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Recent Developments in the
Jurisprudence Concerning the
Delimitation of the Continental Shelf
Beyond 200 Nautical Miles: Analysis
of the *Mauritius/Maldives* and
Nicaragua v. Colombia Cases

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I. INTRODUCTION

The delimitation of the continental shelf beyond two hundred nautical miles is a modern sphinx in international law. In particular, three issues merit highlighting: (1) the relationship between the distance criterion and natural prolongation as a legal title, (2) the relationship between the Commission on the Limits of the Continental Shelf (CLCS) and adjudicative bodies, and (3) the methodology of delimitation.

First, Article 76(1) of the UN Convention on the Law of the Sea (UNCLOS)¹ provides two criteria for the entitlement to a continental shelf: distance and natural prolongation. The relationship between the two criteria raises questions.² Is there any hierarchy between the two criteria in international law? If so, which criterion should prevail? If there is no hierarchy, how is it possible to reconcile the two criteria? UNCLOS remains mute on these questions.³

Second, as regards the relationship between the CLCS and adjudicative bodies, an issue arises whether an international court or tribunal can proceed with the delimitation of the continental shelf when the CLCS has not issued a recommendation. On this issue, the judicial practice varies, even though the difference between the delineation of the outer limits of the continental shelf and maritime delimitation has been stressed by adjudicative bodies.⁴

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. See generally Xuexia Liao, *Is There a Hierarchical Relationship Between Natural Prolongation and Distance in the Continental Shelf Delimitation?*, 33 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 79 (2018).

3. Xuexia Liao, in her recent monograph, argued that “the existing international law is not decisively conclusive as to the question of priority between the two continental shelf entitlements.” XUEXIA LIAO, *THE CONTINENTAL SHELF DELIMITATION BEYOND 200 NAUTICAL MILES: TOWARD A COMMON APPROACH TO MARITIME BOUNDARY-MAKING* 95–96 (2022).

4. See, e.g., *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangl./Myan.), Case No. 16, Judgment of Mar. 14, 2012, 2012 ITLOS Rep. 4, ¶¶ 376, 393–94; *Bay of Bengal Maritime Boundary Arbitration* (Bangl. v. India), 32 R.I.A.A. 1, ¶ 76 (Perm. Ct. Arb. 2014) [hereinafter *Bangladesh v. India Arbitral Award*]; *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d’Ivoire), Case No. 23, Judgment of Sept. 23, 2017, 2017 ITLOS Rep. 4, ¶ 495; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicar. v. Colom.), Judgment on Preliminary Objections, 2016 I.C.J. 100, ¶ 114 (Mar. 16); see also Liao, *supra* note 3, at 113–60.

Third, it is well established that a court or tribunal applies the three-stage approach to the delimitation of marine spaces *within* 200 nautical miles.⁵ According to this approach, at the first stage, a provisional equidistance line is constructed unless there are compelling reasons not to do so. At the second stage, an adjustment of a provisional equidistance line is envisaged, considering relevant circumstances. At the third and final stage, the disproportionality test applies. The question is whether the same approach can equally apply to the delimitation of the continental shelf *beyond* 200 nautical miles. In the jurisprudence, adjudicative bodies have applied the three-stage approach to the delimitation of the continental shelf beyond 200 nautical miles between adjacent coasts.⁶ However, whether the same methodology can also apply to the delimitation of the continental shelf between opposite coasts needs further consideration.⁷

The International Tribunal for the Law of the Sea (ITLOS) Special Chamber decision in *Mauritius/Maldives*⁸ and the International Court of Justice (ICJ) decision in *Nicaragua v. Colombia*,⁹ both decided in 2023, provide

5. YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 166 (2d ed. 2019).

6. The International Tribunal for the Law of the Sea (ITLOS), in the *Bangladesh/Myanmar* case, stated that “In the view of the Tribunal, the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm.” *Bangl./Myan.*, *supra* note 4, ¶ 455. This view was echoed by *Ghana/Côte d’Ivoire*, *supra* note 4, ¶ 526, and *Bangladesh v. India Arbitral Award*, *supra* note 4, ¶ 465.

7. See also TANAKA, *supra* note 5, at 181–84; Liao, *supra* note 3, at 183–93; Hilde J. Woker, *Challenging the Notion of a “Significant Continental Shelf”*, OCEAN DEVELOPMENT AND INTERNATIONAL LAW (Oct. 29, 2023), <https://doi.org/10.1080/00908320.2023.2271393>.

8. Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (*Mauritius/Maldives*), Case No. 28, Judgment of Apr. 28, 2023, https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_orig.pdf.

9. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicar. v. Colom.*), Judgment (July 13, 2023), <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf>. For a commentary on this case, see Matei Alexianu, *The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant*, 27 ASIL INSIGHTS 1 (2023), https://www.asil.org/sites/default/files/ASIL_Insights_2023_V27_I9_0.pdf; 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*, EJIL:TALK! (July 21, 2023), <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/>; Bjørn Kunoy, *The Recognition of a Customary Rule of International Law in NICOL II—*

important insights into the first and second issues. Thus, in Part II, this article addresses the first issue by examining the standard of “significant uncertainty” presented by ITLOS in *Mauritius/Maldives*. In Part III, the article addresses the second issue by analyzing the ICJ’s decision in *Nicaragua v. Colombia*, focusing on three issues: (1) a rule of customary international law concerning the entitlement to the continental shelf beyond 200 nautical miles, (2) the inter-relationship between the exclusive economic zone (EEZ) and the continental shelf, and (3) a grey area. Finally, a conclusion is presented in Part IV.

II. THE STANDARD OF SIGNIFICANT UNCERTAINTY: ANALYSIS OF THE MAURITIUS/MALDIVES CASE

A. Introduction

This Part examines the 2023 *Mauritius/Maldives* case before the ITLOS Special Chamber.¹⁰ On September 24, 2019, Mauritius and Maldives transferred their dispute concerning the maritime boundary between them in the Indian Ocean from an arbitral tribunal under UNCLOS to a Special Chamber of ITLOS.¹¹ Even though Maldives raised preliminary objections to the jurisdiction of the Special Chamber,¹² the Chamber concluded, eight votes to one, that it had jurisdiction to adjudicate the dispute.¹³ The Special Chamber delivered its judgment on April 28, 2023.

A Redundant Exercise?, EJIL:TALK! (Nov. 22, 2023), <https://www.ejiltalk.org/the-recognition-of-a-customary-rule-of-international-law-in-nicol-ii-a-redundant-exercise/>.

10. For a commentary on the *Mauritius/Maldives* case by the author, see Yoshifumi Tanaka, *General Comments: The International Tribunal for the Law of the Sea*, GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE (forthcoming 2023).

11. See Special Agreement and Notification, Maldives-Mauritius, Sept. 24, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/28/C28_Special_Agreement.pdf.

12. These jurisdictional objections were: (1) that the UK was an indispensable third party; (2) that the Special Chamber had no jurisdiction to determine the disputed issue of sovereignty over the Chagos Archipelago; (3) the obligation to negotiate, (4) lack of a dispute, and (5) Mauritius’ claims constitute an abuse of process. Mauritius/Maldives, *supra* note 8, 1 Written Observation of the Republic of Mauritius on the Preliminary Objections Raised by the Republic of Maldives (Feb. 17, 2020), https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_PO_Written_Observations_Mauritius.pdf. Mauritius countered these preliminary objections.

13. Mauritius/Maldives, *supra* note 8, Judgment on Preliminary Objections, ¶¶ 98, 354(6) (Jan. 28, 2021), https://itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf.

In broad terms, the *Mauritius/Maldives* judgment can be divided into two parts. The first part concerns the delimitation of the EEZ and the continental shelf within 200 nautical miles. The ITLOS Special Chamber considered that the “equidistance/relevant circumstances” method was the appropriate method to apply for delimiting the EEZ and the continental shelf within 200 nautical miles. It thus decided to construct a single maritime boundary for the EEZ and the continental shelf following the three-stage approach used by courts to delimit maritime boundaries within 200 nautical miles from the coast.¹⁴ At the first stage of the maritime delimitation, a contentious issue was whether Blenheim Reef, as a drying reef, could be a site of base points. On this issue, the Special Chamber made a distinction between base points for drawing straight archipelagic baselines under Article 47 of UNCLOS and base points for the construction of a provisional equidistance line. In the words of the Special Chamber, “[i]t is one thing to place appropriate points for drawing straight archipelagic baselines at Blenheim reef, and it is something else to select base points at Blenheim Reef for the construction of the equidistance line.”¹⁵ Eventually the Special Chamber constructed a provisional equidistance line without using Blenheim Reef, a Mauritian low-tide elevation, as a base point.¹⁶ Yet the reason why no base points can be located on Blenheim Reef for the construction of the provisional equidistance line seems to need further clarification. Again the issue of Blenheim Reef arose at the second stage of maritime delimitation. At the second stage, the Special Chamber adjusted the provisional equidistance line, giving half-effect to Blenheim Reef. However, there appears to be some scope to consider the question regarding whether giving half-effect to Blenheim Reef at the second stage of maritime delimitation was inconsistent with giving it no effect in the first stage. Even though the Special Chamber stated that “ignoring Blenheim Reef completely would not lead to an equitable solution,”¹⁷ it provided little explanation why giving no-effect would lead to an inequitable result. At the third and final stage, the Special Chamber applied the disproportionality test. According to the Chamber, “the ratio of the lengths of the relevant coasts

14. *Mauritius/Maldives*, *supra* note 8, ¶ 98.

15. *Id.* ¶ 189.

16. *Id.* ¶ 230. Blenheim Reef consists of a number of low-tide elevations. *Id.* ¶ 219. It may be recalled that the ICJ, in the *Tunisia/Libya* case, disregarded the low-tide elevations surrounding the Kerkennah Islands and Jerba without giving any reason. This point was criticized by Judge Evensen. Continental Shelf (Tunis./Libya), Judgment, 1982 I.C.J. 18, 299, ¶ 17 (Feb. 24) (dissenting opinion of Evensen, J.).

17. *Id.* ¶ 245.

of the Parties is 1:1.033 in favour of Mauritius”¹⁸ and “the ratio of the areas allocated to the Parties is 1:0.960 in favour of the Maldives.”¹⁹ It accordingly found that there was no significant disproportion between the two ratios.²⁰

The second part of the decision relates to the delimitation of the continental shelf beyond 200 nautical miles. In this regard, the Special Chamber examined the issues of jurisdiction and admissibility. Referring to the *Barbados v. Trinidad and Tobago* arbitral award,²¹ the Special Chamber opined that it is well established in the jurisprudence that “there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf.”²² In the Chamber’s view, “there is nothing in these documents [Mauritius’ Notification and the Special Agreement] that suggests, expressly or implicitly, that delimitation of the maritime boundary between the Parties should exclude the continental shelf beyond 200 nm.”²³ The Special Chamber accordingly concluded that “its jurisdiction to delimit the continental shelf between the Parties includes not only the continental shelf within 200 nm but also any portion of the continental shelf beyond 200 nm, including the ‘Northern Chagos Archipelago Region.’”²⁴ Furthermore, the Special Chamber denied the existence of any rule requiring that a submission to the CLCS be made prior to the institution of delimitation proceedings.²⁵ It thus declined the Maldives’ objection to the admissibility of Mauritius’ claim.²⁶

Next, the Special Chamber examined the parties’ entitlements to the continental shelf beyond 200 nautical miles.

B. Formulation of the Standard of Significant Uncertainty

A key issue in the *Mauritius/Maldives* case concerned the standard for significant uncertainty applicable to an entitlement to the continental shelf beyond

18. *Id.* ¶ 253.

19. *Id.* ¶ 255.

20. *Id.* ¶ 256.

21. Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf, Decision of Apr. 11, 2006, 27 R.I.A.A. 147, ¶ 213 (Perm. Ct. Arb. 2006).

22. Mauritius/Maldives, *supra* note 8, ¶ 338. The concept of single continental shelf is also supported by Bangl./Myan., *supra* note 4, ¶ 361.

23. Mauritius/Maldives, *supra* note 8, ¶ 331.

24. *Id.* ¶ 343.

25. *Id.* ¶ 377.

26. *Id.* ¶ 383.

200 nautical miles. As discussed below, according to the standard, ITLOS would not proceed with the delimitation of the area beyond 200 nautical miles if there is significant uncertainty as to the existence of a continental margin in the area in question.

As ITLOS stated in the *Bangladesh/Myanmar* case, “the first step in any delimitation is to determine whether there are entitlements and whether they overlap.”²⁷ Thus, the Special Chamber had to ascertain whether the parties had entitlements to the continental shelf beyond 200 nautical miles and, if so, whether they overlapped.²⁸ Both Mauritius and Maldives had made submissions to the CLCS with regard to their continental shelves beyond 200 nautical miles, but the Commission had not yet made recommendations.²⁹

A particular issue that arose in the case was whether the Maldives’ entitlement to the continental shelf beyond 200 nautical miles from its baseline could be extended into the 200 nautical mile limit of Mauritius. Related to this, the Special Chamber posed, *inter alia*, the following questions to the parties:

1. Both Parties maintain that an area beyond 200 nautical miles from their respective coastal baselines is part of the continental shelf under article 76 of the United Nations Convention on the Law of the Sea (“the Convention”) and accordingly outside the adjacent “Area” to which reference is made in articles 1, paragraph 1(1), 134, 136, 137 and 311, paragraph 6, of the Convention. That position is set out in their respective submissions to the Commission on the Limits of the Continental Shelf (“CLCS”). Taking into account article 76, paragraph 8, and article 8 of Annex II to the Convention, what would be the consequence if the CLCS takes a different position on the entitlements of the Parties in its recommendations?

27. *Bangl./Myan.*, *supra* note 4, ¶ 397. In the *Black Sea* case, the ICJ also stated that “the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned.” *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61, ¶ 77 (Feb. 3). According to Judge Tomka, “[e]ntitlements are said to ‘overlap’ when the projections from the coast of one party overlap with projections from the coast of the other party.” *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 10, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

28. *Mauritius/Maldives*, *supra* note 8, ¶¶ 428, 385.

29. *Id.* ¶ 430.

2. 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 . . . ?³⁰

In relation to the first question, the Maldives answered:

If this Chamber were to find that Mauritius has an entitlement, contrary to the CLCS Guidelines, and contrary to its practice, it would create an unfortunate situation where the CLCS would almost certainly issue recommendations contrary to the judgment of this Chamber. It is with good reason that the practice of ITLOS is not to delimit the outer continental shelf where there is significant uncertainty as to the existence of entitlement.³¹

In this regard, the ITLOS Special Chamber recalled the *Bangladesh/Myanmar* judgment that laid out and applied the standard of "significant uncertainty."³² The key paragraph of the *Bangladesh/Myanmar* judgment deserves quoting:

Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal 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.³³

In light of the dictum, the Special Chamber in *Mauritius/Maldives* decided that it would apply the standard of significant uncertainty.³⁴

30. Mauritius/Maldives, *supra* note 8, Questions to the Parties of Oct. 16, 2022, https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Pleadings/C28_Questions_to_the_Parties_16.10.22.pdf; The questions were reproduced in Mauritius/Maldives, *supra* note 8, ¶ 57.

31. Mauritius/Maldives, *supra* note 8, Verbatim Record of Oct. 21, 2022, ITLOS/PV.22/C28/5/Rev.11, at 14 (statement of Payam Akhavan, representing Maldives), https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Pleadings/ITLOS_PV22_C28_5_Rev.1_E.pdf. The response was reproduced in Mauritius/Maldives, *supra* note 8, ¶ 421.

32. *Id.* ¶ 431.

33. Bangl./Myan., *supra* note 4, ¶ 443.

34. Mauritius/Maldives, *supra* note 8, ¶ 433.

The standard of significant uncertainty rests on two rationales. The first is to minimize the risk of conflicts between the views of the CLCS and ITLOS. According to the Special Chamber, “this standard serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or tribunal in a judgment.”³⁵

The second rationale is to safeguard the Area, which is the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction.³⁶ In the words of the Special Chamber:

in maritime delimitation cases, international courts and tribunals refrain from delimiting areas where the rights of other coastal States may be affected. Application of the standard of significant uncertainty affords similar protection to the interests of the international community in the Area and the common heritage principle.³⁷

Thus, the Special Chamber considered that “the exercise of caution is called for in the circumstances of the present case, where there may be a risk of prejudice to the interests of the international community in the Area and the common heritage principle.”³⁸ By applying that standard, the Special Chamber held that it would not proceed to delimit the continental shelf beyond 200 nautical miles between Mauritius and the Maldives in the Indian Ocean.³⁹

C. *The Scope of the Application of the Standard of Significant Uncertainty*

The standard of significant uncertainty creates two issues: the scope of the standard and the criterion for the standard. First, the scope of the application of that standard must be examined.

When the CLCS has already made its recommendations, the parties’ entitlements to the continental shelf beyond 200 nautical miles and whether they overlap are apparent. Accordingly, it can be considered that the application of the standard of significant uncertainty is only at issue in the situation where the CLCS has not yet made recommendations. The question is

35. *Id.* ¶ 433.

36. UNCLOS, *supra* note 1, art. 1(1)(1).

37. Mauritius/Maldives, *supra* note 8, ¶ 452.

38. *Id.* ¶ 453.

39. *Id.* ¶¶ 458, 466(4).

whether the significant uncertainty standard applies to all circumstances where the CLCS has not yet made its recommendations.

In this regard, the ITLOS Special Chamber, in the *Mauritius/Maldives* judgment, highlighted the uniqueness of the Bay of Bengal.⁴⁰ As the Special Chamber observed,⁴¹ in the *Bangladesh/Myanmar* case, the Chamber could be satisfied that there was a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nautical miles in view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings.⁴² In light of this, the Special Chamber could conclude that the "submissions of Bangladesh and Myanmar to the Commission clearly indicate that their entitlements overlap in the area in dispute in this case."⁴³

The *Bangladesh/Myanmar* judgment suggests that the standard of significant uncertainty should not be applied to the circumstances where there is "uncontested scientific evidence." It would seem to follow that the standard of significant uncertainty may come into play where scientific evidence regarding entitlements to a continental shelf beyond 200 nautical miles is contested by one of the disputing parties and/or scientific evidence is debatable or absent.

Unlike ITLOS, the ICJ has not applied the standard of significant uncertainty in its jurisprudence. The 2012 *Nicaragua v. Colombia* case is a case in point. In this case, Nicaragua requested that the Court adjudge and declare:

The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties.⁴⁴

At the time of the 2012 judgment, however, Nicaragua submitted only "preliminary information" to the CLCS. Thus, the ICJ considered that it "falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles" under Article 76(8) of UNCLOS.⁴⁵

40. *Id.* ¶ 432; *Bangl./Myan.*, *supra* note 4, ¶ 444.

41. *Mauritius/Maldives*, *supra* note 8, ¶ 432.

42. *Bangl./Myan.*, *supra* note 4, ¶ 446.

43. *Id.* ¶ 449.

44. *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. 624, ¶¶ 17, 251(3) (Nov. 19).

45. *Id.* ¶ 127. This point was amplified by Judge Donoghue: "If the information falls short of what is needed to permit factual conclusions by expert scientists, surely it cannot

In this case, the Court focused on Nicaragua's procedural deficiency and, accordingly, it did not assess the existence of significant uncertainty concerning the extension of Nicaragua's continental shelf beyond 200 nautical miles on its own. In the end, the Court, in its judgment of 2012, declined Nicaragua's submission, stating:

[S]ince 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, as requested by Nicaragua, even using the general formulation proposed by it.⁴⁶

In 2013, however, Nicaragua instituted new proceedings against Colombia with regard to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast. In its Judgment on Preliminary Objections, the ICJ made clear that: "Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court."⁴⁷ On June 24, 2013, Nicaragua provided the CLCS with the "final" information required in Article 76(8) of UNCLOS.⁴⁸ In the view of the Court, a recommendation from the CLCS "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."⁴⁹ The Court thus admitted Nicaragua's request concerning the precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf that appertain to each of them beyond the boundaries determined by the Court in its judgment of November 19, 2012.⁵⁰

As Malcolm Evans stated, however, "just because a State claims that it has an entitlement does not mean that it does."⁵¹ Filing the full information

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." *Id.* at 754, ¶ 12 (separate opinion by Donoghue, J.).

46. *Id.* at 669, ¶ 129; *see also id.* ¶¶ 131, 251(3).

47. *Nicar. v. Colom.*, *supra* note 4, ¶ 105.

48. *Id.* ¶ 86.

49. *Id.* ¶ 114.

50. *Id.* ¶ 126.

51. Malcolm D. Evans, *Maritime Boundary Delimitation*, in OXFORD HANDBOOK ON THE LAW OF THE SEA 254, 261 (Donald Rothwell et al. eds., 2015).

with the CLCS does not automatically prove a coastal State's entitlement to a continental shelf beyond 200 nautical miles.⁵² In fact, the CLCS can reject, whether partially or entirely, the validity of a coastal State's submission.⁵³ Hence, great caution will be needed in deciding whether an international court or tribunal should proceed with the delimitation of the continental shelf where there is no scientific evidence before the court or tribunal with regard to the parties' entitlements to the continental shelf beyond 200 nautical miles.⁵⁴

A related issue that arises concerns the effect of an agreement between the parties that their continental shelves extend beyond 200 nautical miles. In this circumstance, should the standard of significant uncertainty be applied? Actually, this issue arose in the *Somalia v. Kenya* case pending before the ICJ. In this case, both Somalia and Kenya previously made submissions to the CLCS on the limits of the continental shelf beyond 200 nautical miles in accordance with Article 76(8) of UNCLOS.⁵⁵ The CLCS has yet to con-

52. Massimo Lando, *Delimiting the Continental Shelf Beyond 200 Nautical Miles at the International Court of Justice: The Nicaragua v Colombia Cases*, 16 CHINESE JOURNAL OF INTERNATIONAL LAW 137, 154 (2017). See also Bjørn Kunoy, *The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf*, 83 BRITISH YEARBOOK OF INTERNATIONAL LAW 81 (2013).

53. In this regard, Judge Donoghue gave her misgivings that "the Court's conclusions regarding the location of the outer limits, in a judgment that is binding on the parties, might differ from recommendations that later emerge from the Commission." *Nicar. v. Colom.*, *supra* note 44, at 757, ¶ 23 (separate opinion by Donoghue, J.).

54. In this regard, Lando argued that: "in most cases it would seem more appropriate for international tribunal to establish boundaries beyond 200 nm only after the CLCS's recommendation ascertaining that entitlement to a continental shelf beyond 200 nm actually exist." Lando, *supra* note 52, at 173. Furthermore, Judge Ndiaye stated that: "Good sense required terminating the delimitation line at the 200-nautical-mile limit, not beyond." *Bangl./Myan.*, *supra* note 4, ¶ 98 (separate opinion of Ndiaye, J.). See also Signe Veierud Busch, *The Delimitation of the Continental Shelf Beyond 200 NM*, in MARITIME BOUNDARY DELIMITATION: THE CASE LAW, IS IT CONSISTENT AND PREDICTABLE? 319, 349–50 (Alex G. Oude Elferink et al. eds., 2018); Robin R. Churchill, *The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation*, 1 CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 137, 149–50 (2012); Xuexia Liao, *Evaluation of Scientific Evidence by International Courts and Tribunals in the Continental Shelf Delimitation Cases*, 48 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 136, 148 (2017).

55. Maritime Delimitation in the Indian Ocean (*Som. v. Kenya*), Judgment, 2021 I.C.J. 206, ¶ 188 (Oct. 12). Kenya made its submission to the CLCS on May 6, 2009. Somalia made its submission on July 21, 2014, and provided an amended executive summary on July 16, 2015.

sider these submissions. However, the ICJ emphasized that “the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts, as is the case here.”⁵⁶

While the ICJ accepted that the situation in the *Somalia v. Kenya* case is not the same as the *Bangladesh/Myanmar* case,⁵⁷ the Court noted the following three points. First, according to the ICJ, “in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and that their claims overlap.”⁵⁸ Second, “neither Party questions the existence of the other Party’s entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim.”⁵⁹ Third, “[b]oth Parties in their submissions . . . request the Court to delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf.”⁶⁰ In light of this, the ICJ decided that it would proceed with the delimitation of the continental shelf beyond 200 nautical miles.⁶¹

However, the ICJ’s approach was challenged by Judges Donoghue and Robinson. The key point of their objection concerned the lack of scientific evidence. Judge Donoghue, President of the ICJ, gave her misgivings:

My hesitancy about the Court’s decision to delimit the outer continental shelf in this case stems from the fact that the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties. The Court is not well positioned to identify, even approximately, any area of overlapping entitlement and thus to arrive at an equitable delimitation of any area of overlap.⁶²

Judge Donoghue highlighted the difference between the precedents: *Bangladesh/Myanmar*, *Bangladesh v. India*, *Ghana/Côte d’Ivoire*, and *Somalia v. Kenya*. As regards the Bay of Bengal in the *Bangladesh/Myanmar* case, ITLOS could confirm that there was “uncontested scientific evidence” that “practically the entire floor of the Bay of Bengal, including areas appertaining to

56. *Id.* ¶ 189.

57. *Id.*

58. *Id.* ¶ 194.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 286–87, ¶ 4 (separate opinion by Donoghue, J.).

[both parties],” was covered with a “thick layer of sedimentary rocks.”⁶³ The same could be held true of the *Bangladesh v. India* case.⁶⁴ In the *Ghana/Côte d’Ivoire* case, the ITLOS Special Chamber benefited from an affirmative CLCS recommendation in relation to Ghana. The Chamber also observed that the geological situation of Côte d’Ivoire was “identical” to that of Ghana.⁶⁵ In the view of Judge Donoghue, however, “the Court [in the *Somalia v. Kenya* case] has no comparable evidence regarding the existence, extent, shape or continuity of any outer continental shelf appertaining to either Party.”⁶⁶

Judge Donoghue’s concern was shared by Judge Robinson. As noted earlier, the ICJ considered that in their submissions to the CLCS, both Somalia and Kenya claimed, on the basis of scientific evidence, a continental shelf beyond 200 nautical miles.⁶⁷ According to Judge Robinson, however,

this observation does not provide a sufficient basis for the delimitation because nowhere in the Judgment is there any reference to the content of this scientific evidence and, more importantly, nowhere in the Judgment is there any analysis of that content to show that the Court is satisfied that the necessary geological and geomorphological criteria have been met for the existence of a continental shelf beyond 200 nautical miles.⁶⁸

If the ICJ relies on the parties’ submissions to the CLCS, the learned judge considered:

the Court must explain why it finds them persuasive. Such an explanation is the more necessary where, as in this case, the Commission has not yet made any recommendations on the submissions of the Parties.⁶⁹

For Judge Robinson:

The lack of any evidence of geological and geomorphological data to substantiate the existence of a continental shelf, and thus, of the entitlement

63. *Id.* at 287, ¶ 6 (separate opinion by Donoghue, J.); *Bangl./Myan.*, *supra* note 4, ¶¶ 445–46.

64. *Nicar. v. Colom.*, *supra* note 44, at 287, ¶ 6 (separate opinion by Donoghue, J.).

65. *Id.* at 287, ¶ 7; *Ghana/Côte d’Ivoire*, *supra* note 4, at 136, ¶ 491.

66. *Nicar. v. Colom.*, *supra* note 44, at 287, ¶ 8 (separate opinion by Donoghue, J.).

67. *Id.* at 276, ¶ 194.

68. *Som. v. Kenya*, *supra* note 55, at 329, ¶ 14 (individual opinion by Robinson, J.).

69. *Id.*

of the Parties to a continental shelf beyond 200 nautical miles, undermines the validity of the finding in paragraph 214 (5), which is the principal conclusion of the Court in the part of its Judgment devoted to the delimitation of the continental shelf beyond 200 nautical miles.⁷⁰

As the two learned judges pointedly observed, it is open to debate whether scientific evidence can be replaced by the agreement of the parties regarding their entitlements to the continental shelf beyond 200 nautical miles. It appears that in appropriate circumstances, the standard of significant uncertainty may be applied, even if there is no disagreement between the parties with regard to their entitlements to the continental shelf beyond 200 nautical miles.

D. The Criterion for the Standard of Significant Uncertainty

The next issue concerns the criterion for assessing the existence of “significant” uncertainty. In the *Mauritius/Maldives* case, Mauritius has presented three different routes for natural prolongation to a foot of slope point. As the Scientific and Technical Guidelines of the CLCS state, “[i]f a State is able to demonstrate to the Commission that the natural prolongation of its submerged land territory to the outer edge of its continental margin extends beyond the 200-nautical-mile distance criterion, the outer limit of its continental shelf can be delineated by means of the application of the complex set of rules described in paragraphs 4 to 10 [of article 76 UNCLOS].”⁷¹ Hence, the identification of natural prolongation is of critical importance.

As regards the first route, Mauritius claimed that its natural prolongation in the Northern Chagos Archipelago Region along the Chagos-Laccadive Ridge initially extends northwards from Peros Banhos Atoll, Salomon Islands Atoll, and Blenheim Reef.⁷² However, Maldives challenged the validity of the route, stating that “the foot of slope point in question could only be characterized as the natural prolongation of the Maldives’ submerged land

70. *Id.* at 329, ¶ 15.

71. Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, ¶ 2.2.3, U.N. Doc. CLCS/11 (May 13, 1999).

72. Mauritius/Maldives, *supra* note 8, 1 Memorial of the Republic of Mauritius, ¶ 2.40, (May 25, 2021), https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Pleadings/C28_Memorial_of_Mauritius.pdf. See also Mauritius/Maldives, *supra* note 8, ¶ 437.

territory across *the Maldives'* seabed.”⁷³ In this regard, the Special Chamber made it clear:

[A] coastal State must demonstrate a natural prolongation of *its* submerged land territory to the outer edge of *its* continental margin beyond 200 nm. It follows that 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.⁷⁴

According to the Chamber, “the first route presented by Mauritius passes within the continental shelf of the Maldives within 200 nautical miles that is uncontested by Mauritius,” and hence, “it cannot form a basis for Mauritius' natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 nm.”⁷⁵ Accordingly, the first route was rejected by the Special Chamber.

Concerning the second and third routes, the Special Chamber noted that “there is significant uncertainty as to whether the second and third routes could form a basis for Mauritius' natural prolongation to the critical foot of slope point.”⁷⁶ In light of this, the Special Chamber considered:

On the basis of its assessment of the Parties' pleadings in the present proceedings, and taking into account the fundamental disagreement between the Parties on the aforementioned scientific and technical issues, the Special Chamber is of the view that there is significant uncertainty as to whether the second and third routes presented by Mauritius could form a basis for its natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 nm.⁷⁷

The Chamber accordingly decided that “[g]iven the significant uncertainty, the Special Chamber is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region.”⁷⁸ However, the Special Chamber provided no further

73. Mauritius/Maldives, *supra* note 8, 1 Counter-Memorial of the Republic of Maldives, ¶ 82 (Nov. 25, 2021), https://itlos.org/fileadmin/itlos/documents/cases/28/published/C28_Counter-Memorial.pdf. See also Mauritius/Maldives, *supra* note 8, ¶ 438.

74. Mauritius/Maldives, *supra* note 8, ¶ 444.

75. *Id.*

76. *Id.* ¶ 449.

77. *Id.* ¶ 448.

78. *Id.* ¶ 450.

precision with regard to the criterion for assessing the existence of “significant” uncertainty.

To assess the existence of significant uncertainty requires expert knowledge of geology and geomorphology. However, it is open to debate whether ITLOS, as an adjudicative body, is well equipped to assess complex geological and geomorphological facts with the degree of credible certainty.⁷⁹ In response, the use of experts is well worth considering. Yet the Special Chamber, in the *Mauritius/Maldives* case, did not use experts, stating that “in the circumstances of this case, it would not be appropriate to arrange for such an [expert] opinion.”⁸⁰

E. Analysis

The above considerations lead to three observations.

First, the embryonic concept of significant uncertainty was presented by ITLOS in the *Bangladesh/Myanmar* case, and subsequently, that concept was formulated as the standard for assessing the entitlement of the parties to the continental shelf beyond 200 nautical miles in the *Mauritius/Maldives* judgment. The standard of significant uncertainty performs a dual function: prevention of conflicts between the view of the CLCS and that of ITLOS and the prevention of prejudice to the Area, which is the common heritage of humankind. It is of particular interest to note that the Special Chamber highlighted the need for the protection of common interests of the international community in the Area from a coastal State’s unilateral claim to a continental shelf beyond 200 nautical miles.

Second, there will be no scope to apply the standard of significant uncertainty to the circumstances where there is uncontested scientific evidence regarding the parties’ entitlement to the continental shelf extending beyond 200 nautical miles. Hence, as a matter of theory, the standard of significant uncertainty may come into play in the situation where scientific evidence regarding entitlements to a continental shelf beyond 200 nautical miles is contested by one of the disputing parties and/or scientific evidence is debatable or absent.

79. Lando, *supra* note 52, at 156. In this regard, ITLOS, in the *Bangladesh/Myanmar* case, noted that: “as this article contains elements of law and science, its proper interpretation and application requires both legal and scientific expertise.” *Bangl./Myan.*, *supra* note 4, ¶ 411.

80. *Id.* ¶ 454.

Third, the criterion for assessing the existence of “significant” uncertainty remains less clear. Given that ITLOS is ill-equipped to assess geological and geomorphological data, the objectiveness of the application of the significant uncertainty standard could be better enhanced if the relevant data could be assessed by experts. In fact, Judge Heider, in his declaration, stated:

In my view, an expert opinion would have served to strengthen the scientific and technical basis for the Special Chamber’s conclusions with respect to the second and third routes advanced by Mauritius in support of its natural prolongation to the foot of slope point on which it bases its claim of entitlement to the continental shelf beyond 200 nm.⁸¹

III. ENTITLEMENT TO A CONTINENTAL SHELF WITHIN ANOTHER STATE’S EEZ: ANALYSIS OF THE *NICARAGUA V. COLOMBIA* CASE

A. Introduction

This Part analyzes the 2023 *Nicaragua v. Colombia* case before the ICJ. The background of this case is complex. On December 6, 2001, Nicaragua instituted proceedings against Colombia in respect of a dispute “concerning title to territory and maritime delimitation” in the western Caribbean. In the ICJ’s judgment of November 19, 2012, the Court decided that Colombia had sovereignty over the several islands and established a single maritime boundary delimiting the continental shelf and the EEZ of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured.⁸² However, the Court declined Nicaragua’s submission with regard to the delimitation of the continental shelf beyond 200 nautical miles.⁸³

On June 23, 2013, Nicaragua presented its full submission to the CLCS regarding the limits of its continental shelf beyond 200 nautical miles. Subsequently, on September 16, 2013, Nicaragua filed an application with the ICJ instituting proceedings on the basis of Article XXXI of the Pact of Bogotá, requesting the Court to adjudge and declare the precise course of the

81. Mauritius/Maldives, *supra* note 8, Declaration of Judge Heider, ¶ 30, https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_decl_Heidar_orig.pdf. This view was echoed by President Paik. Mauritius/Maldives, *supra* note 8, Declaration of President Paik, ¶ 9, https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_decl_Paik_orig.pdf.

82. *Nicar. v. Colom.*, *supra* note 44, at 719–20, ¶ 251(4).

83. *Id.* at 719, ¶ 251(3).

maritime boundary between Nicaragua and Colombia in the areas of the continental shelf beyond the boundaries determined by the Court in its 2012 Judgment.⁸⁴ In its judgment of March 17, 2016, the Court found, by the President's tie-breaking vote, that it had jurisdiction to entertain the request put forward by Nicaragua in its application.⁸⁵

B. Assessment of Customary International Law

Unlike Nicaragua, Colombia is not a party to UNCLOS. Hence, a rule of customary international law is key in the *Nicaragua v. Colombia* case. In this regard, the essential question is formulated as follows:

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?⁸⁶

When assessing a rule of customary international law, the ICJ applies the two-elements approach, which consists of an objective element of "extensive and virtually uniform" State practice and a subjective or mental element known as the *opinio juris*.⁸⁷ An issue at point was whether there are general State practice and *opinio juris* that generate a rule of customary international law relating to the question mentioned above. The ICJ's view on this matter deserves quoting in full:

The Court notes that, in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State. The Court considers that the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than

84. *Nicar. v. Colom.*, *supra* note 9, ¶ 1.

85. *Nicar. v. Colom.*, *supra* note 4, at 140, ¶ 126(2)(b).

86. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicar. v. Colom.*), Order of Oct. 4, 2022, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20221004-ORD-01-00-EN.pdf>.

87. *Nicar. v. Colom.*, *supra* note 9, ¶ 46. See also Int'l Law Comm'n, *Draft Conclusions on Identification of Customary International Law*, Conclusion 2, U.N. Doc. A/73/10 (2018), reprinted in [2018] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 90, U.N. Doc. A/CN.4/SER.A/2018/Add.1 (Part 2).

a sense of legal obligation. Furthermore, the Court is aware of only a small number of States that have asserted in their submissions a right to an extended continental shelf encroaching on maritime areas within 200 nautical miles of other States, and in those instances the States concerned have objected to those submissions. Among the small number of coastal States that are not States parties to the Convention, the Court is not aware of any that has claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State. Taken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law. In addition, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*, which is a constitutive element of customary international law. Indeed, this element may be demonstrated “by induction based on the analysis of a sufficiently extensive and convincing practice.”⁸⁸

In light of this, the Court concluded:

[U]nder customary international law, 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 may not extend within 200 nautical miles from the baselines of another State.⁸⁹

According to the ICJ, “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.”⁹⁰ As a consequence, there is no area of overlapping entitlements in the *Nicaragua v. Colombia* case. Since the Court cannot proceed to a maritime delimitation in the absence of overlapping entitlements over the same maritime areas, the Court did not address the second question.⁹¹ On the basis of the above consideration, the Court rejected the requests made by Nicaragua.⁹²

88. *Nicar. v. Colom.*, *supra* note 9, ¶ 77 (citation omitted).

89. *Id.* ¶ 79.

90. *Id.* ¶ 82.

91. *Id.* ¶ 82.

92. *Id.* ¶ 104.

The ICJ's view regarding customary international law constitutes the most debatable issue in the *Nicaragua v. Colombia* judgment. In fact, five members of the Court challenged the majority opinion.⁹³ The watershed that divides the majority and dissenting opinions concerned the manner of the assessment of State practice and *opinio juris*.

As regards State practice, Colombia claimed that about fifty-five submissions of continental shelf claims to the CLCS could have extended into the 200-nautical-mile zones of other States on technical grounds, but fifty-one of those fifty-five submissions stopped at the 200-nautical-mile entitlements of neighboring States.⁹⁴ “Moreover,” Colombia claimed, “no non-State party to UNCLOS has laid claim to an extended continental shelf that encroaches on the 200-nautical-mile zones of another State.”⁹⁵ Thus, Colombia claimed that

the vast majority of those States do not claim a continental shelf that would encroach on maritime areas within 200 nautical miles from the baselines of another State. Colombia adds that the great majority of delimitations by way of agreement between States have disregarded geological and geomorphological features within 200 nautical miles of any coast.⁹⁶

The fact was confirmed by the ICJ itself, stating that “the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State.”⁹⁷

93. Judges Tomka, Robinson, Charlesworth, Xue, and Judge ad hoc Skotnikov.

94. *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 34, ¶ 7, 42, ¶ 50 (statement of Rodman Bundy, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>. *See also id.*, Verbatim Record of Dec. 9, 2022, CR 2022/28, at 23, ¶ 29 (statement of Rodman Bundy, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221209-ORA-01-00-BI.pdf>; *id.*, Judgment, Separate Opinion of Judge Xue, ¶ 39, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>. The four States are China, the Republic of Korea, Nicaragua, and Somalia.

94. *Nicar. v. Colom.*, *supra* note 9, ¶ 67.

95. *Id.*, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 42–43, ¶ 50 (statement of Rodman Bundy, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>.

96. *Nicar. v. Colom.*, *supra* note 9, ¶ 67.

97. *Id.* ¶ 77. *See also* Liao, *supra* note 2, at 95–104.

However, Judge Tomka questioned the majority opinion because, in his words, “the Judgment does not acknowledge, much less analyse, the existence of contrary State practice whereby States have claimed a continental shelf entitlement that extends within 200 nautical miles from the baselines of another State.”⁹⁸ In this regard, the learned judge referred to the following examples: (1) Bangladesh’s 2011 submission in respect of the Bay of Bengal, (2) Cameroon’s 2009 preliminary information in respect of the Gulf of Guinea, (3) China’s 2012 partial submission in part of the East China Sea, (4) France’s 2014 partial submission in respect of Saint-Pierre-et-Miquelon, (5) Korea’s 2012 partial submission in respect of the East China Sea, (6) Nicaragua’s 2013 submission in respect of the Caribbean Sea, (7) Russia’s 2001 submission in respect of the Arctic Ocean, (8) Somalia’s 2015 amended executive summary of its submission in respect of the Indian Ocean, (9) Tanzania’s 2009 preliminary information in respect of the Indian Ocean, and (10) Argentina’s 2009 submission in respect of the South Atlantic Ocean.⁹⁹ In the view of Judge Tomka, “[t]his practice cuts against the Judgment’s rather exaggerated assertion that the ‘vast majority’ of States parties to UNCLOS that have made submissions to the CLCS have chosen not to assert therein limits that extend within 200 nautical miles of another State’s coast.”¹⁰⁰

However, it must be noted that the above submissions have drawn objections from other States. For instance, Japan lodged an objection to China’s 2012 partial submission in part of the East China Sea.¹⁰¹ Japan lodged a similar objection to Korea’s 2012 partial submission in respect of the East China Sea.¹⁰² Bangladesh’s 2011 submission in respect of the Bay of Bengal encountered an objection from Myanmar.¹⁰³ Nicaragua’s 2013 submission in respect of the Caribbean Sea was objected to by several States,

98. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 42, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

99. *Id.* ¶ 45.

100. *Id.*

101. Note Verbale, Permanent Mission of Japan to the United Nations (Dec. 28, 2012), https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf.

102. Note Verbale, Permanent Mission of Japan to the Secretariat of the United Nations, SC/13/019 (Jan. 11, 2013), https://www.un.org/Depts/los/clcs_new/submissions_files/kor65_12/jpn_re_kor_11_01_2013.pdf.

103. Note Verbale, Permanent Mission of Myanmar to the Secretary-General of the United Nations, No. 146/032017 (Mar. 31, 2011), https://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/mmr_nv_un_001_08_04_2011.pdf.

including Costa Rica, Colombia, and Panama.¹⁰⁴ Likewise Argentina's 2009 submission in respect of the South Atlantic Ocean has been opposed by several States. The Netherlands stated that it "does not recognize that a claim to territorial sovereignty in Antarctica is capable of creating any sort of rights over the continental shelf to Antarctica" and that the Netherlands "does not consider that the continental shelf adjacent to Antarctica is subject to the sovereign rights of any State."¹⁰⁵

The objections may undermine the weight of the contrary State practice referred to by Judge Tomka. Furthermore, it cannot pass unnoticed that the practice of some States is inconsistent.¹⁰⁶ For instance, France's submissions in respect of the areas of French Guiana and New Caledonia and in respect of French Polynesia stop at 200 nautical miles from the coasts of neighboring States, but its submission concerning Saint Pierre and Miquelon extends within 200 nautical miles from the coast of Canada.¹⁰⁷ In light of the various States' oppositions and inconsistency of State practice, some doubts can be expressed as to whether the instances referred to by Judge Tomka would furnish an adequate State practice that demonstrates the existence of a rule that a continental shelf entitlement beyond 200 nautical miles may extend within 200 nautical miles measured from the baseline of another State.

104. Communication of Colombia, Costa Rica and Panama to the Secretary-General of the United Nations (Sept. 23, 2013), https://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/col_cri_pan_re_nic_2013_09_23e.pdf.

105. Note Verbale, Permanent Mission of the Netherlands to the Secretary-General of the United Nations, No. NYV/2009/2459 (Sept. 30, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/nld_re_arg_2009.pdf.

106. Judge Tomka: "I also accept that, for some States, practice varies and should arguably be given less weight." *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 49, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

107. *Nicar. v. Colom.*, *supra* note 9, Judgment, Separate Opinion of Judge Xue, ¶ 38, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>; *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, at 13 n.62, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>; Republic of France, Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea in Respect of the Areas of French Guiana and New Caledonia (2007), https://www.un.org/Depts/los/clcs_new/submissions_files/fra07/fra_executivesummary_2007.pdf; Republic of France, Partial Submission to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8 of the United Nations Convention on the Law of the Sea in Respect of the Area of Saint-Pierre-et-Miquelon (2014), https://www.un.org/Depts/los/clcs_new/submissions_files/fra72_14/SPM_Summary_EN_April2014.pdf.

In any event, as Judge Tomka himself accepted, “some inconsistencies and contradictions are not necessarily fatal to a finding of ‘a general practice.’”¹⁰⁸ Indeed, even dissenters, Judges Robinson¹⁰⁹ and Charlesworth,¹¹⁰ admitted that State practice on this matter can be considered as general. Hence, it may not be unreasonable to consider that State practice regarding the continental shelf beyond 200 nautical miles would meet the requirement of generality.

However, the Court’s assessment of *opinio juris* is more debatable. In this regard, Judge Robinson posed the following question to Colombia:

Colombia cited several examples of States which stopped their continental shelf submissions to the CLCS at the 200 nautical mile limit from the baselines from which the breadth of other States’ territorial sea is measured, even though they could have extended their claims further. Nicaragua has submitted that States stopped their continental shelf claims at that limit because it was equitable to do so. Given Nicaragua’s position, a question may arise as to whether the States cited by Colombia stopped their claims at that limit because they considered themselves to be under a customary obligation not to extend their continental shelves into a neighbouring State’s EEZ? In other words, while these submissions may be evidence of practice, to what extent do they also evidence *opinio juris* in relation to such a rule of customary international law?¹¹¹

Colombia replied that “a practice may indicate a conviction as to what the law is, especially when the matter at issue is governed by international law, as is obviously the case with maritime entitlements.”¹¹² As quoted earlier, the ICJ also considered that “the practice of States before the CLCS is indicative

108. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 49, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

109. Judge Robinson stated that “There is therefore practice that can be considered sufficiently widespread and uniform.” *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Robinson, ¶ 13, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-04-en.pdf>.

110. Judge Charlesworth opined that “This practice appears to be a general one.” *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Charlesworth, ¶ 26, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>.

111. *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 7, 2022, CR 2022/27, at 40 (question by Robinson, J.), <https://icj-cij.org/sites/default/files/case-related/154/154-20221207-ORA-01-00-BI.pdf>.

112. *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 9, 2022, CR 2022/28, at 14, ¶ 14 (statement of Michael Wood, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221209-ORA-01-00-BI.pdf>.

of *opinio juris*” and that “this State practice may be seen as an expression of *opinio juris*.”¹¹³

Stressing the variety of motives, however, Judge Tomka criticized the majority opinion. In his words, “[t]oday’s Judgment does not acknowledge the existence of clear expressions of *opinio juris* to the effect that a State’s entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State.”¹¹⁴ This view was echoed by Judges Xue¹¹⁵ and Robinson.¹¹⁶ By contrast, Judge Charlesworth, in her dissenting opinion, accepted that State practice is “supported by legal conviction (*opinio juris*).”¹¹⁷

The difficulty in finding evidence of *opinio juris* constitutes an inherent problem associated with the identification of a rule of customary international law.¹¹⁸ The ICJ, in its jurisprudence, has taken a flexible approach to the assessment of *opinio juris*. The *North Sea Continental Shelf* cases are cases in point. When examining the customary law character of the equidistance method, the Court rigidly assessed the existence of *opinio juris* and denied the customary law character of that method.¹¹⁹ However, the Court did not apply the rigid test of the two elements of custom to the equitable principles.¹²⁰ If the rigid test had been applied to the equitable principles, it seems debatable whether the customary law character of equitable principles could have

113. *Id.* ¶ 77.

114. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 59, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

115. Judge Xue argued that “[t]here is no evidence shown in the Judgment that those States parties, when restricting their claim in the submissions, believed that such restraint was required by a legal obligation or guided by law.” *Nicar. v. Colom.*, *supra* note 9, Judgment, Separate Opinion of Judge Xue, ¶ 47, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>.

116. In view of Judge Robinson, “The Court’s Judgment is open to criticism because in the particular circumstances of this case there is no basis for deriving *opinio juris* from State practice relied upon.” *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Robinson, ¶ 19, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-04-en.pdf>.

117. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Charlesworth, ¶ 27, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>.

118. Hans Kelsen, *Théorie du droit international coutumier*, in HANS KELSEN ECRITS FRANÇAIS DE DROIT INTERNATIONAL 73–74 (Charles Leben ed., 2001).

119. *North Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

120. Philippe Cahier, *Cours général de droit international public*, 195 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 9, 245 (1985).

been proved.¹²¹ It may have to be admitted that in the *North Sea Continental Shelf* cases, the Court applied a double standard.¹²²

The *North Sea Continental Shelf* cases demonstrated that an *opinio juris* can be used as a flexible tool to either confirm or deny a rule of customary international law. It becomes possible for the Court to deny the existence of a rule of customary international law by rigidly assessing the existence of *opinio juris*. By contrast, the Court assesses *opinio juris* in a flexible manner when confirming the existence of a rule of customary international law. Furthermore, the Court has safeguarded rules of customary international law reflecting common interests of the international community, such as the prohibition of the use of force, by giving much weight to an *opinio juris* reflected in UN General Assembly resolutions,¹²³ even though such rules have been frequently breached. Thus, *opinio juris* can be used as a shield to maintain the validity of a rule of customary international law reflecting community interests.

In summary, two contrasting approaches exist with regard to the assessment of *opinio juris*: the rigid (or positivist) approach and the flexible (or teleological) approach. In this regard, it must be stressed that, unlike an ordinary explanation, *opinio juris* is not merely an element that distinguishes those social conventions that are legally binding from comity that is not legally binding.¹²⁴ *Opinio juris* performs a much more crucial role as a tool to confirm or deny the existence of a rule of customary international law.

The 2023 *Nicaragua v. Colombia* judgment also reflected the opposition of the two approaches. In this case, the majority opinion assessed the existence of *opinio juris* in a flexible manner with a view to confirming a rule of customary international law concerning the entitlement to the continental shelf beyond 200 nautical miles. By contrast, Judges Tomka, Robinson, and Xue

121. D. P. O'CONNELL, 2 THE INTERNATIONAL LAW OF THE SEA 696 (1984); NUNO SÉRGIO MARQUES ANTUNES, TOWARDS THE CONCEPTUALISATION OF MARITIME DELIMITATION: LEGAL AND TECHNICAL ASPECTS OF A POLITICAL PROCESS 95–97 (2003).

122. See ROSALYN HIGGINS, PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 223 (1994). See also P-M Dupuy, *Le juge et la règle générale*, 93 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 569, 576–78 (1989); TANAKA, *supra* note 5, at 53.

123. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8).

124. See, e.g., VAUGHAN LOWE, INTERNATIONAL LAW 38 (2007).

applied a rigid approach to the assessment of *opinio juris* in order to deny the existence of such a rule of customary international law.¹²⁵

It may have to be accepted that the two elements of State practice and *opinio juris* are usually inseparable in practice.¹²⁶ In this regard, Charles Rousseau argued that owing to the difficulty of demonstrating the existence of *opinio juris* in a positive way, international case law has deduced it from the circumstances surrounding relevant State practice as a whole, such as the succession of similar facts, the existence of a uniform and constant practice, the number and importance of the States participating in a multilateral treaty creating new law, etc.¹²⁷ Judge Iwasawa also pointedly observed:

States usually do not curtail themselves when they believe that they have a right. If an issue is regulated by international law and States abstain from certain conduct in a way that is inconsistent with their own interests, it may be presumed that their abstention is motivated by a sense of legal obligation.¹²⁸

125. It is not suggested that Nicaragua's claim was supported by the dissenters. For instance, Judge Xue considered that "[t]he materials submitted by Nicaragua are not sufficient for the Court to ascertain whether and to what extent Nicaragua's continental shelf extends within 200 nautical miles of Colombia." *Nicar. v. Colum.*, *supra* note 9, Judgment, Separate Opinion of Judge Xue, ¶ 56, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>. Judge Tomka stated that "My vote however should not be seen as meaning that I would have necessarily upheld Nicaragua's submission as far as the delimitation line it proposed." *Nicar. v. Colum.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 74, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>. Likewise Judge Charlesworth stated that "I do not necessarily endorse Nicaragua's position on the question of maritime delimitation." *Nicar. v. Colum.*, *supra* note 9, Dissenting Opinion of Judge Charlesworth, ¶ 37, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>.

126. Brigitte Stern, *La coutume au cœur du droit international. Quelques réflexions*, in *LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ, MÉLANGES OFFERTS À PAUL REUTER* 482 (1981). For the same view, Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Five*, 64 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 1, 41 (1993); Peter Haggemacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, 90 *REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC* 1, 114 (1986).

127. CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC, TOME I, INTRODUCTION ET SOURCES* 325 (1970).

128. *Nicar. v. Colum.*, *supra* note 9, Separate Opinion of Judge Iwasawa, ¶ 12, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-05-en.pdf>.

All in all, it may not be unreasonable to consider a general practice as indicative of *opinio juris*.¹²⁹ Hence, it would appear that the ICJ's interpretation of a rule of customary international law, including the assessment of *opinio juris*, has some force.¹³⁰

An issue that needs further consideration is whether the ICJ's interpretation can be supported by the other considerations or, conversely, whether there is a factor that is contrary to the Court's interpretation. Here, two issues must be examined: the inter-relationship between the EEZ and the continental shelf and the "grey area."

C. *The Inter-Relationship Between the EEZ and the Continental Shelf*

When considering the inter-relationship between the EEZ and the continental shelf, the integrity of the EEZ and the continental shelf must be stressed. This point was highlighted by the ICJ in the *Libya/Malta* judgment as follows:

Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. *Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.*¹³¹

129. Nicaragua also accepted that "Sir Michael P'a affirmé avec force: «it is important to note that practice may sometimes be evidence of acceptance as law (*opinio juris*)»." *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 7, 2022, CR 2022/27, at 26, ¶ 14 (statement by Alain Pellet, representative of Nicaragua), <https://icj-cij.org/sites/default/files/case-related/154/154-20221207-ORA-01-00-BI.pdf>.

130. A possible criticism may be that in its 2012 judgment, the ICJ had not dismissed Nicaragua's continental shelf beyond 200 nautical miles on the basis of a rule of customary international law that the Court identified in its 2023 judgment. *See Nicar. v. Colum.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 4, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>. As Judge Nolte observed, a possible explanation may be that "such a rule has subsequently emerged as a rule of customary international law." *Nicar. v. Colum.*, *supra* note 9, Separate Opinion of Judge Nolte, ¶ 13, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-06-en.pdf>. *See also* Alexianu, *supra* note 9, at 3.

131. *Continental Shelf (Libya/Malta)*, Judgment, 1985 I.C.J. 13, ¶ 34 (June 3) (emphasis added).

As the Court clearly stated, the concept of the EEZ comprises the seabed and its subsoil, and the continental shelf within 200 nautical miles forms part of the EEZ.¹³² Accordingly, separating the continental shelf (i.e., the seabed and its subsoil of the EEZ) from the superjacent waters within 200 nautical miles is inconsistent with the concept of the EEZ itself.¹³³

Related to this, Judge Iwasawa considered that “natural prolongation has been replaced by distance as the criterion used to define the continental shelf within 200 nautical miles.”¹³⁴ Following this interpretation, only the distance criterion provides the legal title to the continental shelf within 200 nautical miles. This point was already confirmed by the ICJ in the *Libya/Malta* case, stating:

where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, *title depends solely on the distance from the coasts* of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.¹³⁵

Accordingly, to accept the legal title of a third State to the continental shelf within the 200-nautical-mile EEZ of the coastal State on the basis of natural prolongation is inconsistent with the coastal State’s entitlement on the basis of distance as the sole criterion to the continental shelf within 200 nautical miles.

All in all, as the ICJ observed in the *Libya/Malta* case, one can say that “the two institutions—continental shelf and exclusive economic zone—are

132. ROBIN CHURCHILL ET AL., *THE LAW OF THE SEA* 258 (4th ed. 2022); YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 161 (4th ed. 2023); LAN NGOC NGUYEN, *THE DEVELOPMENT OF THE LAW OF THE SEA BY UNCLOS DISPUTE SETTLEMENT BODIES* 148 (2023).

133. In this regard, Colombia argued that “an exclusive economic zone whose water column is divorced from its sea-bed and subsoil is no longer an exclusive economic zone.” *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 48, ¶ 7 (statement of Lorenzo Palestini, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>.

134. *Nicar. v. Colum.*, *supra* note 9, Separate Opinion of Judge Iwasawa, ¶ 4, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-05-en.pdf>. *See also* *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 21–22, ¶ 12 (statement of Michael Wood, representative of Columbia), <https://icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>.

135. *Libya/Malta*, *supra* note 131, at 35, ¶ 39 (emphasis added).

linked together in modern law.”¹³⁶ The key provision connecting the two institutions is Article 56(3) of UNCLOS, which stipulates: “The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.” In this regard, Judge Oda, in the *Tunisia/Libya* case, suggested that the intention of the authors of the draft convention was that “Article 56, paragraph 3, should be interpreted to mean that the régime of the exclusive economic zone will incorporate, in principle, the whole régime of the continental shelf.”¹³⁷ Judge Jiménez de Aréchaga also stated: “at least in the case of continental shelves not extending beyond 200 miles, the notion of the continental shelf is in the process of being assimilated to, or incorporated in that of the Exclusive Economic Zone.”¹³⁸ Likewise, Judge Attard opined that “these provisions [Articles 77(1) and 56(3)] merge the shelf regime with that of the EEZ regime.”¹³⁹

Commentators shared the view mentioned above. For instance, Lan Ngoc Nguyen also argued that “the EEZ and continental shelf regimes constitute an integral system of rights and obligation within 200 nm.”¹⁴⁰ This view was echoed by Prölss, stating: “the wording of Art. 56(1), by referring also to ‘seabed and its subsoil’, clarifies that if and to the extent to which the coastal State has claimed and established an EEZ above its continental shelf, the two zones form part of *an integral regime*.”¹⁴¹

All in all, as Judge Iwasawa stated, it may have to be admitted that “the régime of the exclusive economic zone affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State.”¹⁴²

D. *The Grey Area*

The next issue that needs discussion concerns the “grey area.” The grey area refers to a marine space that is on one State’s side of a delimitation line but

136. *Id.* at 33, ¶ 33.

137. Continental Shelf (*Tunis./Libya*), Judgment, 1982 I.C.J. 18, 233–34, ¶ 130 (Feb. 24) (dissenting opinion of Oda, J.).

138. *Id.* at 115, ¶ 55 (separate opinion of Jiménez de Aréchaga, J.).

139. DAVID ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 139 (1987). See also JOE VERHOEVEN, *DROIT INTERNATIONAL PUBLIC* 553 (2000).

140. NGUYEN, *supra* note 132, at 149.

141. Alexander Prölss, *Article 56*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 418, 436 (Alexander Prölss ed., 2017) (emphasis added).

142. *Nicar. v. Colom.*, *supra* note 9, Separate Opinion of Judge Iwasawa, ¶ 7, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-05-en.pdf>.

outside that State's 200-nautical-mile limit and *inside* another State's 200-nautical-mile limit.¹⁴³ The grey area is not unknown in the jurisprudence.

In the two *Bay of Bengal* cases, the use of an adjusted equidistance line between Bangladesh and Myanmar and between India and Bangladesh gave rise to a grey area. The grey area in the *Bangladesh/Myanmar* case was located beyond 200 nautical miles from the coast of Bangladesh but within 200 nautical miles from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.¹⁴⁴ As a consequence, Bangladesh's continental shelf rights overlap Myanmar's EEZ rights in the grey area.¹⁴⁵

In the *Bangladesh v. India* case, the delimitation line created an area that lies beyond 200 nautical miles from the coast of Bangladesh and within 200 nautical miles from the coast of India, and yet lies to the east of the Chamber's delimitation line.¹⁴⁶ There are three grey areas in the Bay of Bengal.¹⁴⁷ The first grey area is the area where Bangladesh's continental shelf rights overlap Myanmar's EEZ rights. The second grey area is a trilateral or a "double" grey area where the EEZs of Myanmar and India overlap Bangladesh's continental shelf.¹⁴⁸ The third grey area is the area where Bangladesh's continental shelf rights overlap India's EEZ.¹⁴⁹

The question is whether these grey areas can be considered as evidence contradicting the ICJ's determination that customary international law prohibits a State from claiming continental shelf rights inside another State's

143. Jin-Hyun Paik, *The Grey Area in the Bay of Bengal Case*, in INTERNATIONAL MARINE ECONOMY: LAW AND POLICY 269, 271–81 (Myron H. Nordquist et al. eds., 2017). See also Churchill, *supra* note 54, at 150.

144. *Bangl./Myan.*, *supra* note 4, at 119, ¶ 463.

145. *Id.* at 121, ¶ 474.

146. *Bangladesh v. India* Arbitral Award, *supra* note 4, at 147, ¶ 498.

147. Bjarni Már Magnússon, *The Grey Areas in the Bay of Bengal*, 57 INDIAN JOURNAL OF INTERNATIONAL LAW 41, 43–44 (2016); Raghavendra Mishra, *The "Grey Area" in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution*, 47 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 29, 33–35 (2016); TANAKA, *supra* note 5, at 148–50.

148. Rao used the term "double" grey area. *Bangladesh v. India* Arbitral Award, *supra* note 4, at 173–74, ¶ 24 (concurring and dissenting opinion of P.S. Rao).

149. See Mishra, *supra* note 147, at 33–35. In 2015, Bangladesh drew a new straight baseline. Government of People's Republic of Bangladesh, Notification Pursuant to Article 16, Paragraph 2 of UNCLOS, of a List of Geographical Coordinates of Points Concerning the Straight Baselines for Measuring the Breadth of the Territorial Sea of Bangladesh, Nov. 4, 2015, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/bgd_mzn118.pdf. The new straight baseline affects the scope of the grey areas created by the *Bangladesh/Myanmar* judgment and the *Bangladesh v. India* arbitral award.

EEZ. Indeed, Judge Xue argued that “the ‘grey area’, albeit incidental in nature and small in size, is in itself a piece of hard evidence that disproves at least the inseparability of the two zones in the maritime delimitation.”¹⁵⁰ This view was echoed by Judge Charlesworth,¹⁵¹ Judge Tomka,¹⁵² and Judge ad hoc Skotnikov.¹⁵³

By contrast, the ICJ opined that the grey area constitutes “an incidental result” of that adjustment of the provisional equidistance line, and thus, the circumstances in the *Bay of Bengal* cases are distinct from the situation in the *Nicaragua v. Colombia* case, where one State claims an extended continental shelf that lies within 200 nautical miles from the baselines of one or more other States.¹⁵⁴ Thus, the Court considered that the two *Bay of Bengal* cases are of no assistance in answering the question concerning the first question posed in the *Nicaragua v. Colombia* case.¹⁵⁵

The grey area has been a subject of serious criticism. In particular, four points merit highlighting. First, as explained earlier, the EEZ and the continental shelf form part of an integral regime. However, the grey area is inconsistent with the integrity between the EEZ and the continental shelf. In this regard, P.S. Rao, an arbitrator in the *Bangladesh v. India* case, stated that “[t]he creation of a grey area is entirely contrary to law and the policies underlying the decision taken in UNCLOS to create the EEZ as one single, common maritime zone within 200 nm which effectively incorporates the regime of the continental shelf within it.”¹⁵⁶

150. *Nicar. v. Colum.*, *supra* note 9, Judgment, Separate Opinion of Judge Xue, ¶ 27, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>.

151. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Charlesworth, ¶ 21, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>.

152. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Tomka, ¶ 67, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf>.

153. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge ad hoc Skotnikov, ¶ 17, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-08-en.pdf>.

154. *Id.* ¶ 72. This view is similar to Colombia’s argument. *See Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 45–49, ¶¶ 2–8 (statement of Lorenzo Palestini, representative of Columbia), <https://www.icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>.

155. *Nicar. v. Colom.*, *supra* note 9, Judgment, ¶ 72.

156. *Bangladesh v. India* Arbitral Award, *supra* note 4, at 173–74, ¶ 24 (concurring and dissenting opinion of P.S. Rao). *See also* MASSIMO LANDO, MARITIME DELIMITATION AS A JUDICIAL PROCESS 140 (2019) (“If one accepts the incorporation of the continental shelf

Second, sovereign rights are exclusive in the sense that other States cannot engage in economic activities in the EEZ/continental shelf without the consent of the coastal State.¹⁵⁷ As the Special Chamber of ITLOS stated in the *Mauritius/Maldives* case, “neither Party may claim or exercise sovereign rights or jurisdiction with respect to the exclusive economic zone or the continental shelf within the 200 nm limit of the other Party on the latter’s side of the boundary.”¹⁵⁸ As Rao pointedly observed in the *Bangladesh v. India* arbitration, “within 200 nm from the coast, the sovereign rights of a coastal State over the water column and the seabed and its subsoil are considered as two *indispensable and inseparable parts* of the coastal State’s rights in the EEZ.”¹⁵⁹ Accordingly, to accept the exercise of a third State’s jurisdiction in the seabed and subsoil of the EEZ within 200 nautical miles conflicts with the exclusive nature of the sovereign rights of the coastal State.¹⁶⁰

Third, a grey area creates practical difficulties with regard to the exercise of jurisdiction. In the words of Rao, “[t]he grey area may thus create more problem for the Parties . . . than the benefits it could potentially offer.”¹⁶¹ In this regard, Robin Churchill also expressed his misgivings that “it may pose challenges to states to act with necessary due regard when exercising their rights in a grey zone.”¹⁶²

Fourth, of particular note in this regard, is the dictum in the *Mauritius/Maldives* case. In that case, a possible grey area overlapping the Maldives’ continental shelf beyond 200 nautical miles and Mauritius’ EEZ was at issue.¹⁶³ The question was whether the Maldives’ claim of entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles

into the EEZ, the separation of jurisdiction in *Bangladesh/Myanmar* and *Bangladesh v. India* between seabed and subsoil on one hand and water column on the other hand would be legally groundless.”).

157. TANAKA, *supra* note 132, at 163.

158. *Mauritius/Maldives*, *supra* note 8, ¶ 274.

159. Concurring and Dissenting Opinion of P.S. Rao, *supra* note 148, at 177, ¶ 31.

160. The sovereign rights over the continental shelf exist *ipso facto* and *ab initio*, while the EEZ must be proclaimed by the coastal State. However, the difference does not affect the exclusive nature of the sovereign rights over the EEZ and the continental shelf.

161. Concurring and Dissenting Opinion of Dr. P.S. Rao, *supra* note 148, at 179, ¶ 36.

162. Churchill, *supra* note 54, at 151. *See also* Clive Schofield, Anastasia Telesetsky, and Seokwoo Lee, *A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case*, 44 OCEAN DEVELOPMENT & INTERNATIONAL LAW 363, 376 (2013); Magnússon, *supra* note 147, at 54; Lando, *supra* note 52, at 141.

163. According to the Maldives, the “grey area” denotes a very small area of some 244 square kilometers north of the equidistance line where the Maldives has continental shelf rights, by virtue of its outer continental shelf claim, and Mauritius has rights over the EEZ.

of Mauritius. The Special Chamber gave no effect to Maldives' claim of entitlement to a continental shelf beyond 200 nautical miles that extended within 200 nautical miles of Mauritius. In the words of the Chamber: "the boundary [within 200 nautical miles] has the effect of rendering moot the question of delimitation of the area of overlap between the claim of the Maldives to a continental shelf beyond 200 nm and the claim of Mauritius to a 200 nm zone."¹⁶⁴

Following the Special Chamber's view, a grey area will no longer arise when a State's entitlement to a continental shelf beyond 200 nautical miles extends within the 200-nautical-mile EEZ of another State. In light of the above considerations, it is debatable whether the grey area can provide counter-evidence contradicting the existence of the rule of customary international law prohibiting a State from claiming continental shelf rights inside another State's EEZ.

E. Analysis

The above considerations lead to the following observations. First, the relationship between the distance criterion and the geological criterion (i.e., natural prolongation) remains obscure under UNCLOS. Nor would it be possible to find an answer in the *travaux préparatoires* of UNCLOS.¹⁶⁵ However, the ICJ, in the *Nicaragua v. Colombia* judgment, clearly declared that under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles may not extend within 200 nautical miles from the baselines of another State. It would seem to follow that within the 200-nautical-mile EEZ, the distance criterion trumps natural prolongation,¹⁶⁶ even though the ICJ did not explicitly declare this point.¹⁶⁷

Mauritius/Maldives, *supra* note 8, ¶ 267. For an illustration of Maldives' grey area, see Mauritius/Maldives, *supra* note 8, Rejoinder of the Republic of Maldives, Vol. I, at 32, Aug. 15, 2022, https://itlos.org/fileadmin/itlos/documents/cases/28/published/C28_Rejoinder.pdf.

164. Mauritius/Maldives, *supra* note 8, ¶ 274.

165. In this regard, the ICJ held that "the possibility of one State's extended continental shelf extending within 200 nautical miles from the baselines of another State was not debated during the Third United Nations Conference on the Law of the Sea." *Nicar. v. Colom.*, *supra* note 9, ¶ 76.

166. See also Woker, *supra* note 9.

167. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Robinson, ¶ 2, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-04-en.pdf>.

Second, the difference between the majority and dissenting opinions in the *Nicaragua v. Colombia* judgment consists in their different approaches to the assessment of a rule of customary international law, that is, the flexible (or teleological) approach or the rigid (or positivist) approach. The difference is vividly raised with regard to the assessment of *opinio juris*. By rigidly or flexibly assessing *opinio juris*, the Court has discretion to decide the existence or absence of a rule of customary international law. In the *Nicaragua v. Colombia* case, the ICJ applied a flexible approach to the assessment of *opinio juris*, with a view to confirming the rule of customary international law. In so doing, the Court seemingly attempted to prevent complex legal and practical issues that arise when a State extends its continental shelf within 200 nautical miles from the baselines of another State.¹⁶⁸

Third, as the ICJ rightly observed, there cannot be an EEZ without a corresponding continental shelf. Furthermore, sovereign rights over the EEZ under Article 56 of UNCLOS are exclusive. Thus, concerning the matters provided by international law, the coastal State exercises its exclusive jurisdiction over the seabed and subsoil and its superjacent waters within the EEZ. Hence it is illogical to consider that a third State can concurrently exercise exclusive jurisdiction over the seabed and subsoil of the EEZ of another State.

Fourth, it appears that the grey area has received little support in light of its theoretical and practical problems. Hence, the value of the grey area should not be overestimated. It is true that in State practice, there are some instances where coastal States established two separate delimitation lines for the seabed and its superjacent waters.¹⁶⁹ However, unless a rule constitutes *jus cogens*, States can modify the application of a rule of customary international law by agreement. Hence the State practice regarding the establishment of separate maritime boundaries for the seabed and its superjacent waters may not be an obstacle to confirm the existence of a rule of customary international law prohibiting a State from claiming continental shelf rights inside another State's EEZ.

168. See also *Nicar. v. Colum.*, *supra* note 9, Verbatim Record of Dec. 6, 2022, CR 2022/26, at 16–17, ¶¶ 23–26 (statement of Eduardo Valencia-Ospina, representative of Colombia) <https://icj-cij.org/sites/default/files/case-related/154/154-20221206-ORA-01-00-BI.pdf>.

169. *Nicar. v. Colum.*, *supra* note 9, Judgment, Separate Opinion of Judge Xue, ¶¶ 28–36, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>. See also TANAKA, *supra* note 5, at 454–56.

Fifth, the ITLOS Special Chamber, in the *Mauritius/Maldives* case, took the view that a State's entitlement to the continental shelf beyond 200 nautical miles would become "moot" when it extends within the 200 nautical miles limit of the EEZ of the coastal State. Following the Special Chamber's view, a State's entitlement to a continental shelf beyond 200 nautical miles that extends within the 200-nautical-mile EEZ of another State shall be given no effect. It appears that this approach has the effect of erasing a grey area.

Sixth, on the basis of equity, Judge Charlesworth, in her dissenting opinion, argued that "under the applicable rules on maritime delimitation, an entitlement to an extended continental shelf in principle shall be given no effect in so far as it overlaps with another State's entitlement to a 200-nautical-mile zone."¹⁷⁰ According to the learned judge, "[w]hile a State's entitlement to an extended continental shelf remains intact in the abstract, in practice it will likely be subordinated to the neighbouring State's entitlement to a 200-nautical-mile zone by virtue of the goal of achieving an equitable solution."¹⁷¹ It would appear that the ITLOS Special Chamber's approach in the *Mauritius/Maldives* case has an affinity with Judge Charlesworth's approach in the *Nicaragua v. Colombia* case.

IV. CONCLUSION

This article examined the issues concerning entitlements to a continental shelf beyond 200 nautical miles by analyzing the *Mauritius/Maldives* and *Nicaragua v. Colombia* cases of 2023. The two cases marked a milestone in the development of the law of delimitation of the continental shelf beyond 200 nautical miles. By way of conclusion, six comments can be made.

First, the ITLOS Special Chamber, in the *Mauritius/Maldives* judgment, formulated the standard of significant uncertainty, and the standard is essentially preventive. Prudence and caution would be required with a view to avoiding conflicts between the CLCS and adjudicative bodies and a risk of prejudice to the Area. Hence, the application of that standard can perform a crucial role in a situation where the CLCS has not issued a recommendation and the entitlement to the continental shelf beyond 200 nautical miles is not well established.

170. *Nicar. v. Colom.*, *supra* note 9, Dissenting Opinion of Judge Charlesworth, ¶ 31, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>.

171. *Id.* ¶ 33.

Second, the criterion for the standard of significant uncertainty needs further clarification. The ITLOS Special Chamber, in the *Mauritius/Maldives* case, did not use experts when assessing the significant uncertainty relating to the parties' entitlement to the continental shelf beyond 200 nautical miles. Given that an adjudicative body is ill-equipped to assess complex geological and geomorphological facts, the use of experts may be worth considering with a view to enhancing the objectiveness of the application of that standard.

Third, it is remarkable that the ICJ, in the *Nicaragua v. Colombia* case, identified a rule of customary international law that the continental shelf of a State beyond 200 nautical miles may not extend within 200 nautical miles from the baselines of another State. In so doing, the Court gave an answer to the difficult question concerning the relationship between the distance criterion and natural prolongation in the continental shelf beyond 200 nautical miles.¹⁷²

Fourth, it is true that the ICJ's view was challenged by some members of the Court. The difference between the majority and dissenting opinions consists in the approaches to the assessment of a rule of customary international law, in particular, *opinio juris*. By rigidly applying the positivist approach, one can easily deny the existence of a rule of customary international law. In the *Nicaragua v. Colombia* case, however, the ICJ did not take this approach. Instead, the Court assessed the general practice and *opinio juris* in a flexible manner. It would appear that the Court's approach reflected its judicial policy to prevent adverse implications of the continental shelf beyond 200 nautical miles that extends into the EEZ of another State for an international legal order in the oceans.

Fifth, unlike the ICJ, the ITLOS Special Chamber, in the *Mauritius/Maldives* case, did not declare a rule of customary international law concerning the entitlements of the continental shelf beyond 200 nautical miles that extends into the EEZ of another State. Even so, the Special Chamber gave no effect to Maldives' claim to an entitlement to the continental shelf that extends within 200 nautical miles of Mauritius. Despite the difference in the approaches taken by the ICJ and ITLOS Special Chamber, the legal consequence will remain the same: no effect shall be given to a continental shelf beyond 200 nautical miles that extends into the 200-nautical-mile EEZ of

172. The *Nicaragua v. Colombia* judgment may have practical effects on maritime claims in other regions of the world, including the East China Sea. See Alexianu, *supra* note 9, at 5–6.

another State. It would appear that the approaches taken by the ICJ and ITLOS prevent complex issues arising from the separation of legal regimes governing the seabed/subsoil and its superjacent waters within 200 nautical miles.