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Challenging the Notion of a “Single Continental Shelf”

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ABSTRACT

According to international courts and tribunals, there exists in law only a “single continental shelf,” rather than an “inner” and an “outer” continental shelf. What originally started as a simple phrase to justify the jurisdiction of the court or tribunal eventually ended up as a justification for using the traditional delimitation methodology for delimitation of the continental shelf beyond 200NM. This article challenges the notion of a “single continental shelf” on various bases, namely, with respect to bases of entitlement, delineation formulas, the nature of coastal state rights, and the inapplicability of the equidistance line beyond 200NM.

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Introduction

The continental shelf as an internationally legally binding concept finds its origin in the 1958 Convention on the Continental Shelf,¹ and has subsequently been further developed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).² Accumulating in Article 76 of UNCLOS, the extent of the continental shelf is defined either by reference to a distance of 200 nautical miles (NM), or by determining the outer edge of the continental margin, for which Article 76 and the Statement of Understanding on the Bay of Bengal (SoU)³ establish several methods and restrictions.

Since the entry into force of UNCLOS in 1994, the legal concept of the continental shelf has continued to evolve. State practice, judgments by international courts and tribunals, and recommendations by the Commission on the Limits of the Continental Shelf (CLCS) have elaborated upon and further developed the definition and limits of the continental shelf. Although Article 76 is a complex provision, highly technical in nature, and offers various ways of delineating the outer limits of the continental shelf,

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¹ Convention on the Continental Shelf, adopted 29 April 1958, entered into force 10 June 1964, 499 UNTS 311.

² United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

³ Final Act of the Third United Nations Conference on the Law of the Sea, A/CONF.62/121, *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVII (Plenary Meetings, Summary Records and Verbatim Records, as well as Documents of the Conference, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion)* (1982), Annex II.

the case law has claimed that “there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf.”⁴

This article challenges this claim on various grounds. First, this article explains the notion of a “single continental shelf” by referring to the judgments in which this has been claimed. Second, this article discusses some of the most recent case law that may contradict what has been previously upheld. Third, this article then introduces various challenges to this notion, namely, the different bases of entitlement to a continental shelf, the different formulas recognized to delineate the outer limits of the continental shelf, the distinctions established in the text of UNCLOS in relation to coastal state rights and obligations, and the inapplicability of the traditional delimitation methodology to the delimitation of overlapping continental shelf entitlements beyond 200 NM. The article concludes with some final remarks.

The purpose of this article is to assess to what extent the notion of a “single continental shelf” is valid.⁵ This analysis ties into the spatial architecture constructed by the law of the sea, the law–science interface within the law of the sea, and (in)consistency within the case law of maritime delimitation. The analysis of this issue is especially relevant now that international courts and tribunals have started to delimit the continental shelf beyond 200 NM, requiring a reassessment as to whether the three-step approach to delimitation is equally as suitable for the delimitation of the continental shelf beyond 200 NM as it is for the delimitation of the continental shelf within 200 NM.

The Notion of a “Single Continental Shelf”

Various courts and tribunals have referred to the notion of a “single continental shelf,”⁶ a notion that also finds some support in scholarly literature.⁷ However, Evans explains

⁴ The first time this statement was made was in *Maritime Delimitation (Barbados v. Trinidad and Tobago)* (Award of the Arbitral Tribunal of 11 April 2006) XXVII RIAA 147, [213].

⁵ Despite the notion of a “single continental shelf” gaining traction in case law and scholarly literature, there are a few scholars who have raised doubt about this notion and/or its underlying presumptions. In this respect, this article builds upon what has been said before. See Leonardo Bernard, “The Problem with the Concept of ‘Single Continental Shelf’” (2022) 7 *Asia-Pacific Journal of Ocean Law and Policy* 91; Malcolm Evans, “Maritime Boundary Delimitation: Whatever Next?” in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law BIICL, 2016), 41, 74–75; Tara Davenport, “The China–Japan Dispute over Entitlement in the East China Sea: Legal Issues and Prospects for Resolution” in Clive H. Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Brill Nijhoff, 2013), 297, 316–318; Bjorn Kunoy, “Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf” (2010) 25 *International Journal of Marine and Coastal Law* 237, 258.

⁶ *Barbados v. Trinidad and Tobago*, note 4; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of 14 March 2012), ITLOS Reports 2012, 4; *In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)* (Award of 7 July 2014) (UNCLOS Annex VII Tribunal) Award, available at: <https://pcacases.com/web/sendAttach/383> (accessed 30 September 2023); *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)* (Judgment of 23 September 2017), ITLOS Reports 2017, 4; *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment of 28 April 2023), ITLOS Reports 2022–2023 (to be published); *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Judgment of 13 July 2023) (ICJ).

⁷ Xuexia Liao, “Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?” (2018) 33 *International Journal of Marine and Coastal Law* 79; Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Brill Nijhoff,

that “the mere act of rejecting [the distinction between an “inner” and an “outer” continental shelf] has in fact helped to establish it.”⁸ Courts and tribunals have referred to this notion in the context of discussing the scope of the dispute, the (exercise of) jurisdiction to delimit the continental shelf beyond 200 NM, the applicable law, the identification of relevant coasts, the delimitation methodology, the relevant circumstances, and in the context of the adjustment of the provisional equidistance line. This section chronologically discusses the various references to the notion of a “single continental shelf” in the judgments of international courts and tribunals to date.

The first reference to this notion occurred in a case between Barbados and Trinidad and Tobago before an ad hoc arbitral tribunal. There was some difference between the parties regarding the scope of the dispute, and whether this included the continental shelf beyond 200 NM. Here, the arbitral tribunal stated that “in any event there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf.”⁹ The Tribunal was thus not addressing entitlement, delineation, or delimitation of the continental shelf, but rather, whether its competence extended to delimiting the continental shelf beyond 200 NM.¹⁰

In another landmark case, the International Tribunal for the Law of the Sea (ITLOS) found that “Article 76 of the Convention embodies the concept of a single continental shelf.”¹¹ ITLOS made this statement when considering whether it had jurisdiction to delimit the continental shelf beyond 200 NM. It relied upon Articles 77 and 83 of UNCLOS to explain that no distinction is made between the continental shelf within and beyond 200 NM.¹² ITLOS found it had jurisdiction to delimit the continental shelf “in its entirety.”¹³ It must be noted that, again, ITLOS only referred to this notion in the context of a threshold of jurisdiction, rather than in the context of entitlement, delineation, or delimitation. Judge Cot in his Separate Opinion agreed with the majority, and stated that the “Tribunal rightly considers there to be a single continental shelf” and that “there is only one continental shelf, which lies both within and beyond 200 nautical miles.”¹⁴ Despite this assertion, the Tribunal nevertheless treated the delimitation of the continental shelf within 200 NM separately from that beyond 200 NM.¹⁵

The arbitral tribunal in *Bangladesh/India* referred to the *Barbados v. Trinidad and Tobago* case, and emphasized that “article 76 of the Convention embodies the concept of a single continental shelf.”¹⁶ Despite this, and like ITLOS in *Bangladesh/Myanmar*, the arbitral tribunal treated the delimitation of the continental shelf within 200 NM separately from that beyond 200 NM.¹⁷ Nevertheless, in identifying the relevant coasts, the arbitral tribunal, “in keeping with its view that there is a single continental shelf,”

2015). However, although Magnússon supports the notion of a “single continental shelf,” he admits that “there are in law some differences between the continental shelf within and that beyond 200 nm.” *Ibid*, 137.

⁸ Michael Evans, “Maritime Boundary Delimitation” in Donald R. Rothwell, Alex Oude Elferink, Karen N. Scott et al., (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015), 254, 265, note 58.

⁹ *Barbados v. Trinidad and Tobago*, note 4, [213].

¹⁰ See Bernard, note 5, 101.

¹¹ *Bangladesh/Myanmar*, note 6, [361].

¹² *Ibid*, [361].

¹³ *Ibid*, [363].

¹⁴ *Bangladesh/Myanmar*, note 6, Separate Opinion of Judge Cot, 190.

¹⁵ See the table of contents at *ibid*, 6.

¹⁶ *Bangladesh/India*, note 6, [77].

¹⁷ See the table of contents at *ibid* 4.

saw “no basis for distinguishing between projections within 200 nm and those beyond that point.”¹⁸ In its discussion of relevant circumstances to the delimitation within 200 NM, the arbitral tribunal “proceeds from the position that there is only a single continental shelf and it is, therefore, inappropriate to make a distinction between the continental shelf within and beyond 200 nm.”¹⁹ To determine whether or not a cutoff effect existed, the arbitral tribunal thus found it relevant to also look at the configuration and extent of the entitlements beyond 200 NM.²⁰ As for the relevant circumstances beyond 200 NM, the arbitral tribunal noted that the parties and the arbitral tribunal “agree that there is a single continental shelf,” and that “the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200 nm.”²¹ With regard to possible adjustment of the provisional equidistance line within and beyond 200 NM, the arbitral tribunal found that, “consistent with the concept of a single continental shelf, [...] any adjustment of the provisional equidistance line within 200 nm should result in a delimitation line extending into the area beyond 200 nm.”²² In other words, although the references to the notion of a “single continental shelf” in the previous case law were still relatively subtle, the arbitral tribunal in the *Bangladesh/India* arbitration extrapolated this notion to the actual delimitation of the continental shelf itself.

The Special Chamber of ITLOS in *Ghana/Côte d’Ivoire* emphasized that “there is in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf” when considering *proprio motu* its jurisdiction to delimit the continental shelf beyond 200 NM.²³ Furthermore, the Special Chamber followed in the footsteps of the arbitral tribunal in *Bangladesh/India*, and stated that “as far as the methodology for delimiting the continental shelf beyond 200 nm is concerned, the Special Chamber recalls its position that there is only one single continental shelf,” and that “therefore it is considered inappropriate to make a distinction between the continental shelf within and beyond 200 nm as far as the delimitation methodology is concerned.”²⁴ Again, however, the delimitation of the continental shelf beyond 200 NM is treated in a separate (sub)section of the judgment in contrast to the continental shelf within 200 NM,²⁵ although not as significantly as in the Bay of Bengal cases.

In *Mauritius/Maldives*, a Special Chamber of ITLOS was requested to delimit the continental shelf beyond 200 NM, both within 200 NM from the baselines from the other party and beyond both parties’ 200-NM limit. The Special Chamber, yet again, “recalled” that Article 76 of the UNCLOS “embodies the concept of a single continental shelf” by referring to the ITLOS Judgment in *Bangladesh/Myanmar*.²⁶ It did so in the context of discussing the Maldives’ claim of entitlement to a continental shelf beyond 200 NM that in one small area overlaps with the 200 NM entitlement of Mauritius.

¹⁸ *Bangladesh/India*, note 6, [299].

¹⁹ *Ibid.*, [404].

²⁰ *Ibid.*

²¹ *Bangladesh/India*, note 6, [465].

²² *Ibid.*, [437].

²³ *Ghana/Côte d’Ivoire*, note 6, [490].

²⁴ *Ibid.*, [526].

²⁵ See the table of contents at *ibid.*, 5–6.

²⁶ *Mauritius/Maldives*, note 6, [274].

The purpose of referring to this notion was to explain that, having already delimited the overlapping area of entitlements within 200 NM, leaving “no areas to be further delimited within the 200 [NM] limit of either Party,” it need not delimit an additional maritime zone (i.e., the continental shelf beyond 200 NM) in this specific area.²⁷ The Special Chamber furthermore referred to the concept of a “single continental shelf” when discussing its jurisdiction to delimit the continental shelf beyond 200 NM between Mauritius and the Maldives in an area beyond 200 NM of both parties.²⁸ It ultimately considered that “the portion of the continental shelf beyond 200 [NM] should not be seen and treated as a separate and different maritime area of the coastal State, entailing two separate disputes.”²⁹ In other words, contrary to the Maldives’ contentions, the dispute submitted to the Special Chamber included the delimitation of the continental shelf beyond 200 NM, over which the Special Chamber had jurisdiction.³⁰

Finally, the most recent judgment by the International Court of Justice (ICJ) in the case between Nicaragua and Colombia on the delimitation of the continental shelf beyond 200 NM noted that, despite recognizing different bases of entitlement (see discussion below), “in contemporary customary international law, there is a single continental shelf in the sense that the substantive rights of a coastal State over its continental shelf are generally the same within and beyond 200 [NM] from its base-lines.”³¹ The Court referred to this notion as one of “certain considerations relevant to the régime that governs the extended continental shelf.”³²

The case law thus seems to be clear: There is only a single continental shelf, rather than an inner and an outer continental shelf. This apparently (and problematically so) also means that no distinction in delimitation methodology is required to delimit to the continental shelf beyond 200 NM.

Recent Developments in the Case Law: Contradicting the Notion of a Single Continental Shelf?

Recent developments in the case law, notably the ITLOS case between Mauritius and Maldives and, more significantly, the ICJ case between Nicaragua and Colombia, appear to contradict the notion of the single continental shelf otherwise so “religiously”³³ upheld by international courts and tribunals. In both cases the ICJ and the ITLOS

²⁷ Ibid. However, it must be noted that the Special Chamber did not take into consideration the Maldives’ claim of entitlement to a continental shelf beyond 200 NM within 200 NM of Mauritius in this context.

²⁸ Ibid, [338–339].

²⁹ Ibid, [340].

³⁰ Ultimately, however, the Special Chamber decided not to proceed to delimit the continental shelf beyond 200 NM due to “significant uncertainty” concerning the natural prolongation of Mauritius. Ibid, [448–451].

³¹ *Nicaragua v. Colombia*, note 6, [75]. The Declaration of Judge Bhandari supports the notion of the “single continental shelf” and therefore questions whether the phrase “generally the same” should have been included as it “could potentially be read as diluting the notion of a ‘single continental shelf’” and “risks perpetuating uncertainty about the practical consequences of this notion.” *Nicaragua v. Colombia*, note 6, (Declaration of Judge Bhandari), [5–6].

³² *Nicaragua v. Colombia*, note 6, [74].

³³ Hilde Woker, “Preliminary Reflections on the ICJ Judgment in Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (*Nicaragua v. Colombia*) of 13 July 2023” 21 July 2023, *EJIL:Talk!* at: <https://www.ejiltalk.org/preliminary-reflections-on-the-icj-judgment-in-question-of-the-delimitation-of-the-continental-shelf-between-nicaragua-and-colombia-beyond-200-nautical-miles-from-the-nicaraguan-coast-nicaragua-v-co> (accessed 2 August 2023).

Special Chamber requested the parties to elaborate on their positions with respect to the question of whether one continental shelf entitlement beyond 200NM could extend within 200NM of another state.

In *Nicaragua v. Columbia* the ICJ requested that the parties present arguments exclusively with regard to two questions, including:

Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?³⁴

Only 12 days later, the President of the ITLOS Special Chamber in *Mauritius/Maldives* communicated to the parties a list of questions, including:

Can the Parties elaborate on their positions with respect to the question whether the Maldives' entitlement to the continental shelf beyond 200 nautical miles from its baseline can be extended into the 200 nautical miles limit of Mauritius, as indicated in Figure 29 of the Maldives' Counter-Memorial and Figure 6 of the Maldives' Rejoinder?³⁵

The fact alone that these questions were raised seems to be an implicit recognition of different versions of the continental shelf.³⁶ For if there was in law only a "single continental shelf," why would it not be possible for one entitlement to overlap another? Indeed, this is the case for all delimitation cases, so why is it even a question whether one entitlement (beyond 200NM) may extend within another state's entitlement (within 200NM)? It is widely accepted that an entitlement to a continental shelf within 200NM of one state can extend within 200NM of another state³⁷—in fact, the ICJ even accepted that an entitlement to a continental shelf or EEZ may overlap with the *territorial sea* of another state (in which a coastal state has a much larger degree of sovereignty than in an EEZ or on the continental shelf),³⁸ so the fact that the ICJ and the ITLOS Special Chamber posed the question implies that a significant difference exists between a continental shelf within and a continental shelf beyond 200NM.

Ultimately, the ITLOS Special Chamber in *Mauritius/Maldives* did not need to address this question because it delimited the area of overlapping entitlements within 200NM solely by reference to the entitlements within 200NM, thus "rendering moot" the question of delimitation of the area of overlap between one state's entitlement beyond 200NM and another's entitlement within 200NM.³⁹ It did, however, find that

³⁴ *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v Colombia)* (Order of 4 October 2022) ICJ Reports 2022, 2.

³⁵ *Mauritius/Maldives*, note 6, [57].

³⁶ Alternatively, it could be viewed as a reference to the relationship between the exclusive economic zone (EEZ) and the continental shelf, thus posing the question of whether an entitlement to a continental shelf beyond 200NM may extend within another coastal state's entitlement to an EEZ (within 200NM), rather than posing the question of whether an entitlement to a continental shelf beyond 200NM may extend within another coastal state's entitlement to a continental shelf within 200NM. However, if that had been the Judges' intention, would they not have explicitly referenced the EEZ in the questions?

³⁷ *Nicaragua v. Colombia*, note 6, (Dissenting Opinion of Judge Charlesworth), [10]. See also generally the Dissenting Opinion of Judge Tomka.

³⁸ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment of 19 November 2012), ICJ Reports 2012, 624, [177]. The Court concluded that the continental shelf entitlement in this case would not be given effect, which is different from concluding that the entitlement did not exist at all. See also *Nicaragua v. Colombia* (Dissenting Opinion of Judge Charlesworth), note 38, [9].

³⁹ *Mauritius/Maldives*, note 6, [274].

a coastal state “cannot validly claim” an entitlement to a continental shelf beyond 200 NM “based on the natural prolongation through another State’s *uncontested* continental shelf.”⁴⁰ Because the first route of natural prolongation presented by Mauritius passed through the Maldives’ continental shelf within 200 NM, which is uncontested by Mauritius, it “cannot form a basis for Mauritius’ [...] entitlement to the continental shelf beyond 200 NM.”⁴¹ This seems to imply that a continental shelf entitlement within 200 NM is less contested and therefore stronger than an entitlement beyond 200 NM, and even hints at the idea that only an entitlement within 200 NM is inherent. For if both entitlements were indeed (equally) inherent as per Article 77(3) UNCLOS, one would not depend on the other being contested or not. In any case, the Special Chamber’s approach challenges the notion of a “single continental shelf.”

More explicitly, the ICJ in *Nicaragua v. Colombia* determined that

under customary international law, a State’s entitlement to a continental shelf beyond 200 [NM] from the baselines from which the breadth of the territorial sea is measured may not extend within 200 [NM] from the baselines of another State.⁴²

It furthermore concluded that “irrespective” of any scientific and technical considerations, “Nicaragua is not entitled to an extended continental shelf within 200 [NM] from the baselines of Colombia’s mainland coast” and that “accordingly, within 200 [NM] from the baselines of Colombia’s mainland coast, there is no area of overlapping entitlement to be delimited.”⁴³

Although the questions posed by both the ITLOS Special Chamber and the ICJ did not explicitly refer to the relationship between the continental shelf beyond 200 NM and that within 200 NM, as they merely referred to an (undefined) area within 200 NM, the ICJ’s conclusion confirms—despite also discussing the EEZ as one of the “maritime zones at issue”⁴⁴—that it is the legal regime of the continental shelf within 200 NM that negates the existence of an entitlement to a continental shelf beyond 200 NM of another state.⁴⁵ For in paragraph 82 of the judgement, the ICJ states:

regardless of the criteria that determine the outer limit of the extended continental shelf to which a State is entitled, its extended continental shelf cannot overlap with the area of continental shelf within 200 nautical miles from the baselines of another State.⁴⁶

The questions posed and the ICJ’s findings imply that a state’s entitlement to a continental shelf within 200 NM is stronger than that of *another state’s* continental shelf entitlement beyond 200 NM, and that the continental shelf entitlement of a state beyond 200 NM is weaker than that *same state’s* continental shelf entitlement within 200 NM.

What does this mean for the validity of the notion of a “single continental shelf”? The following sections discuss potential challenges to this notion, going beyond the

⁴⁰ Ibid, [444] (emphasis added).

⁴¹ Ibid.

⁴² *Nicaragua v. Colombia*, note 6, [79].

⁴³ Ibid, [86]. The Court made the same conclusions with respect to the islands of San Andrés and Providencia, and similar conclusions with respect to Serranilla and Baja Nuevo. Ibid, [91]; [99].

⁴⁴ See *ibid*, [45]; [49–50]; [69–73]; [78].

⁴⁵ Woker, note 33.

⁴⁶ *Nicaragua v. Colombia*, note 6, [82].

discussion of the case law above where the concept of a “single continental shelf” has been used to reject the distinction between an “inner” and “outer” continental shelf. In addition to this distinction, there are other potential distinctions to be made with regard to the legal concept of the continental shelf, such as the different bases of entitlements over the entire continental shelf, the different formulas for delineating the “outer” continental shelf, and the applicable methods for delimitation of overlapping entitlements. Only the third challenge discussed below directly targets a potential distinction between an “inner” and an “outer” continental shelf.

The Role of Natural Prolongation and Different Bases of Entitlement

It has been posited that different bases of entitlement to a continental shelf exist.⁴⁷ Article 76 provides that the continental shelf of a coastal state comprises the seabed and subsoil of submarine areas extending beyond the 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” where the outer edge of the continental margin does not extend up to that distance.⁴⁸ Although there is still uncertainty as to how these components relate to each other, the fact remains that Article 76 establishes differences within the concept of the continental shelf.

These differences depend on the role of “natural prolongation” in establishing entitlement to a continental shelf,⁴⁹ most notably on the interpretation of Article 76(1). Obviously, Article 76 creates a distinction between two components, with the use of the word “or” (italicized in the quote above). The question is where precisely the distinction is made. There are two possible interpretations with two different roles for the concept of natural prolongation, regardless of the actual content of that concept.

According to the first interpretation, the continental shelf is defined as “the seabed and subsoil of the marine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory” (A) “to the outer edge of the continental margin,” or (B) “to a distance of 200 nautical miles from the baselines” where the outer edge of the continental margin does not extend up to that distance.⁵⁰ According to this interpretation, the role of “natural prolongation” provides the (sole) basis of entitlement to the continental shelf, with two alternative criteria for its delineation: the outer edge of the continental margin, and distance. This interpretation has its foundations in the *North Sea Continental Shelf Cases*, in which the ICJ recognized the “more fundamental concept” of the continental shelf as being the “natural prolongation

⁴⁷ See for example *ibid.*, [75].

⁴⁸ 1982 UNCLOS, Art 76(1) (emphasis added).

⁴⁹ See also D. N. Hutchinson, “The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas” (1985) 55 *British Yearbook of International Law* 133, 184–185, who identifies seven different senses of the term “natural prolongation,” including a “basis of entitlement” in addition to referring to the entire region in which coastal states have sovereign rights, and Hyun Jung Kim, “Natural Prolongation: A Living Myth in the Regime of the Continental Shelf?” (2014) 45 *Ocean Development & International Law* 374, who distinguishes between three dimensions of natural prolongation: entitlement, delineation, and delimitation of the continental shelf.

⁵⁰ This view seems to be supported by Bing Bing Jia, “The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?” (2013) 12 *Chinese Journal of International Law* 79.

of the land domain,”⁵¹ and that the underlying idea of the doctrine was an “extension of something already possessed.”⁵² Indeed, according to the ICJ,

What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, - in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.⁵³

With the recognition of distance as one way of delineating the continental shelf during UNCLOS III, the ICJ in the *Libya/Malta* case concluded that “natural prolongation [...] is in part defined by distance from the shore.”⁵⁴

According to this first interpretation, natural prolongation can be considered to be a condition to be satisfied in order to gain title to the continental shelf; alternatively, natural prolongation could be considered to have a “double meaning,” namely, a geological or geomorphological concept regarding the continental shelf beyond 200 NM, and a “juridical concept” regarding the continental shelf within 200 NM; or, natural prolongation could simply be considered a “rhetorical device” and a general expression for coastal states’ sovereign rights over the continental shelf.⁵⁵ In any case, according to this possible interpretation, the concept of natural prolongation is—however defined—always a defining element of the continental shelf, regardless of its limits.

According to the second possible interpretation, the continental shelf is defined as “the seabed and subsoil of the submarine areas that extend beyond its territorial sea” (A) “throughout the natural prolongation of its land territory to the outer edge of the continental margin,” or (B) “to a distance of 200 nautical miles from the baselines” where the outer edge of the continental margin does not extend up to that distance.⁵⁶ According to this interpretation, the concept of natural prolongation only plays a part in one way of delineating the continental shelf. This interpretation thus creates two bases of entitlement: natural prolongation and distance, while at the same time merging the basis of entitlement with criteria for its delineation.⁵⁷

Which interpretation prevails? Although the history of the concept of the continental shelf suggests that natural prolongation is a defining element for the concept, and should thus be the basis of entitlement for both methods of delineating the continental shelf, practice seems to suggest that natural prolongation is only relevant when delineating the continental shelf according to the outer edge of the continental margin. Despite the ICJ’s conclusions in the *North Sea Continental Shelf Cases*, more recent continental shelf delimitation cases have dismissed the role of natural prolongation in

⁵¹ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment of 20 February 1969), ICJ Reports 1969, 3, [40].

⁵² *Ibid.*, [4].

⁵³ *Ibid.*, [43].

⁵⁴ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment of 3 June 1985), ICJ Reports 1985, 3, [34].

⁵⁵ Kim, note 53, 378, 381.

⁵⁶ The Virginia Commentaries seem to endorse this view, evident from the diagram of Article 76, Satya N. Nandan and Shabtai Rosenne (eds), “Article 76—Definition of the Continental Shelf,” *United Nations Convention on the Law of the Sea 1982: A Commentary Volume II* (Martinus Nijhoff Publishers, 1993), 875.

⁵⁷ This article is not concerned with the scholarly discussion surrounding the question of whether one basis of entitlement prevails over the other, as for example discussed in Liao, note 7; Davenport, note 5, 311–318. Rather, the fact that that discussion exists confirms the idea that there are indeed two alternative bases of entitlement.

delimitation cases within 200 NM. Indeed, as Colson remarked in relation to the *Libya/Malta* judgment,⁵⁸ “natural prolongation in a physical sense, for all practical purposes, was dead,” at least within 200 NM.⁵⁹ According to Olorundami, the ICJ in this case divided the continental shelf into an “inner (within 200 nautical miles of the coast) and an outer (beyond 200 nautical miles of the coast) continental shelf,” by rejecting the relevance of geological and geomorphological factors for delimitation within 200 NM, but leaving open the possibility of their relevance beyond 200 NM.⁶⁰

Judge Robinson, in his partly concurring and partly dissenting opinion in the *Somalia v. Kenya* case,⁶¹ confirms the bifurcation introduced by Article 76. He states that “the régime for a coastal State’s entitlement to a continental shelf within 200 nautical miles is different from the régime for its entitlement to a continental shelf beyond 200 nautical miles,”⁶² that where “the question relates to a State’s entitlement to a continental shelf beyond 200 nautical miles, different considerations apply,”⁶³ and that “by effecting a delimitation of a party’s continental shelf beyond 200 nautical miles without any reliable evidence of the existence of a shelf in that area, the Court has effectively eliminated the importance drawn by the Convention between a coastal State’s entitlement to a shelf within and beyond 200 nautical miles.”⁶⁴

In the view of the present author, the correct view is that “natural prolongation”—whatever its meaning—should be considered as the basis of entitlement of the continental shelf, with different methods for its delineation. This view is thus in line with the first interpretation discussed above, and—although contrary to the interpretation upheld by most scholars and the case law—reflects the genesis of the legal concept of the continental shelf. Any other perspective confuses entitlement with delineation. If so considered, we may then indeed, for the purposes of entitlement, speak of “one single continental shelf,” with various methods for its delineation and delimitation. However, if—according to the second interpretation—there are two different (and alternative) bases upon which a coastal state has a title to sovereign rights over the seabed, how can we speak of “one single continental shelf”?

In any case, Article 76 distinguishes between a continental shelf delineated according to the outer edge of the continental margin and a continental shelf delineated according to the 200-NM limit.⁶⁵ In the words of Judge Oda, these are “two radically *alternative*

⁵⁸ *Libya/Malta*, note 58.

⁵⁹ David A. Colson, “The Delimitation of the Outer Continental Shelf between Neighboring States Notes and Comments” (2003) 97 *American Journal of International Law* 91, 101. See also Jørgen Lilje-Jensen and Milan Thamsborg, “The Role of Natural Prolongation in Relation to Shelf Delimitation Beyond 200 Nautical Miles” (1995) 64 *Nordic Journal of International Law* 619, 622; Keith Highet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries” (1993) 1 *International Maritime Boundaries* 176.

⁶⁰ Fayokemi Olorundami, “Revisiting the *Libya/Malta* Decision and Assessing Its Relevance (or Otherwise) to the East China Sea Dispute” (2016) 15 *Chinese Journal of International Law* 717, 726. *Libya/Malta*, note 58, [40]; Colson, note 63, 103. However, Olorundami believes this division to be incorrect and states that “nowhere in the UNCLOS can the idea of inner and outer continental shelves be found” (despite evidence to the contrary as discussed below). Olorundami, note 64, 726.

⁶¹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment ICJ Reports 2021, 206 (Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson), 326.

⁶² *Ibid.*, [4].

⁶³ *Ibid.*, [5].

⁶⁴ *Ibid.*, [16].

⁶⁵ See Davenport, note 5, 316, who states “there are two definitions of continental shelf, the distance-based continental shelf and the extended continental shelf.”

definitions.”⁶⁶ Colombia had also maintained that the “idea of the single continental shelf” put forward by Nicaragua is “irrelevant” because the rules to be followed in determining a coastal state’s entitlement to a continental shelf are “different depending on whether the area in question is within or beyond 200 [NM].”⁶⁷ Although both are inherent in accordance with Article 77(3), a coastal state will need to collect and submit extensive scientific information and gather positive recommendations from the CLCS⁶⁸ in order to establish outer limits of the continental shelf beyond 200 NM, whereas this is not the case for outer limits established according to the 200-NM line. Furthermore, in the context of sea-level rise and the discussion on ambulatory baselines and limits, it seems that the limits of a continental shelf entitlement beyond 200 NM are already accepted as “final and binding” and “permanent,” whereas such status regarding limits of a continental shelf entitlement within 200 NM is still debated, thus highlighting the difference between the two.⁶⁹

Therefore, there seems to be a distinction between a “legal” continental shelf entitlement (based on distance) and a “scientific” continental shelf entitlement (based on natural prolongation and with reference to the outer edge of the continental margin). This is thus a first potential challenge to the concept of a “single continental shelf.”

Different Formulas for Establishing the Outer Edge of the Continental Margin

A second challenge to the notion of a “single continental shelf” is the fact that the law of the sea has established various different formulas for establishing the outer edge of the continental margin, and thereby the outer limits of the continental shelf. In addition to the 200-NM limit of the continental shelf discussed above, Article 76 introduces two scientific formulas to delineate the outer edge of the continental margin:

- i. a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
- ii. a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.⁷⁰

A third method for delineating the outer edge of the continental margin is the method recognized by the SoU on the Bay of Bengal.⁷¹ The SoU sets out the special characteristics of the continental margin that need to be met in order for the SoU to be applicable; it explains the inequity that would result from adopting the methods

⁶⁶ *Libya/ Malta*, note 58, (Dissenting Opinion of Judge Oda) [61].

⁶⁷ *Nicaragua v. Colombia*, note 6, [65].

⁶⁸ 1982 UNCLOS, Art 76(8).

⁶⁹ Nandan and Rosenne, note 60, 882–883; Signe Veierud Busch, “Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation” in Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press, 2020), 309, 331–332.

⁷⁰ 1982 UNCLOS, Art 76(4).

⁷¹ ‘Final Act of the Third United Nations Conference on the Law of the Sea, note 3, Annex II.

recognized in Article 76 in these circumstances, and therefore provides a new method for determining the outer edge of the continental margin in these situations, namely, at the point where “the thickness of sedimentary rock is not less than 1 kilometre.”⁷²

Despite the different formulas introduced, states are allowed to use these scientific formulas and the 200-NM limit interchangeably to their advantage, thus arguably comprising “one single continental shelf.” This is therefore not so much a challenge to the concept of a “single continental shelf” in the sense that there is an “inner” and “outer” continental shelf, but rather an attempt to demonstrate that the continental shelf is a complex legal concept with varying delineation methods, making the claim of a “single continental shelf” too rudimentary, and its related legal consequences problematic.

Distinctions Within the Text of UNCLOS in Relation to Coastal State Rights and Obligations

A third potential challenge to the notion of a “single continental shelf” is the distinction made by the text of UNCLOS itself. Despite the reliance upon Article 77 and Article 83 by proponents of the notion of a “single continental shelf,” there are, in fact, two important distinctions between the continental shelf within 200 NM and that beyond 200 NM in UNCLOS itself. In addition to the bifurcation introduced by Article 76 and discussed above, Articles 82 and 246 explicitly establish different rules within the continental shelf beyond 200 NM compared to the continental shelf within 200 NM. In other words, the nature of coastal state rights and duties with regard to the continental shelf within 200 NM differs from that beyond 200 NM.⁷³

Article 82(1) provides that the coastal state “shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines.”⁷⁴ Although Article 77 establishes full, inherent, sovereign rights over the continental shelf, Article 82 thus introduces a limitation to that level of sovereignty with regard to those areas of continental shelf lying beyond 200 NM from the baselines. A coastal state needs to make payments or contributions in kind with respect to exploitation of nonliving resources of the continental shelf beyond 200 NM, but not with respect to exploitation of those resources of the continental shelf within 200 NM.

⁷² Ibid. The SoU was developed to apply to the southern part of the Bay of Bengal, but the special circumstances may also be present in other areas, such as Myanmar and Kenya. It is at this stage in time uncertain whether those coastal states (beyond the Bay of Bengal) would also be allowed to refer to the SoU to determine the outer edge of the continental margin. See Lindsay Parson, “Annex II to the Final Act” in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (BECK, 2017), 600; Ray Wood and Elana Geddis, “Technical and Legal Challenges of the Statement of Understanding,” *ABLOS X: Opportunities and Challenges in the Governance of the Planet Ocean* (2019), <https://iho.int/en/ablos10-conference-2019>, accessed 27 February 2023.

⁷³ See also Joanna Mossop, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford University Press, 2016), 241, where she considers that “although many of the legal considerations in relation to the extended continental shelf are not significantly different than within 200 nm [...] there are some important respects in which the legal regime applying to the extended continental shelf needs separate consideration.”

⁷⁴ 1982 UNCLOS, Art 82(1).

Evans submits that this provision “hardly provides a basis for a general conceptual distinction between the ‘inner’ and ‘outer’ continental shelf,”⁷⁵ owing to the fact that Article 82(3) exempts a “developing State which is a net importer of a mineral resource produced from its continental shelf” from making payments “in respect of that mineral resource.”⁷⁶ According to Evans, a provision “which affects only some of the non-living resources produced by some of the States cannot justify a reconceptualization of the entitlement of all States over all non-living resources” of the seabed and subsoil beyond 200 NM.⁷⁷ The fact remains, however, that in general, coastal state rights over the continental shelf beyond 200 NM are restricted whereas those within 200 NM are not.

Article 246, on the consent regime for marine scientific research, also introduces different rules applicable to the continental shelf beyond 200 NM compared to within 200 NM. Paragraph 5 of Article 246 recognizes a coastal state’s discretion to withhold consent for marine scientific research projects on the continental shelf if they are of “direct significance” for the exploration and exploitation of natural resources.⁷⁸ Paragraph 6, then, provides that “coastal States may not exercise their discretion to withhold consent” under subparagraph (a) of that paragraph “in respect of marine scientific research projects to be undertaken [...] on the continental shelf, beyond 200 nautical miles from the baselines.”⁷⁹

Thus, a coastal state may exercise discretion to withhold consent within 200 NM, but not beyond. This implies, as do the recent developments in the case law, that a coastal state’s entitlement to a continental shelf within 200 NM is stronger than its entitlement to a continental shelf beyond 200 NM. In fact, the Virginia Commentaries even go so far to say that Article 246 “reflects the fact that the regime for marine scientific research has to accommodate *three maritime zones*, in each of which a different legal regime applies.”⁸⁰ These three maritime zones are the EEZ, the “normal” continental shelf to a distance not exceeding 200 NM, and “any established zone of continental shelf beyond 200 nautical miles.”⁸¹

Inapplicability of Traditional Delimitation Methodology to the Continental Shelf Beyond 200 NM

If it is true that there is in law only a “single continental shelf,” then this would mean that every overlap in continental shelf entitlements would be delimited according to the same delimitation methodology, as has been suggested in the case law. This is indeed true for the delimitation of the territorial sea, the EEZ, and the continental shelf within 200 NM: international courts and tribunals delimit these maritime zones according to the three-stage approach. However, the traditional delimitation

⁷⁵ Evans, note 8, 265, note 59.

⁷⁶ 1982 UNCLOS, Art 82(3).

⁷⁷ Evans, note 8, 265, note 59.

⁷⁸ 1982 UNCLOS, Art 246(5).

⁷⁹ 1982 UNCLOS, Art 246(6).

⁸⁰ Shabtai Rosenne and Alexander Yankov (eds), “Article 246—Marine Scientific Research in the Exclusive Economic Zone and on the Continental Shelf,” *United Nations Convention on the Law of the Sea 1982: A Commentary Volume IV* (Martinus Nijhoff Publishers, 1991), 519 (emphasis added).

⁸¹ *Ibid.*

methodology used to delimit overlapping maritime zones based on distance may not be applicable to delimit overlapping maritime zones based on geological and/or morphological features,⁸² despite what has been said in the case law and scholarly literature.⁸³ The present author submits that in the case of delimitation of the continental shelf beyond 200 NM, the traditional delimitation methodology—with equidistance as an important element—is both inappropriate and impractical.

Article 83 establishes the rule for the delimitation of the continental shelf. It must be delimited “on the basis of international law [...] in order to achieve an equitable solution.”⁸⁴ It does indeed not distinguish between various kinds of continental shelf. The case law has developed the delimitation methodology by introducing a three-stage approach. First, in the case of adjacent coasts, one draws a provisional equidistance line, “unless there are compelling reasons that make this unfeasible in the particular case.”⁸⁵ For opposite coasts, the “provisional delimitation line will consist of a median line between the two coasts.”⁸⁶ Note the fact that the ICJ did not consider the possibility of “compelling reasons” rendering a median line inapplicable in the case of opposite coasts, as it did for the equidistance line in the case of adjacent coasts. Second, one considers factors calling for an adjustment of that line,⁸⁷ and finally, one checks whether this leads to an inequitable result by looking at any marked disproportion between the ratio of coastal length and the ratio of the relevant area by reference to the delimitation line.⁸⁸ This delimitation methodology is widely recognized and applied, in the context of both the exclusive economic zone and the continental shelf. Usually, states request a single maritime boundary,⁸⁹ thus requesting a line delimiting all maritime zones at the same time.

The practicalities rendering the traditional delimitation methodology inapplicable to overlapping entitlements beyond 200 NM may be illustrated by [Figure 1](#). The figure represents a situation in which one or more coastal states have an entitlement to a continental shelf beyond 200 NM, but in which they are located in such a way that the equidistance line—or median line in the case of opposite coasts—constructed from the coast lies beyond the area of overlapping entitlements. Before the ICJ found that

⁸² The idea that the three-stage approach may not be applicable to delimitation of the continental shelf beyond 200 NM finds some support in the literature: for example, Liao, note 7, 111–115; Davenport, note 5, 320; Jianjun Gao, “The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes Within the East China Sea” (2010) 9 *Chinese Journal of International Law* 143, 169–177.

⁸³ Leonardo Bernard and Clive Schofield, “Disputes Concerning the Delimitation of the Continental Shelf Beyond 200 Nautical Miles” in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill Nijhoff, 2020), 157, 174; Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge University Press, 2019), 134–135.

⁸⁴ 1982 UNCLOS, Art 83(1). This wording is also used in Article 74 on the delimitation of the EEZ.

⁸⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* Judgment, ICJ Reports 2009, 61, [116]. There is juridical precedent for not using the provisional equidistance line. In the *Nicaragua/Honduras* case, the ICJ found that an equidistance line did not produce an equitable outcome, and instead applied the angle bisector method. It concluded that “the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.” *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, 659, [272]. Indeed, in this case, the ICJ found that it was “impossible” to construct a provisional equidistance line. *Ibid.*, [280].

⁸⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, note 63, [116].

⁸⁷ *Ibid.*, [120].

⁸⁸ *Ibid.*, [122].

⁸⁹ See Erik Franckx, “A Single Maritime Boundary: From UNCLOS III to Present-Day Developments” (2023) 148 *Marine Policy* 105425.

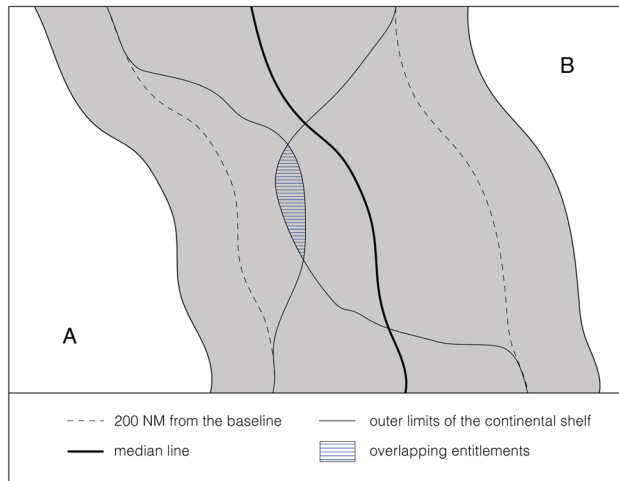


Figure 1. The inapplicability of the equidistance/median line in delimitation of the continental shelf beyond 200 NM of opposite states.

Nicaragua’s entitlement could not extend within 200 NM of Colombia, such a situation existed in the case of Colombia and Nicaragua, where an equidistance/median line between the mainland of Nicaragua and the mainland of Colombia would be located beyond the 200-NM limit of Colombia. This was also the case in the dispute between China, Korea, and Japan, where an equidistance/median line would “only reflect their coastal relationship without addressing the claimed entitlement to the continental shelf beyond 200 nm by China.”⁹⁰

In addition to the fact that the traditional delimitation methodology may be impractical to apply beyond 200 NM, it is also inappropriate. The case between Mauritius and the Maldives recently adjudicated by the ITLOS Special Chamber offers a good example. As Mauritius had argued, there is “reason to proceed with care” in considering whether the traditional delimitation methodology used in cases of adjacent coasts should be applied to situations with opposite coasts,⁹¹ despite Mauritius agreeing with the notion of a single continental shelf. In that particular case, the equidistance line would have distributed more than 98.88 percent of the area of overlapping entitlements beyond 200 NM to Maldives, and only 1.12 percent to Mauritius.⁹² The question in this context is whether the equidistance line would lead to an “equitable solution,” as required by Article 83 of UNCLOS. Owing to the Special Chamber’s hesitance in proceeding with delimitation because of significant uncertainty concerning Mauritius’ entitlement, this question was left unanswered.

Furthermore, while the equidistance line is an appropriate provisional line to delimit maritime zones based on distance, if the entitlement to a maritime zone relies solely

⁹⁰ Liao, note 7, 111. See also Bernard and Schofield, note 87, 168–169; Giovanni Vega-Barbosa, “Outer Continental Shelf Delimitation in the Western Caribbean Sea (Nicaragua v. Colombia II): What Lessons to Learn from the East China Sea Dispute on the Viability of Maritime Delimitation Between Different Bases of Continental Shelf Entitlement?” (2019) 47 *Revista da Faculdade de Direito da Universidade Federal de Uberlândia* 92.

⁹¹ *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* Memorial of Mauritius (25 May 2021), [4.70].

⁹² *Ibid.*, [4.71].

or predominantly upon geological and/or geomorphological criteria, this conclusion does not apply. As Mauritius explained,

Even though there is one continental shelf, there is a fundamental difference between delimitation within and beyond 200 M. In particular, entitlement and ultimately delimitation within 200 M is based on coastal geography and distance from the coast, while entitlement beyond 200 M is based on neither.⁹³

Mauritius continued by arguing that “if distance from the coast is irrelevant to entitlement beyond 200 M, there is no reason why it should be used to determine how a disputed area beyond 200 M from both coasts is divided.”⁹⁴ This has been confirmed by Judge Xue in her Separate Opinion in *Nicaragua v. Colombia*, where she considered it “highly problematic” to apply the three-stage delimitation methodology because “the relevant considerations for achieving an equitable solution may be quite different” beyond 200 NM.⁹⁵ In other words, in addition to being impractical, equidistance may not be an appropriate method for delimitation when delimiting overlapping entitlements based on geological and/or geomorphological criteria.

Alternative methods have been proposed, including a line of equal division, constructing the equidistance line from the relevant outer limits rather than from the coast, or recognizing geological and geomorphological factors as part of the relevant circumstances.⁹⁶ Indeed, Mauritius had pleaded for an “equal division of the area of overlap beyond 200 M.”⁹⁷ According to Mauritius,

In circumstances where there are no geological, geomorphological or other relevant factors tending to favour one State over another, and where there is, in essence, a single continental shelf on which both States are situated, and to which each has made an equally valid claim, an equitable solution requires an equal division of the area of overlap beyond 200 M.⁹⁸

However, a line of equal division would require prior delineation of the outer limits of the continental shelf, thus upsetting the accepted relationship between delineation and delimitation.⁹⁹ In any case, were the overlap in entitlements to be delimited not by constructing an equidistance line from the coast, but rather from the relevant outer limits of the respective states,¹⁰⁰ or by any of the other proposed suggestions, this could solve the practical issues discussed above, but it would not address the issue of legitimacy of using distance-based division lines to delimit overlapping entitlements (predominantly) based on geological and/or geomorphological criteria.

Although the current three-stage approach may be inapplicable to delimitation beyond 200 NM, the other proposed solutions are not ideal either. Carleton suggests

⁹³ Ibid, [4.72]. Technically, one of the constraint lines includes a reference to the distance from the coast.

⁹⁴ Ibid, [4.73].

⁹⁵ *Nicaragua v. Colombia*, note 6 (Separate Opinion of Judge Xue), [57].

⁹⁶ Liao, note 7, 111–115.

⁹⁷ *Mauritius/Maldives, Memorial of Mauritius*, note 95, [4.73]. This had also been argued by Nicaragua in its earlier case with Colombia. *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Reply of Nicaragua Volume I (2009), [3.46].

⁹⁸ *Mauritius/Maldives, Memorial of Mauritius*, note 95, [4.73].

⁹⁹ This argument had been put forward by the Maldives; see *Mauritius/Maldives*, note 6, [277].

¹⁰⁰ As had been suggested by Nicaragua in its earlier case with Colombia, see *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Verbatim Record CR 2012/9, [75].

that “if a natural geological ‘boundary’ is found to exist within the disputed area, this may form part of the basis of a negotiated settlement, together with other relevant geographical considerations.”¹⁰¹ However, this may be problematic if one of the coastal states only has a distance-based entitlement to a continental shelf (for which it can be argued that geological and/or geomorphological criteria are irrelevant), or if the coastal states abut on the same geophysical continental shelf/margin with no clear natural geological boundary.

In the end, delimitation must lead to an “equitable result.”¹⁰² Indeed, ITLOS in the *Bangladesh/Myanmar* case explained that Article 83(1) stipulates that the delimitation of the continental shelf must be effected on the basis of international law in order to achieve an equitable solution, “without specifying the method to be applied.”¹⁰³ This thus leaves open the possibility of using an alternative method to equidistance (or any other distance-based line) for delimitation. It will be interesting to see how international law develops in interpreting that requirement, hopefully recognizing that equity in this context means more than distance-based equity.¹⁰⁴

Concluding Remarks

Pre-UNCLOS, there was indeed no distinction between an “inner” and an “outer” continental shelf. There were already two different ways to delineate the maritime zone, either on the basis of depth or on the basis of exploitability, but this distinction did not have any legal consequences in terms of delimitation, or even the nature of rights and duties over the continental shelf. Before UNCLOS, there was indeed in law a “single continental shelf.”¹⁰⁵ However, with the adoption of the 1982 UNCLOS, not only were there more alternative methods to delineate the continental shelf than before, but these distinctions now actually had legal consequences affecting the nature of coastal state rights and duties over the continental shelf, and, in the view of the present author, these distinctions should also have consequences for the delimitation process.

This author does not necessarily submit that Article 76 introduces two separate and distinct maritime zones. However, the notion of a “single continental shelf” fails to recognize the multifaceted nature of the continental shelf, with its highly legal–scientific character. Claiming that there is only one single continental shelf is too simplistic, and does not recognize the differing legal rights and duties applicable to the maritime zone, nor the nuance required for delimiting all variants of the maritime zone. Although many rules and considerations applicable to the continental shelf are the same, regardless of distance from the coast and regardless of formulas used to delineate, for some aspects these rules and considerations differ. Thus, to claim that there is in law only a “single continental shelf” is an “oversimplification” of the maritime zone, and one

¹⁰¹ Chris Carleton, “Delimitation Issues” in Peter J. Cook and Chris Carleton (eds), *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford University Press, 2000), 312, 316. Despite the general lack of recognition of geophysical factors in delimitations to date, in the delimitation between Australia and New Zealand, geophysical factors were “influential” for portions of the delimitation beyond 200 NM. Bernard and Schofield, note 87, 175.

¹⁰² 1982 UNCLOS, Art 83(1).

¹⁰³ *Bangladesh/Myanmar*, note 6, [225].

¹⁰⁴ See Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press, 2015), 199–203.

¹⁰⁵ Bernard, note 5, 101.

that “hides and obfuscates the complexity of the regime.”¹⁰⁶ Furthermore, although the notion of a “single continental shelf” in itself is problematic, the legal consequences for delimitation connected to that notion are especially concerning.

The ways in which the most recent case law has upset and challenged the notion of a “single continental shelf” demonstrate that perhaps we need to let go of it. It is incoherent practice to continuously refer to this notion, whilst at the same time concluding that one state’s continental shelf entitlement may not even overlap with another state’s continental shelf entitlement, only because the former entitlement extends beyond 200 NM and the latter stays within.

To some extent, the notion has been helpful to determine the scope of a dispute and with respect to thresholds of jurisdiction. Indeed, Article 76 does not create two separate zones, but rather establishes various bases of entitlements, limits, and legal consequences depending on how that zone is measured. However, to simply extrapolate the notion of a “single continental shelf” to the appropriateness of *exercising* jurisdiction and the actual substantive aspects of entitlement, delineation, and delimitation is more problematic. Instead of thus trying to religiously uphold the notion of a “single continental shelf,” perhaps we should rather look at the circumstances of each case, while recognizing the legal–scientific complex nature of the continental shelf.

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¹⁰⁶ Ibid, 109.