution adopted by the CLCS in that instance could also be adopted with respect to delimitation disputes. The delimitation of a maritime boundary need not always concern the entire area in which a State claims sovereign rights over the continental shelf under Part VI UNCLOS. Aware that the

¹³⁸ Note No. 84/09 (6 August 2009). The UK repeated its position in Note No. 273/12 (23 August 2012).

¹³⁹ Statement by the Chairman of the Commission, above n.123, 17, para.76.

¹⁴⁰ Progress of Work in the Commission on the Limits of the Continental Shelf – Statement by the Chair, UN Doc. CLCS/76 (5 September 2012), 10-11, paras.53-57.

¹⁴¹ Progress of Work in the Commission on the Limits of the Continental Shelf – Statement by the Chair, UN Doc. CLCS/93 (5 September 2012), 6, paras.19-20.

CLCS could issue a recommendation partially establishing the existence of maritime entitlements beyond 200 nm, an international tribunal could decline to delimit the continental shelf beyond 200 nm without fearing to incur the “practical impasse” invoked by Nicaragua. After the delivery of a partial recommendation by the CLCS, which could establish “lack of significant uncertainty” as to the existence of entitlements beyond 200 nm, international tribunals could accede to a request for delimitation beyond 200 nm. However, this manner of ensuring “lack of significant uncertainty” concerning the existence of continental shelf entitlement beyond 200 nm seems to be case-specific, as there could be geographical scenarios in which it could provide only limited help. This could be the case of enclosed and semi-enclosed seas, in which the areas in dispute between two states and the delimitation area would likely overlap.

V.B.iii. The ultra vires character of paragraph 5(a) of Annex I to the CLCS's Rules of Procedure

58. One could also argue that paragraph 5(a) of Annex I to the CLCS's Rules of Procedure is *ultra vires*, which would deprive the “practical impasse” argument of its legal basis. Jensen wrote that “the Commission has gone beyond the proper limits set out in [UNCLOS] by declining to examine submissions affected by a dispute without the consent of all parties to the dispute”.¹⁴² Jensen emphasised that Article 76(8) UNCLOS uses imperative language, requiring that “[t]he Commission *shall* make recommendations to coastal States”. Paragraph 5(a), which gives the CLCS the power to refuse a recommendation, would thus directly contradict Article 76(8) UNCLOS. Jensen's argument is convincing. Apart from the textual reading of Article 76(8), which is Jensen's basis for stating that paragraph 5(a) is *ultra vires*, there are further reasons to support his view.

59. First, other UNCLOS provisions including the term “shall” have been read as being imperative in character. For example, Article 290(6) UNCLOS provides that the parties to a dispute under Part XV of the Convention “*shall* comply promptly with any provisional measures prescribed under this article”. ITLOS interpreted Article 290(6) as endowing provisional measures prescribed under it with binding character.¹⁴³ Similarly, Rosenne described

¹⁴² Jensen, above n.90, 66.

¹⁴³ Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, 117 ILR 148, 164, para.87; M/V Saiga (No. 2) (St. Vincent and the Grenadines v. Guinea), Provisional Measures, 117 ILR 111,

Article 290(6) as “unambiguous” in respect of the binding character of provisional measures prescribed under it.¹⁴⁴ Although Article 290(6) concerns a different subject-matter from the one of Article 76(8), ITLOS’s interpretation of the former could be used as a guideline for interpreting the latter.

60. Second, the lack of imperative language in Article 65 of the ICJ’s Statute has been interpreted as meaning that the Court can refuse to render an advisory opinion. According to Article 65, “[t]he Court *may* give an advisory opinion on any legal question [...]”. The ICJ itself interpreted the verb “may” in the sense that “the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met”.¹⁴⁵ Otherwise, using the verb “may” in Article 65 “would make no sense”.¹⁴⁶ In respect of its power to render advisory opinions, the Court is in a position similar to the CLCS with respect to recommendations on continental shelf delineation. Both Article 65 of the ICJ’s Statute, and Article 76(8) UNCLOS, concern the power of an organ created under those instruments to deliver a non-binding opinion or recommendation. The ICJ interpreted the lack of imperative language in Article 65 of its Statute to entail the absence of a duty to render an advisory opinion. *A contrario*, the imperative language in Article 76(8) UNCLOS should convey that the CLCS has a duty to render a recommendation requested by a coastal State.

61. There is a further reason to accept the argument that paragraph 5(a) is *ultra vires*. When the CLCS’s Rules of Procedures were being prepared, the States parties to UNCLOS underscored that the CLCS’s draft “provided no

124, para.48.

¹⁴⁴ Shabtai Rosenne, *Provisional Measures in International Law – The International Court of Justice and the International Tribunal for the Law of the Sea* (2005), 46. The ICJ adopted this reading of the word “shall” in *LaGrand*, in which it held that provisional measures indicated under Article 41 of its Statute are binding. See *LaGrand* (Germany v. US), Judgment, ICJ Reports 2001, 466, 502, para.100.

¹⁴⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 156, para.44. See also *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, 415-416, para.29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 234-235, para.14.

¹⁴⁶ Jochen A. Frowein and Karin Oellers-Frahm, Article 65, in: Andreas Zimmermann et al. (eds.), *The Statute of The International Court of Justice – A Commentary* (2nd ed., 2012), 1605, 1617.

guidance regarding the Commission's dealing with areas which were the subject of disputes or with undefined boundaries between opposite or adjacent States".¹⁴⁷ Therefore, the CLCS adopted Annex I to the Rules of Procedure, and paragraph 5(a) therein, following a request from the States parties to UNCLOS. However, the CLCS refrained from adopting Annex I until such time as it would have been "considered" by the Meeting of the States parties to the Convention.¹⁴⁸ Upon considering Annex I, States remarked that "the Rules of Procedure should be drafted in a neutral manner and should be limited to what the Commission can or cannot do, and should not appear to create new rights for States that are only defined by the Convention".¹⁴⁹ Such a statement was not opposed by any State. However, paragraph 5(a) could be said to create a right to veto the consideration of a submission by the CLCS. The holder of such a right would be every State with which another State making a submission to the CLCS has an on-going "land or maritime dispute". Paragraph 5(a) could thus be said to endow States with rights not provided for under UNCLOS. As a result, it seems to be *ultra vires* and to have been adopted against the explicit indications of the States parties to UNCLOS. This could be problematic for the persuasiveness of the "practical impasse" argument.

V.B.iv. The practical (ir)relevance of the "practical impasse" argument

62. A final issue with the "practical impasse" argument concerns whether the deadlock predicted by Nicaragua in *Nicaragua v. Colombia* (2016) has ever taken place in practice. The CLCS's documents suggest a negative answer. All three States parties to *Bangladesh/Myanmar* and *Bangladesh v. India* had a pending

¹⁴⁷ Report of the Seventh Meeting of the States Parties, UN Doc. SPLOS/24 (12 June 1997), 9, para.31.

¹⁴⁸ Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/3 (12 September 1997), 20; Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/3/Rev.1 (14 May 1998), 20. See also Letter dated 12 March 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of the States Parties, UN Doc. SPLOS/26 (12 March 1998), 1, para.2; Letter dated 15 May 1998 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the Eighth Meeting of the States Parties, UN Doc. SPLOS/28 (15 May 1998), 1, para.2.

¹⁴⁹ Report of the Eighth Meeting of the States Parties, UN Doc. SPLOS/31 (4 June 1998), 12, para.48.

submission at the time of their delimitation dispute. A 2009 Statement by the CLCS Chairperson on Myanmar's submission reported that "the Commission decided to defer further consideration of the submission and the notes verbales until such time as the submission is next in line for consideration as queued in the order in which it was received".¹⁵⁰ With reference to Bangladesh's submission, a 2011 Statement by the CLCS's Chairperson stated that "the Commission decided to defer further consideration of the submission and the notes until such time as the submission was next in line for consideration as queued in the order in which it was received".¹⁵¹ The CLCS's Chairperson used similar wording with respect to India's submission in a 2010 Statement.¹⁵²

63. The CLCS's decision in respect of the submissions of Bangladesh, India and Myanmar does not convey that the Commission decided to "defer" their consideration exclusively owing to the existence of delimitation disputes involving those States. The wording used in the Chairperson's Statements conveyed that the submissions would not be considered immediately, but only after all other submissions filed before the ones of Bangladesh, India and Myanmar would have been considered. The CLCS's decisions were thus not actual "deferrals". A "deferral" implies that the submission is ready for consideration, yet it would be considered at a later stage. Conversely, the CLCS simply implemented a chronological criterion under which all submissions would be considered in the order in which they were filed. It follows that one does not know how the CLCS would deal with a coastal State's submission if, that submission being ready for consideration given the chronological order in which it was filed, a germane delimitation case were still subject to dispute settlement by any means.

64. With respect to the *Bay of Bengal* cases, the CLCS presumably expected that, by the time the submission would have needed to be considered in accordance with the chronological criterion, ITLOS and the *Bangladesh v. India* tribunal would have settled the disputes involving Bangladesh, India and

¹⁵⁰ Statement by the Chairman of the Commission, above n.123, 10, para.40.

¹⁵¹ Progress of Work in the Commission on the Limits of the Continental Shelf above n.123, 7, para.22.

¹⁵² Statement by the Chairperson of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, UN Doc. CLCS/68 (17 September 2010), 9, para.36. On "deferral" by the CLCS, see Ki Beom Lee, Should the Invocation of Paragraph 5(a) of Annex I to the CLCS Rules of Procedure Result in an Automatic *Deferral* of the Consideration of a Submission?, 13 Chinese JIL (2014), 605.

Myanmar. Therefore, by that time international tribunals would have decided whether they could delimit the continental shelf beyond 200 nm prior to its delineation. The Commission would thus have avoided addressing the legal matter concerning the relationship between delimitation and delineation. The CLCS itself may have deemed the consideration of legal issues to be beyond its expertise as a technical and scientific body.

65. This situation repeated itself in *Nicaragua v. Colombia* (2016). With respect to Nicaragua's submission, the Commission's Chairperson wrote, in a 2014 Statement, that:

[a]ddressing the modalities for the consideration of the submission, the Commission took note of the communications from Colombia, Costa Rica, Jamaica, Nicaragua and Panama; and the joint communications from Colombia, Costa Rica and Panama. [...] The Commission also took note of the views expressed in the presentation by Nicaragua in connection with the communications. Taking into account these communications and the presentation made by the delegation, the Commission decided to defer further consideration of the submission and the communications until such time as the submission was next in line for consideration, as queued in the order in which it was received.¹⁵³

The wording is the same as that previously employed in relation to the submissions of Bangladesh, India and Myanmar. Therefore, the same considerations apply. The CLCS did not make an actual deferral, but simply scheduled the consideration of Nicaragua's submission according to the chronological order in which it had been filed.

66. Although it did not explicitly discuss the "practical impasse" argument in its 2016 judgment, the Court reached a solution in accordance with it. According to the Court, international tribunals requested to delimit the continental shelf beyond 200 nm need not wait for the CLCS's recommendation on the delineation of that continental shelf's outer limits. However, the "practical impasse" argument, *prima facie* convincing, raises a number of problems. These problems could cast doubts on the Court's decision, in the 2016 judgment, that delimitation beyond 200 nm could be effected absent the CLCS's recommendation.

¹⁵³ Progress of Work in the Commission on the Limits of the Continental Shelf – Statement by the Chair, UN Doc. CLCS/83 (31 March 2014), 15, para.83.

VI. The *Nicaragua v. Colombia* cases as a cautionary tale

67. This article discussed issues concerning the ICJ's judgments in the *Nicaragua v. Colombia* cases. It addressed the ICJ's decision in 2016 to delimit the continental shelf beyond 200 nm absent a recommendation by the CLCS on the establishment of the outer limits of the continental shelf. The principal problem concerns the ascertainment of the neighbouring States' overlapping entitlements over the continental shelf beyond 200 nm, as a precondition to its delimitation. The delimitation of boundaries absent a recommendation by the CLCS ascertaining that maritime entitlements exist beyond 200 nm and the outer limits of those entitlements seems to undermine the central role of this requirement. It appears that, in its 2012 and 2016 judgments between Nicaragua and Colombia, the ICJ did not uphold the necessity that this precondition be respected in the delimitation of the continental shelf beyond 200 nm. The Court's *Nicaragua v. Colombia* judgments raise questions concerning the proof of existence of continental shelf entitlements beyond 200 nm which are still open.

68. The statement that delimitation and delineation are distinct and thus could be carried out independently of one another raises contentious issues. First, the decisions in *Bangladesh/Myanmar* and *Bangladesh v. India*, to date the only cases in which continental shelf delimitation was effected beyond 200 nm, could not be taken as authoritative statements that delimitation and delineation could be performed independently, owing to their exceptional character. Second, Nicaragua's "practical impasse" argument, not explicitly endorsed but conceivably considered by the Court in its judgments, seems unconvincing. Delimiting the continental shelf beyond 200 nm prior to the CLCS's recommendation conclusively ascertaining entitlement could be seen to have a positive effect, as it would permit the full settlement of inter-State disputes concerning maritime delimitation. However, in most cases it would seem more appropriate for international tribunals to establish boundaries beyond 200 nm only after the CLCS's recommendation ascertaining that entitlement to a continental shelf beyond 200 nm actually exists.