6 The Continental Shelf

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(p. 137) 6. The Continental Shelf

6.1 The Continental Shelf

The continental shelf is a challenging area of the Earth to analyse. It is as old as the bordering lands and as young as our knowledge of it; it is an imagined juridical space and a real physical phenomenon; it encompasses some of the most hotly disputed territory on Earth but is governed by one of the most widely accepted multilateral regimes in history; it holds the promise of economic growth for developing States and the fear of militarization for developed States. This Chapter seeks to outline the complex and often contradictory nature of the continental shelf and to help the reader locate further resources and research in the area.

6.1.1 The physical nature and extent of the continental shelf

The continental shelf has a physical reality distinct from legal definitions. Physical definitions of the shelf and the terms used to describe it vary but the continental shelf is, in essence, a relatively shallow extension of the continental landmass surrounding most of the continents. The shelf reaches from the shore of a State to the shelf edge (also called the shelf break) where, at an average depth of 135 metres,[1] it meets the continental slope (see Figure 6.1). The continental slope is an area of relatively steep descent to the deep ocean floor where, in some areas, the slope and floor may be divided by a gently sloping apron of sediment called the continental rise.[2]

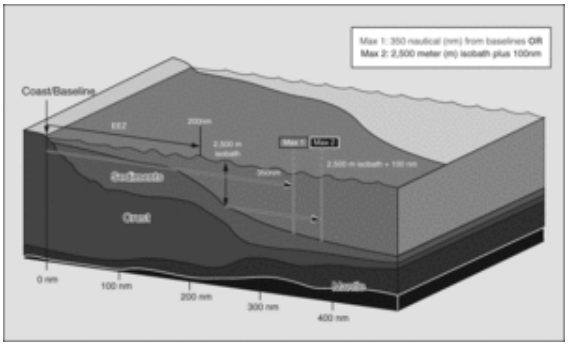

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Figure 6.1 Extended continental shelf constraint lines

Some continental shelves emerged as above-water land masses in the last ice age. As a large amount of the Earth's water became trapped in ice, sea levels dropped and exposed these shelves as land. Later, glaciers melted and sea levels rose, such that (p. 138) the water covering the shelf today averages only about 60 metres and, in places where there is no noticeable slope between the shore and the shelf break, the continental shelf is generally considered by geologists to end where the superjacent water is roughly 100 to 200 metres deep.[3] Yet the shelf, break, slope, and rise are not completely static. This part of the Earth is affected by diverse phenomena including sediment accumulation, ocean level rise, tectonic plate movement, and erosion.

A variety of technologies have been used to determine the extent of the continental shelf and to produce maps of the ocean floor. These techniques include single beam and multibeam bathymetry, surface gravimetry, geomagnetism, seismic surveys, survey craft, and bottom and coring samplings.[4] While these technologies may have been intended to establish a three-dimensional view of the ocean floor (p. 139) and a detailed understanding of what lies beneath the ocean floor, they have also given rise to State claims to jurisdiction over the continental shelf, especially that beyond 200 nautical miles (nm), and the pursuit of resource exploitation.

6.1.2 The claimed shelf

More than 150 million square kilometres have already been claimed by States before the Commission on the Limits of the Continental Shelf,[5] with continental shelves past 200 nm comprising

more than 25 million square kilometres of the total. Huge areas also remain to be specified by States, including claims in the Arctic and claims by non-parties to the Third United Nations Conference on the Law of the Sea (UNCLOS III), including the United States.[6] The underlying physical disparities between States' respective claims to the continental shelf, the normative approaches thereby engendered, and the potential rewards of a successful claim[7] would all feature prominently in the negotiations over the continental shelf regime under the United Nations Convention on the Law of the Sea (UNCLOS). In this respect States' priorities were key and depended on how each State assessed the value of the shelf.

6.1.3 The multifaceted value of the shelf

The continental shelf is a strategically important location for military purposes and has been proven to be valuable as a source of fisheries, minerals, carbon energy resources, and scientific discoveries.

(a) Military and strategic value

In a world based on international trade and mass production it is easy to view the shelf's value primarily in terms of its resource bounty. Yet the shelf is valuable in other ways, including its use in military strategy. The permanent sea-bases, ocean-floor nuclear missile batteries, and arms race in the seas of Ambassador Pardo's 1967 speech may not yet have materialized, but his vision was partly shared by Cold War policymakers who, in 1971, concluded the Treaty on the (p. 140) Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof.[8] As a strategic space, moreover, the importance of the continental shelf's superjacent waters to shipping, coastal defence, and nuclear weapons has also long featured in the considerations of national policymakers.

(b) Economic value

The continental shelf has enormous economic potential and its living and non-living resources already contribute to traditional subsistence economies and modern industrial economies.

(i) Sedentary fisheries

Sedentary fisheries on the shelf, for example, have long been exploited in traditional economies to provide sustenance, trinkets, and religious artefacts.[9] The objects of the sedentary fishery vary with location but historically have included oysters, pearls, chank, sponges, and corals.[10] Such fisheries have been important enough to attract both municipal legislation and international conflict. Australia, for example, passed pearling industry legislation in the early 1950s in response to anxieties over the harvesting rates of Japanese vessels.[11]

(ii) Bio-prospecting

The scientific value of the continental shelf and deep ocean may have only recently been appreciated but scientists and corporations now increasingly focus upon it. The scale and diversity of life on the shelf is thought to be vast but just how vast remains an open question. Estimates of the extent of deep ocean diversity vary from as low as 500,000 species to as many as 100 million species.[12] This rich target for research or 'bio-prospecting' has attracted the attention of major pharmaceutical firms hoping to develop drugs from marine resources for uses including the fighting of HIV, bacterial infections, cancer, and (p. 141) malaria.[13] This bio-prospecting looks set to continue as the number of issued patents increases[14] and some species have already been successfully commercialized.[15]

(iii) Minerals

The mineral resources of the continental shelf are also vast. In 1967 Ambassador Pardo delineated the various resources already then being drawn from the continental shelf. In addition to the tin,

diamonds, phosphorite, sulphur, coal, iron, and hydrocarbons then being exploited,[16] the global volumes of both producing and potential resources are today greater than ever. Placer deposits have been discovered on the shelf containing metals, including tin, titanium, chromium, and zirconium; subsoil brine pools have also been found containing concentrations of lead, zinc, gold, and silver; volcanic springs have been found with high concentrations of iron, zinc, copper, silver, and gold; and naturally occurring manganese nodules continue to attract interest.[17]

(iv) Carbon energy resources

Dwarfing the economic value of all such mineral production is the present and potential value of offshore organic carbon energy resources: oil, gas, and methane hydrates. As a component of the economic value of the shelf, oil and gas reserves have been estimated to represent about 90 per cent of the value of exploited seabed minerals.[18] As a component of global energy production, too, the shelf is vital: offshore oil wells produced about 30 per cent of the 85 million barrels consumed per day in 2010.[19] The enduring potential of offshore resources, by one estimate containing roughly 70 per cent of the world's undiscovered reserves,[20] has driven oil and gas companies into deeper and deeper waters. A new record-setting offshore well, expected to start producing in 2016, will plunge through almost 3 km of water and is estimated to contain two billion barrels of oil equivalent.[21]

Methane hydrates, or gas trapped in a water/ice lattice structure, are also of potentially enormous value. A largely untouched resource of some continental (p. 142) slopes and rises, it has been estimated that methane hydrates contain double the combustible carbon of all other fossil fuels.[22]

6.2 History of the Legal Theory of the Continental Shelf

6.2.1 Pre-Truman customary international law

The sources of international law concerning the continental shelf are—whether customary, conventional, or jurisprudential—largely of recent origin. As was observed in the *Abu Dhabi Arbitration* award, prior to World War II 'the doctrine of the Continental Shelf…as a legal doctrine did not then exist'.[23] Perhaps for this reason, many international lawyers consider the 1945 Truman Proclamation as the principal starting point for an analysis of the doctrine of the continental shelf. Yet the origins of international law in this area and conflicting State desires are visible in broader and older debates, such as those concerning developments in international relations.

6.2.2 Freedom of the seas and sovereign control

The seas were generally characterized by freedom of use from antiquity until the thirteenth century. From the thirteenth century onwards a debate grew as to the geographic and lawful extents of State power in bordering seas.[24] By the 1600s, two fundamentally different conceptions of the nature of ocean spaces vied for dominance.

On the one hand were States, such as Spain and Portugal, which relied upon Papal Bulls to justify their dominion over the Earth's oceans. This doctrine of *mare clausum* held that the sea was capable of being subject to State sovereignty.

Against the doctrine of *mare clausum* was the doctrine of *mare liberum*, by which other States considered the sea as a *res communis* and therefore incapable of being subject to any State's sovereignty.[25] One of the best-known articulations of this legal theory was that of Grotius, who argued among other things that: (1) that which cannot be occupied cannot be property of a State because property arises from occupation, and (2) a space which is not diminished by use ought to remain a

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(p. 143) common space in perpetuity.[26] The doctrine of *mare liberum*, ultimately prevailed—although it did not achieve complete victory.

6.2.3 The cannon-shot rule and prior examples of shelf claims

The oceans were historically a space of free transit and available to all, but States still had an enduring and strong interest in securing their territories against military, health, customs, and domestic security threats. As the ocean waters adjacent to the coastline increasingly became the subject of State claims of sovereignty, the methods of delimitating those waters developed to include the distance that the human eye could see and the distance that coastal artillery could fire (the so-called 'cannon-shot rule'). In time, a standard distance from the coast developed to define maritime sovereignty, such that by the nineteenth century a three-mile territorial sea had come to be accepted by the great powers and most, but not all, of the medium and lesser powers.[27] By 1926 the idea that parts of the continental shelf—at least within territorial waters—could be subject to a State's ownership was, in the words of the Rapporteur of the League of Nations Sub-Committee of experts on territorial waters, a 'universally accepted legal conception'.[28] By reason of its 'sovereign rights over the territorial sea', the Draft Convention on territorial waters proclaimed at Article 11 the littoral State's 'sole right of taking possession of the riches of the sea, the bottom and the subsoil', such riches being said by the Rapporteur to include 'coral-reefs, oil-wells, [and] tin-mines'.[29]

This focus on resources, visible in the Sub-Committee's report, arguably drove developments in State practice and in the *lex ferenda* concerning claims to the continental shelf.[30] Russia, for example, relied in the 1920s on the continental (p. 144) shelf in claiming certain uninhabited islands. Argentina, for its part, issued a decree in 1944 establishing zones of mineral reserves in the epicontinental sea.[31]

But it was at the time of the Gulf of Paria Treaty, made between the United Kingdom and Venezuela in 1942[32] in respect of a relatively shallow inland sea between Trinidad and Venezuela, that the continental shelf may be said in international law terms to have come of age. The Gulf of Paria Treaty is significant in its recognition by two States of an entitlement to the continental shelf and as the first known agreement to delimit[33] the corresponding 'submarine areas'—being defined as 'the seabed and subsoil beyond territorial waters'. The role of resource exploitation in shaping the treaty is not emphasized in the text but is visible in, among other places, Articles 6 and 7. Article 6 requires that no works or installations erected by the parties may interfere with shipping while Article 7 imposes a duty on the parties to prevent their exploitation activities from polluting the territorial waters of the other party by oil, mud, or otherwise. These two considerations of control and exploitation of the continental shelf's natural resources continue to feature prominently in the modern law of the sea.[34]

6.2.4 The Truman Proclamation

In 1943 the American Secretary of the Interior, Harold Ickes, recognizing the United States' need for natural resources to fight the Second World War, recommended that the United States should claim the resources of the continental shelf and superjacent waters. A little over two years later, on 28 September 1945, President Truman signed two proclamations covering, respectively, coastal fisheries and the subsoil and seabed of the continental shelf.[35]

The continental shelf proclamation (commonly called the 'Truman Proclamation') is widely regarded as a key development in the doctrine of the continental

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(p. 145) shelf and 'the decisive event in State practice' in this area.[36] The Truman Proclamation claimed not sovereign rights for the United States, but 'jurisdiction' and 'control' over the 'naturally appurtenant' continental shelf contiguous to the United States coast. The Truman Proclamation

was, moreover, self-limiting. First, it in no way sought to affect the character of the superjacent waters as high seas and associated right of free navigation. Second, the boundary between States was to be determined in accordance with equitable principles where an adjacent or opposite coastal State shared the continental shelf with the United States.[37] The Truman Proclamation triggered a series of related declarations from other States, the impacts of which continue to be felt today.

6.3 1958 Continental Shelf Convention

6.3.1 A series of conflicting proclamations

There followed a series of similar claims to the continental shelf by other States which was varied and reflected differing State priorities and policies over the different attributes of the continental shelf, and the extent of intended sovereignty over it and its resources.[38] Australia, to take one example, issued a proclamation in 1953 that also emphasized the exploitation of the continental shelf's seabed and subsoil resources but surpassed the Truman Proclamation's jurisdiction and control claims; it instead claimed 'sovereign rights'.[39] Several Latin American States went further and claimed full sovereignty over the seabed and superjacent waters out to 200 nm.[40] Pakistan and Brazil annexed the continental shelf to their respective territories.[41]

These incompatible approaches and the natural desire of States to expand their sovereign claims drove efforts to rationalize international law in this area. These efforts became formalized first in the work of the International Law Commission (ILC) and then in the Convention on the Continental Shelf of 1958 ('1958 Continental Shelf Convention').

6.3.2 The International Law Commission's early attempts to codify the law of the continental shelf

The ILC first met to codify the international law of the sea in 1949 and, recognizing its increasing economic and social importance, introduced draft (p. 146) Articles on the continental shelf in 1951.[42] The ILC's 1951 draft Articles contained provisions on the shelf's definition, the governing legal regime, and the interplay of that regime with international law governing the superjacent waters.[43]

Certain aspects of the draft Articles were controversial. The definition of the continental shelf, to take the most prominent example, was criticized, revised, and criticized again.[44]

In 1957, the ILC submitted its final draft Articles on the continental shelf (as one of several draft conventions on the law of the sea) to the United Nations General Assembly and in April 1958 the First UN Conference on the Law of the Sea (UNCLOS I) ultimately adopted the text of this first Continental Shelf Convention in Geneva.[45]

6.3.3 The 1958 Continental Shelf Convention

The 1958 Continental Shelf Convention is often described as containing both elements that crystallized applicable customary international law and elements that reflected the then *lex ferenda*. Key in this regard is the fact that the 1958 Continental Shelf Convention is often thought to have crystallized as law the idea (subsequently maintained in UNCLOS) that rights over the continental shelf are not dependent on a State's proclamations nor do they require occupation.[46]

The definition of the continental shelf was not so widely adopted. Article 1 of the 1958 Continental Shelf Convention defined the limits of the juridical continental shelf as:

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

This definition, while flexible and indeed reflective of criticisms levelled at previous attempts to define the continental shelf, was nevertheless criticized by both scholars and States.[47] These criticisms formed part of the pressure against the 1958 Continental Shelf Convention (and, of course, the pressure on developments in the overarching law of the sea) that ultimately led to the negotiations at UNCLOS III.

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(p. 147) 6.4 From the Continental Shelf Convention to UNCLOS III

6.4.1 Decolonization

On 14 December 1960, the UN General Assembly adopted Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples.[48] Resolution 1514 reflected the increasing pace of decolonization following the end of the Second World War. Many former colonies had played no part in creating the system of treaties and customary international law to which they were now subject as equal members of the international community. They consequently felt that the traditional law of the sea, like many areas of international law, should change to take their interests and positions into account.[49]

6.4.2 Technological disparity and changes

Many of these former colonies did not possess the same technical resources as the developed world. This technological disparity was particularly salient when it came to the continental shelf. In particular, the exploitability component of the 1958 Continental Shelf Convention meant that the juridical continental shelf might come to encompass—as offshore mining and drilling technology continued to improve—ever increasing areas of the ocean floor. This expansion would not, moreover, occur evenly: the developing countries faced the prospect of a developed country race to monopolize resources.[50] A large cross-section of the international system (comprised mainly of developing, shelf-scarce, and landlocked States) consequently had a strong interest in seeing changes to, at a minimum, the criteria of the continental shelf regime concerning its exploitability.

6.4.3 Low participation rates

Low participation rates in the 1958 Continental Shelf Convention (and indeed the three other 1958 law of the sea conventions) could be seen as both a consequence of States' dissatisfaction with the regime and a cause of it. Prior to UNCLOS III, only 54 States became parties to the 1958 Continental Shelf Convention; even then, numerous States entered reservations upon ratification.[51]

Also troubling was the fact that the 1958 Continental Shelf Convention and its three related law of the sea conventions left a number of critical issues unresolved.[52] This

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(p. 148) incomplete nature and other factors, such as concern for the environment and the overexploitation of fisheries—sometimes by foreign fishing fleets—were also crucial in motivating changes to the overall law of the sea.

6.4.4 Developing jurisprudence

The International Court of Justice (ICJ) and other tribunals were called upon to render decisions concerning the continental shelf, on the basis of international law, throughout the period between the 1958 Continental Shelf Convention and the coming into force of UNCLOS III. Such decisions

contributed to the development of customary international law in this area. Analyses of key continental shelf decisions generally begin with 1969's *North Sea Continental Shelf* case which emphasized the role of equity in delimitation methods. In the years that followed, the ICJ and other tribunals would also render important decisions including 1977's *Anglo-French Continental Shelf* case, 1982's *Tunisia/Libya* case, 1984's *Gulf of Maine* case, 1985's *Libya/Malta* case, and the 1992 *Canada–France Maritime Boundary* arbitration. These cases would see invoked a variety of central principles including equity, equidistance, and special circumstances. This jurisprudence and related cases are discussed in greater detail in Chapter 11.

6.5 The Third United Nations Conference on the Law of the Sea

6.5.1 The strategic considerations at the commencement of UNCLOS III

The UN had previously organized two conferences on the law of the sea—UNCLOS I, which, as described, led to the Geneva Conventions, and the Second UN Conference on the Law of the Sea (UNCLOS II) in 1960. However, while technology had continued to improve access to deep-sea resources, neither conference had succeeded in resolving key issues, such as the limits to the territorial sea and the limits to the fishery or resource zone.[53] There were consequently, in the words of Ambassador Pardo, 'increasingly numerous voices' at this time 'stressing the urgency of considering the vital political questions involved' in discussing and creating a legal regime to govern the continental shelf.[54]

For UNCLOS I and UNCLOS II, the UN had relied upon the ILC to undertake preparatory work and to submit relevant reports as to the prevailing issues for discussion. But with a view to overcoming previous shortcomings and addressing

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(p. 149) the contentious nature of the issues at hand, the UN General Assembly resolved to establish the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (the 'Preparatory Committee').[55] The Preparatory Committee was instructed, inter alia, to study the exploitation and use of the resources of the seabed and the ocean floor as well as the means by which international cooperation might be promoted, and to make appropriate recommendations to the General Assembly.[56] Having considered the report of the Preparatory Committee, the General Assembly recognized that the existing legal framework did not sufficiently regulate the use of the seabed and ocean floor. By way of response, the General Assembly resolved to convene a third conference on the law of the sea in 1973 (UNCLOS III),[57] whose task was to deal comprehensively with the law of the sea, and instructed the Preparatory Committee to act as the preparatory body for the conference.

6.5.2 The creation of the United Nations Convention on the Law of the Sea

UNCLOS III was first convened in New York on 3 December 1973 and after 10 more sessions resulted in the creation of the 1982 UN Convention on the Law of the Sea.[58] The work of the conference was undertaken by committee. The First Committee was responsible for the deep seabed beyond States' jurisdictions while the Second Committee was in charge of, among other things, the continental shelf, the territorial sea, the contigious zone, the exclusive economic zone (EEZ), and the high seas. Over the course of about 10 years more than 160 States, specialized UN agencies, non-governmental organizations (NGOs), and other observers participated in these negotiations.

UNCLOS III was an unusual conference in that no preparatory text was made available prior to the conference. It was therefore necessary to negotiate every aspect of the proposed treaty at the

conference itself. The means used to reach agreement were foreshadowed by Ambassador Pardo in his speech to the General Assembly in which he emphasized the need for consensus and attention to avoiding public controversy.[59]

(p. 150) (a) Innovative negotiation procedures

Achieving the goals set at UNCLOS III required the use of a number of innovative techniques, each of which complemented each other and contributed to the completion of the Draft Convention.[60] Several deserve specific mention.

The first, known as the consensus approach, was derived from the Gentleman's Agreement on consensus embodied in an Appendix to UNCLOS III in which it was agreed that 'the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted'.[61] As such, the consensus approach refers to the procedure used at UNCLOS III whereby the agreement of all relevant actors was to be procured through a process of consultation and negotiation, rather than simply putting matters to possibly divisive and repetitive votes. This approach, it was hoped, would help to avoid creating powerful but alienated minorities who would not feel bound by the text or authority of the Convention.[62] As such, it was argued that an ongoing process of negotiation would be more conducive to ensuring widespread support for decisions taken over the course of the Conference, although this optimistic perspective was not universally accepted.[63] As the President of the Conference put it, the consensus approach 'requires all delegations, those in the majority as well as those in the minority, to make efforts, in good faith, to accommodate the interests of others'. It is often thought of as one of the defining features of the Conference.[64]

The second approach, known as the 'package deal approach' was also usefully defined by the President of the Conference as a procedural approach whereby 'every delegation…had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it'.[65] In other words, of the numerous items on the agenda at UNCLOS III, no single item need be agreed upon until all other items had been agreed upon. This package deal also meant, however, that States arguably faced an all-or-nothing choice when it came to the treaty in its entirety.

(p. 151) The third principal approach saw a single negotiating text serve as the basis for discussion in each of the three main committees. This approach was introduced during the course of negotiations by the President of the Conference who, in 1975, in order to address the innumerable individual proposals and the consequent slow progress, suggested that the chairmen of the three main committees produce these texts.[66] Texts such as the Informal Single Negotiating Text[67] and the Informal Composite Negotiating Text[68] played key roles in disseminating information to the State parties while still emphasizing the informal nature of the proposals. This ensured that the State parties appreciated that these proposals did not constitute any form of binding agreement. Once negotiations were under way, the onus fell on the officers of UNCLOS III to decide whether a particular proposal or text had received sufficient support.[69]

The success of these approaches can be measured by the vote on the final text of the Law of the Sea Convention agreed at UNCLOS III. The vote, held on 30 April 1982, counted 130 States in favour, four against, and thirty-six either abstained or went unrecorded.[70] Today, UNCLOS has been ratified by 166 parties, of which 163 are member States of the United Nations, two are non-member States, and one is a regional organization, the European Union.

6.5.3 The continental shelf within the scheme of the Convention

The continental shelf finds its legal definition in Article 76 UNCLOS. This provides in part as follows:

> 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical

miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope, and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

(p. 152) Article 76, therefore provides that the continental shelf of a coastal State comprises the submerged prolongation of the land territory of the coastal State—the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, or to a distance of 200 nm where the outer edge of the continental margin does not extend up to that distance. The continental margin consists of the seabed and subsoil of the continental shelf, the slope, and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.[71]

(a) The outer limits of the continental shelf

During the negotiations for UNCLOS, significant attention was given to the definition of the outer continental shelf beyond 200 nm in order to establish the precise limits of national jurisdiction. As well as defining the continental shelf in a legal context, Article 76 also outlines the process of delineating its outer limits. Establishing these limits ensures the right of coastal States to explore and exploit the resources of the seabed and subsoil of the continental shelf. It is important to note that Article 76 does not affect the legal status of the superjacent waters or the airspace above those waters.[72]

UNCLOS provides that a State can establish the outer limits of the continental shelf by adhering to a two-step approach.

4.

(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nm from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

As will be discussed in greater detail, these provisions allow for the establishment of a continental shelf not exceeding 350 nm from the baseline (the distance constraint) or 100 nm from the 2,500 metre isobath (the depth constraint).[73]

(p. 153) (b) Rights associated with the continental shelf

Scholars often distinguish, for the purposes of examining State rights and responsibilities, between the continental shelf contained within a State's EEZ (if claimed) and the continental shelf falling outside 200 nm. The continental shelf beyond 200 nm is sometimes termed the 'extended continental shelf'. This Chapter focuses, however, on the rights and responsibilities derived solely from the continental shelf; Chapter 7 contains detailed information on those established pursuant to the EEZ.

There are several rights associated with a coastal State's continental shelf. Article 77 permits the coastal State to exercise exclusive 'sovereign rights' over the continental shelf for the purpose of exploration and exploitation of its natural resources.[74] Consistent with the right of a State to its continental shelf without 'occupation, effective or notional, or on any express proclamation' under Article 77(3), the coastal State has sovereign rights over the natural resources of the continental shelf which are said by Article 77(2) to be exclusive in that even 'if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.' The limits and enforceability of Article 77 are one of the issues in dispute in the pending Annex VII arbitration, *The Republic of the Philippines v The People's Republic of China*.

The natural resources of the continental shelf are unchanged from the 1958 Continental Shelf Convention[75] and include:

> mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Although the definition of 'sedentary species' has, at times, given rise to controversy[76] there is no doubt that for many States one of the most important rights is to the mineral resources of the continental shelf.

Other rights associated with the continental shelf include Article 80, which affords the coastal State the exclusive right to construct artificial islands, installations, and structures, and Article 81 which grants the coastal State the exclusive right to authorize and regulate drilling on the continental shelf.

Coastal States arguably also have the right to legislative and enforcement jurisdiction over the continental shelf under Articles including 111(2), although these

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(p. 154) rights are not without limits, and should be exercised in accordance with the provisions of UNCLOS.[77]

(c) Coastal State obligations and third State rights

Additionally, UNCLOS imposes various obligations upon coastal States and grants certain freedoms to third States.

A basic obligation resting on a coastal State is to give due publicity to the limits of its continental shelf and to deposit such information with the Secretary-General of the United Nations and in the case of the extended continental shelf, with the Secretary-General of the International Seabed Authority.[78]

Coastal States are also obliged in certain situations by Article 82, for example, to pay a proportion of the volume of production in respect of non-living resources exploited beyond 200 nm 'through' the International Seabed Authority for equitable sharing among the States parties to UNCLOS.

Coastal States have an obligation under Article 78(2), when exercising their rights under UNCLOS, not to infringe or otherwise unjustifiably interfere with navigation or other rights and freedoms provided in UNCLOS. This balance between coastal State obligations and third State freedoms is also visible in other areas, such as the laying of submarine cables and pipelines. While Article 79 provides that all States are entitled to lay submarine cables and pipelines on the continental shelf; the coastal State may not impede such activities subject, however, to its right to take reasonable measures for exploration, exploitation, and pollution control.

6.6 The Extent of the Continental Shelf

6.6.1 Defining the outer limits of the continental shelf

The question of the definition of the outer limits of the continental shelf was one of the most controversial issues at UNCLOS III. Advances in exploitation technology meant that the concept of exploitability became an imprecise and unworkable reference point,[79] since uncertainty as to the ultimate limit of the continental shelf—when understood in terms of the 1958 Continental Shelf Convention's exploitability criteria—was a key challenge facing negotiators. To reach agreement (p. 155) on this limit to the continental shelf, the Convention needed to reconcile the competing interests of four major groups of States.[80]

First, the coastal States with broad continental shelves wished to widen the legal definition to include both the continental slope and the continental rise. Second, the United States and the former Soviet Union sought a precise definition and had, as superpowers, more specific strategic interests than other States. Third, the landlocked and geographically disadvantaged States, upon being unable to prevent the expansion of the legal definition of the continental shelf to include the slope and the rise, insisted that, in return for granting coastal States rights to the continental shelf beyond 200 nm, such coastal States should contribute a portion of the income gained from the exploitation of energy resources of the continental shelf beyond 200 nm to the wider international community.[81] Fourth, the Arab States, who generally did not possess continental shelves extending beyond 200 miles, asserted that the continental shelves of all coastal States should be limited to 200 nm.

The 1969 judgment of the ICJ in the *North Sea Continental Shelf Cases* further contributed to this challenge and, perhaps because the Geneva Conventions were said not to be opposable to the Federal Republic of Germany, one of the parties to the decision, added uncertainty by defining the continental shelf not by reference to the 200-metre isobath geomorphological concept contained in Article 2 of the Continental Shelf Convention, but instead by reference to the geological concept of natural prolongation.[82] Article 76 UNCLOS sought to address these issues by offering a definition of the continental shelf that was 'scientifically based, legally defensible, and politically acceptable'.[83] As will be seen, the concept of the continental shelf under Article 76 is primarily a legal concept, informed by technical and scientific considerations.

6.6.2 Article 76(1) incorporates customary international law

In the 2012 *Nicaragua/Colombia* case, the ICJ held that the definition of the continental shelf contained in Article 76(1) UNCLOS reflected customary international law. However, the Court declined to decide whether the other provisions of Article 76, which define the continental margin and how the outer edge of the continental margin should be determined, reflect customary

References

(p. 156) international law.[84] The ICJ has recognized, however, in a number of other cases that the principles of maritime delimitation of the continental shelf enshrined in Article 83 reflect customary international law.[85]

6.6.3 The regime prescribed by Article 76

(a) Delineation within 200 nm

Article 76(1) sets down two alternative criteria for determining the outer limits of the continental shelf: (i) the natural prolongation of a coastal State's land territory to the outer edge of the continental margin; or (ii) a distance of 200 nm form the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to

200 nm. Article 76(3) provides that the continental margin comprises the submerged prolongation of the land mass of a coastal State, consisting of the seabed and subsoil of the shelf, the slope, and the rise.[86] It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

The definition contained in Articles 76(1) and 76(3) takes into account the principle set down by the ICJ in the *North Sea Continental Shelf Cases* that the jurisdiction of a coastal State over its continental shelf is derived from the natural prolongation of its land territory. It also allows a State to claim the continental shelf up to 200 nm, whatever the characteristics of the corresponding seabed and subsoil, aligning the concepts of a coastal State's jurisdiction over the continental shelf with its jurisdiction over a 200-nm EEZ. A claim depends solely on the distance from the coasts of the claimant States of any areas of seabed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are immaterial.[87]

(b) Delineation beyond 200 nm

Where the outer edge of the continental margin extends beyond 200 nm, the outer limit of the continental shelf is to be determined on the basis of Article 76(4).

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(p. 157) Article 76(4) defines the outer limits of the continental margin on the basis of the geomorphological characteristics of the submerged prolongation of the landmass of the coastal State. It provides for two alternative tests: the Irish (or Gardiner) formula and the Hedberg formula. Article 76 thus uses both geological concepts (natural prolongation in Article 76(3)) and geomorphological concepts (Irish and Hedberg formulae in Article 76(4)) in defining the outer limits of the continental shelf beyond 200 nm. This combination of scientific criteria (beyond 200 nm) and juridical distance criteria (up to 200 nm) underlines the fundamentally legal nature of the continental shelf defined in Article 76.

The Irish formula is the 'sedimentary rocks thickness' test contained in Article 76(4)(a)(i). It provides that the outer edge of the continental margin is fixed by a line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope. The Irish formula was closely linked to criteria used to evaluate the presence or absence of hydrocarbon resources and sought to ensure that coastal State sovereign rights extended to a major portion of the continental rise where significant resources were expected to exist.[88]

The Hedberg formula is the '60 nm from foot of slope' test contained in Article 76(4)(a)(ii). It provides that the outer edge of the continental margin is determined by a line delineated by reference to fixed points not more than 60 nm from the foot of the continental slope. Article 76(4)(b) provides that, in the absence of evidence to the contrary, the foot of the continental slope is to be determined as the point of maximum change in the gradient at its base. The outer limits of the continental shelf must be delineated by straight lines not exceeding 60 nm in length, connecting fixed points, defined by coordinates of latitude and longitude.[89]

Coastal States may choose the formula for delineation of the continental shelf beyond 200 nm (Irish or Hedberg) that is most favourable to them. However, Article 76(5) places a maximum distance on the outer edge of the continental shelf beyond 200 nm, determined by two alternative criteria. The fixed points comprising the line of the outer limits of the continental shelf shall not exceed: (i) 350 nm from the baselines from which the breadth of the territorial sea is measured; or (ii) 100 nm from the 2,500m isobath. Coastal States may choose the most favourable formula that constrains delineation in Article 76(5).

Where delineation includes submarine ridges, Article 76(6) provides that the outer limit of the continental shelf may not exceed 350 nm from the baselines from which the breadth of the territorial sea is measured. This condition does not apply to submarine elevations that are natural components of the continental margin, (p. 158) such as plateaux, rises, caps, banks, and spurs. The seabed and deep ocean floor beyond the outer limits of the continental shelf is known as 'the

Area'.[90] No State may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, which are 'the common heritage of mankind' and fall under the jurisdiction of the International Seabed Authority.[91] This is discussed in detail in Chapter 10.

Under Article 76(9), the coastal State is obliged to deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, which permanently describes the outer limits of its continental shelf.[92] The use of the word 'permanently' indicates that once a coastal State has deposited information under Article 76(9), it can no longer change these outer limit lines, apart from where another State has successfully challenged the outer limit lines set by the coastal State.[93]

6.6.4 The Commission on the limits of the continental shelf

The delegations which negotiated UNCLOS recognized the complexity of Article 76, the need for its provisions to be applied consistently, and the sensitivity of coastal States claiming sovereign rights over the seabed.[94] It was agreed to create the Commission on the Limits of the Continental Shelf (CLCS) which would make recommendations to the coastal State regarding the delimitation of the continental shelf beyond 200 nm.

Article 76(8) provides that information on the limits of the continental shelf beyond 200 nm must be submitted by a coastal State to the CLCS. The CLCS must then make recommendations to that State on the establishment of the outer limits of its continental shelf. The limits of the continental shelf established by a coastal State on the basis of the recommendations is final and binding.

(p. 159) The CLCS is composed of an elected group of 21 technical specialists in the field of geology, geophysics, or hydrography, elected by States parties to UNCLOS from among their nationals.[95] A nominee does not necessarily need to be a national of the nominating State. Members of the CLCS serve in their personal capacities. They are elected for a term of five years and are eligible for re-election.[96] The CLCS contains no representative of the International Seabed Authority, even though the recommendations of the CLCS directly affect it.[97] The members of the CLCS have a duty to act independently. They must not seek or receive instructions from any government or from any other authority external to the CLCS and must refrain from any action which might reflect negatively on their position as members of the CLCS.[98]

(a) Functions of the CLCS

The CLCS has two functions: (i) to consider the data and other material submitted by a coastal State concerning the outer limits of the continental shelf beyond 200 nm and to make recommendations in accordance with Article 76 and the Statement of Understanding; and (ii) to provide scientific and technical advice to the coastal State, if requested, during the preparation of the data.[99]

The CLCS performs its duties in respect of function (i) by way of sub-commissions composed of seven members.[100] Members of the CLCS who are nationals of the coastal State making the submission and any CLCS member who has assisted a coastal State by providing scientific and technical advice may not be a member of the sub-commission dealing with that submission. They do, however, have the right to participate in the proceedings of the CLCS concerning that submission and the member of the CLCS who is a national of the coastal State may participate in the proceedings without the right to vote.

The sub-commission submits its recommendations to the CLCS. Approval by the CLCS of the recommendations of the sub-commission must be by a majority of two-thirds of the CLCS members present and voting.[101] The recommendations of the CLCS are then submitted in writing to the coastal State and to the Secretary-General of the United Nations.[102]

References

(p. 160) In relation to function (ii), no more than three CLCS members may provide advice to a

coastal State at any time.[103] When it makes its submission to the CLCS, the coastal State must provide the names of any CLCS members which have provided it with scientific and technical advice in the preparation of its submission.[104]

(b) Scientific and Technical Guidelines

Despite the technical detail of Article 76, the complexity and technical nature of its subject matter created some degree of uncertainty. The CLCS adopted its Scientific and Technical Guidelines on 13 May 1999 to mitigate these ambiguities.[105]

The Guidelines are addressed to States and are meant to assist them in the preparation of their submissions to the CLCS. The Guidelines are a non-binding instrument and do not form part of UNCLOS, but constitute the CLCS's authoritative interpretation of Article 76.[106] They outline the processes, data, and analyses acceptable, or at least considered sufficient, in order for the CLCS to make its recommendations,[107] and set out the 'test of appurtenance' which the CLCS applies to determine whether a coastal State is entitled to delineate the outer limits of the continental shelf beyond 200 nm.[108]

(c) Timing of submissions

Article 4 of Annex II of UNCLOS provides that coastal States must make their submissions to the CLCS within 10 years of the entry into force of UNCLOS, i.e. 16 November 2004. In view of the complexity of the preparation and significant time required in order to make submissions, and given the time in which it took the CLCS to adopt its Scientific and Technical Guidelines, by reason of which 'States had before them the basic documents concerning submissions in accordance with Article 76, paragraph 8', SPLOS/72 decided that for all States ratifying UNCLOS before 13 May 1999, the deadline for presentation of their submissions was subsequently extended to a period of 10 years from 13 May 1999.[109] For all other States, the relevant date is 10 years after the State has ratified or acceded to UNCLOS. However, there is no sanction for failing to make a submission within the 10-year period,[110] and a number of States, including Canada, China, and France as well as less well-resourced developing and island States, have taken

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(p. 161) advantage of the decision in SPLOS/183 to submit 'preliminary information indicative of the outer limits of the continental shelf beyond 200 nm and a description of the status of preparation and intended date of making a submission'.[111]

(d) Can non-parties to UNCLOS use the CLCS?

Article 4 of Annex II of UNCLOS provides that a 'coastal State' shall make a submission to the CLCS 'as soon as possible but in any case within 10 years of the entry into force of this Convention for that State'.[112] The broad language of Article 4 has raised the issue of whether a State that it not a party to UNCLOS has the right to make a submission to the CLCS. This was rejected by the International Law Association (ILA) Committee on the Legal Issues of the Outer Continental Shelf in its First and Second Reports.[113] While parties to a treaty can accord rights to non-parties,[114] such a right has to be stated in a sufficiently clear manner and there must be both an intention on the part of the State parties to accord rights and an acceptance of those rights by the third State.[115] The text of Article 4 is ambiguous, but does not appear to fulfil these requirements.

UNCLOS does not confer any right on third States to participate in the delimitation process between the CLCS and a coastal State.[116] Comments by third States on a submission by a coastal State will not be taken into account by the CLCS when considering that submission. Only in the case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes would the CLCS be required to consider communications from States other than the submitting State.[117]

(e) Competence of the CLCS

Even though it contains no jurists, the CLCS will by necessity have to consider questions regarding the interpretation and application of UNCLOS when it

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(p. 162) considers the submissions of coastal States.[118] By its very nature, delineation of the continental shelf beyond 200 nm will touch on questions regarding the interpretation and application of UNCLOS and other rules of international law which may affect the rights of other States. The CLCS must be considered competent to carry out this task.[119] This does not replace the competence of State parties and international courts or tribunals to interpret UNCLOS, and the CLCS's competence is limited to the extent that it is strictly necessary in order to carry out its functions under Article 76.[120] The CLCS is specifically empowered under UNCLOS to evaluate scientific and technical data submitted by the coastal State, and this competence should not be interpreted restrictively.[121]

6.6.5 The Commission on the Limits of the Continental Shelf: Procedure

(a) 'Final and binding' outer limits to be established 'on the basis of' CLCS recommendations

The limits of the continental shelf beyond 200 nm can be established only by the coastal State.[122] However, the limits of the continental shelf beyond 200 nm only become 'final and binding' when they are established by the coastal State 'on the basis of' the recommendations made by the CLCS.[123] The coastal State thus retains ultimate control of setting the outer limits of the continental shelf, but this power is circumscribed by the requirements of Article 76(8).[124]

In this regard, the term 'on the basis of' is ambiguous. It allows a coastal State an element of flexibility, but cannot mean that a coastal State may merely 'take into account' recommendations made by the CLCS but reject some or all aspects of the

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(p. 163) recommendations.[125] However, it is theoretically possible that a coastal State may establish outer limit lines different from those recommended by the CLCS, as long as these are in accordance with the reasons indicated by the CLCS for recommending its outer limit lines.[126]

Outer limits which have not been established by a coastal State in accordance with the substantive and procedural requirements of Article 76 will not become final and binding on other States.[127] If a coastal State disagrees with the recommendations of the CLCS, it must make a new or revised submission to the CLCS within a reasonable time.[128] UNCLOS does not address how a continuing disagreement regarding outer limit lines between the CLCS and a coastal State is to be resolved. While new or revised submissions could in theory be submitted ad infinitum, it is likely in practice that a coastal State could—provided it was acting in good faith in accordance with Article 300 UNCLOS—proceed to establish the outer limits in accordance with its own submission, and not the recommendations of the CLCS. However, the CLCS is not empowered to assess whether a coastal State has established the outer limits of the continental shelf on the basis of its recommendations, though other States may refuse recognition on this basis.[129] The ambiguity of the term 'on the basis of' means that both the coastal State and the objecting State may have competing interpretations of this provision and whether Article 76 was complied with more generally. Such disputes between State parties to UNCLOS regarding the interpretation or application of Article 76 may be settled by recourse to Part XV of UNCLOS—recognizing nevertheless that some States may rely upon their denouncement of the compulsory procedures entailing binding decisions to resolve their disputes.[130]

The fact that UNCLOS does not require the recommendations of the CLCS to be made public makes it potentially difficult in practice for third States to assess whether a coastal State has acted on the basis of the recommendations of the CLCS. However, a coastal State is obliged to publish an executive summary of its submission and the limited information contained therein may be sufficient for

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(p. 164) third States to make a detailed assessment of such submission.[131] Moreover, Rule 54(3) of the CLCS Rules of Procedure provides that, upon giving due publicity to the relevant information permanently describing the outer limits of the continental shelf which was deposited by the coastal State in accordance with Article 76(9) UNCLOS, the Secretary-General must also give due publicity to the recommendations of the CLCS which, in the view of the CLCS, are related to those limits.

(b) Influence of delimitation agreements and decisions on the CLCS

Although the delimitation of outer limits and boundary delimitation are separate concepts, the issues are closely linked and most submissions to the CLCS implicate one or more boundary relationships.[132] Article 76(10) expressly provides that the provisions of Article 76 are 'without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts'. Article 9 of Annex II of UNCLOS provides that '[t]he actions of the [CLCS] shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.'

These provisions ensure that the CLCS is not to function in determining, or to influence negotiations on, the continental shelf boundary between States with overlapping claims beyond 200 nm or where there is a dispute with another State over that limit.[133] Rather than involving third States in the consideration of a submission, the CLCS has to insulate itself from such matters.[134] Dispute settlement or direct negotiations leading to treaties can take place prior, parallel, or sometimes pursuant to the engagement of the CLCS.[135] Where an international court or tribunal, or States themselves by agreement, delimit the continental shelf beyond 200 nm prior to the completion of the CLCS process, the CLCS will merely be informed of (and potentially use) the court/tribunal decision or delimitation agreement.[136]

References

(p. 165) Many States have concluded maritime boundary agreements in which the outer continental shelf is delimited before any submissions are made to the CLCS, or before any recommendations have been received from the CLCS.[137] Prior agreement on a boundary can clarify the extent of the area in respect of which a State is to make a submission: entitlement to the continental shelf beyond 200 nm and pending submissions to the CLCS were central considerations of Australia and New Zealand when they delimited their maritime boundary in 2004[138] and (so it would seem) Malaysia and Vietnam in relation to their joint submission in respect of the southern part of the South China Sea presented in 2009.

Where there is a dispute regarding the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes related to the submission, the CLCS must be informed of such disputes by the coastal States making the submission.[139] The coastal States making the submission are obliged to assure the CLCS, to the extent possible, that the submission will not prejudice matters relating to the delimitation of boundaries between States.[140] Where a land or maritime dispute exists, the CLCS may not consider a submission made by any of the States concerned, unless all of them give their prior consent.[141] Coastal States may therefore make submissions to

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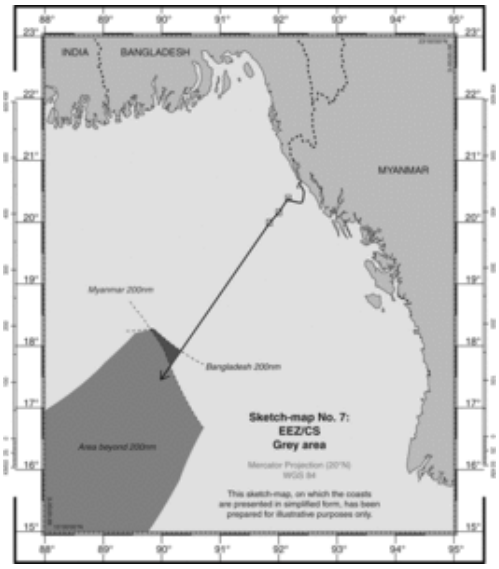
(p. 166) the CLCS where an unresolved land or maritime dispute exists, but under Rule 46.2 of its Rules of Procedure, '[t]he actions of the [CLCS] shall not prejudice matters relating to the delimitation of boundaries between States' and, pursuant to Annex I of those Rules, the CLCS may not consider or qualify the submissions unless all parties give their prior consent.[142] This occurred in the *Bangladesh/Myanmar* case, where both States had made submissions to the CLCS, but it decided to defer consideration of the submissions on the basis that a dispute existed between Bangladesh and Myanmar as to their claims to the continental shelf which had not been resolved at the time of presentation of Myanmar's submission (see Figure 6.2).[143]

(c) Settlement of disputes involving the outer limits of the continental shelf beyond 200 nm

The establishment of the outer limits of the continental shelf beyond 200 nm has two main features: the establishment of the boundary line between the continental shelf of a coastal State and the Area (the delineation of the continental shelf) and the establishment of the boundary of the continental shelf between adjacent or opposite coastal States (the delimitation of the continental shelf).[144] A 'clear distinction' exists under UNCLOS between the delimitation of continental shelf and the delineation of its outer limits.[145]



View full-sized figure

Figure 6.2 EEZ/CS 'grey area'

Delimitation of the continental shelf between States with opposite or adjacent coasts is to be effected by agreement on the basis of international law, in order to achieve an equitable solution.[146] If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the dispute resolution procedures provided for in Part XV of UNCLOS.[147] Since the unanimous decision of the ICJ in the *Serpents Isle* case in 2009, the approach of international courts and tribunals has been to follow a three-stage approach to maritime delimitation.[148] The court or tribunal

References

(p. 167) (p. 168) will: (i) establish a provisional equidistance/median line;[149] (ii) analyse whether there exist relevant circumstances requiring an adjustment or shifting of that line; and (iii) test the adjusted line to see whether the result which it would produce is disproportionate. This operates as 'a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion'.[150]

(d) Jurisdiction of international courts and tribunals to delimit the continental

shelf beyond 200 nm

The Tribunal in the *St Pierre and Miquelon* arbitration found that it did not have jurisdiction to delimit the continental shelf beyond 200 nm. Any decision recognizing or rejecting any rights of the parties over the continental shelf beyond 200 nm would constitute a delimitation, not 'between the parties' but between each one of them and the international community, represented by organs entrusted with the administration and protection of the International Seabed Area. The Tribunal held that it was not competent to carry out a delimitation 'which affects the rights of a party which is not before it'.[151] The Tribunal referred to the (then yet to be established) CLCS, noting the provisions of Article 76(8), which provides that '[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.'[152]

The Annex VII Tribunal in the *Barbados/Trinidad and Tobago* case took a pioneering step towards changing this view, finding that it did have jurisdiction to delimit the continental shelf boundary beyond 200 nm, though without having to apply this in practice.[153] The 2012 decision of the International Tribunal for the Law of the Sea (ITLOS) in the *Bangladesh/Myanmar* case is significant because it marks the first time that an international court or tribunal accepted jurisdiction to delimit (but not to delineate) the continental shelf boundary between two States beyond 200 nm.

The ITLOS referred to Article 76(10) and Article 9 of Annex II of UNCLOS and emphasized the 'without prejudice' nature of the role of the CLCS in relation to

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(p. 169) maritime boundary delimitation.[154] It distinguished between the function of the CLCS under Article 76 of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, and the function of international courts and tribunals under Article 83 and Part XV of UNCLOS to settle disputes with respect to delimitation of maritime boundaries. It further distinguished between the role of the CLCS to consider scientific and technical issues of submissions by coastal States under Article 76 and the role of the ITLOS in interpreting and applying the provisions of Article 76.

The CLCS had already decided to defer consideration of the submissions of Myanmar and Bangladesh on the basis that there was a dispute between the parties.[155] The ITLOS noted that if it declined to delimit the continental shelf beyond 200 nm, the issue of delineation under Article 76 could remain unresolved and that it would be contrary to the object and purpose of UNCLOS not to resolve the impasse.[156] It further noted that the exercise of its jurisdiction could not be seen as an encroachment on the functions of the CLCS, inasmuch as the settlement of delimitation disputes between States through negotiation is not seen as precluding the CLCS from examining submissions or making recommendations.[157]

The fact that the outer limits of the continental shelf beyond 200 nm had not been established did not preclude the ITLOS from determining the existence of an entitlement to the continental shelf beyond 200 nm, and delimiting the continental shelf between the parties concerned. As the question of the parties' entitlement to a continental shelf beyond 200 nm raised issues which were predominantly legal in nature, it was appropriate to determine the entitlements of the parties.[158] However, the ITLOS did not determine the outer limits of the continental shelf beyond 200 nm. Instead, it extended the line of the single maritime boundary beyond the 200-nm limit until it reached an area where the rights of third States may be affected.

(p. 170) In the 2007 *Nicaragua v Honduras* case, the ICJ suggested that it would not delimit the outer continental shelf beyond 200 nm in the absence of recommendations of the CLCS:

> It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.[159]

The Court reaffirmed this statement in the 2012 *Nicaragua v Colombia* case and declined to delimit Nicaragua's entitlement to a continental shelf beyond 200 nm, on the basis that Nicaragua had not established its entitlement to a continental shelf which overlapped with Colombia's 200-nm entitlement to the continental shelf.[160]

The judgment of the Court was criticized in a number of separate opinions and declarations, which found the Court's reliance on its dicta in the *Nicaragua v Honduras* case to be unnecessary: it suggested that the Court would never delimit the continental shelf in the absence of full submissions to the CLCS or because the CLCS had not made recommendations. The Court had adequate reasons to reject Nicaragua's submission solely on the grounds that (i) the delimitation methodology which Nicaragua proposed required the Court to delineate the outer continental shelf and (ii) that the information submitted by Nicaragua to justify its entitlement to an outer continental shelf was wholly inadequate.[161] Dissenting opinions were also expressed in relation to the majority of the Court's finding that Nicaragua was bound by its obligations under Article 76(8) to make submissions to the CLCS in relation to Colombia, a State which was not a party to UNCLOS.[162]

In the *Nicaragua v Honduras* case, the ICJ in was not asked to delimit the continental shelf beyond 200 nm and its previously quoted statement could be interpreted as nothing more than a statement of the obvious, given the circumstances of the case.[163] Its decision in the *Nicaragua v Colombia* case may

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(p. 171) be justified on the grounds that it was impossible for the Court to delimit the outer continental shelf on the basis of the scientific evidence provided to it. However, its reaffirmation of the dicta in the *Nicaragua v Honduras* case suggests that the Court has taken a conservative view of its competence and jurisdiction to delimit the outer continental shelf and it should be recalled that in the *Bangladesh/Myanmar* case, both States had already made full submissions to the CLCS. While the ITLOS cautioned in that case that it would have been hesitant to proceed with delimitation had there been uncertainty about the existence of a continental margin in the area in question, it made clear that 'the absence of established outer limits of a maritime zone does not preclude delimitation of that zone'.[164]

It seems that States must establish some form of entitlement to the continental shelf beyond 200 nm before international courts and tribunals will accept jurisdiction to delimit that area. This will generally be established where a State has made full submissions to the CLCS. Entitlement could also be established by the presentation of adequate geological and geomorphological information of the area in which delimitation is sought. To determine such matters, an international court or tribunal would have to make judgments about complex geological and geomorphological facts which, given the extensive scientific and technical information which must be submitted and considered by a predominantly scientifically and technically qualified sub-commission of the CLCS, a panel of legally trained judges may feel itself ill-equipped and therefore unwilling to do.[165] However, if the CLCS is prevented from considering submissions because of States' lack of consent, there is a risk that such situations will turn into a 'jurisdictional black hole' where neither the CLCS nor international courts or tribunals will be willing to determine entitlements. In an international system based on the consent of sovereign States this may be an unfortunate but foreseeable and appropriate outcome.

6.6.6 The role of Article 76 in delimitation beyond the 200-nm limit

(a) 'Natural prolongation' in Article 76

The notion of natural prolongation was first introduced as a fundamental concept underpinning the regime of the continental shelf in the *North Sea Continental Shelf Cases*.[166] As a central part of the definition of the continental shelf in Article 76(1) UNCLOS, it plays an important role in the establishment of its outer limits.

References

(p. 172) However, natural prolongation is not defined in Article 76 and has never been defined by an international court or tribunal.[167]

In the *Bangladesh/Myanmar* case, the ITLOS examined the interrelationship between the 'natural prolongation' concept of Article 76(1) and the 'outer edge of the continental margin' concept of Article 76(4). It noted that they were 'closely interrelated' and referred to the same area.[168] While 'natural prolongation' was mentioned in Article 76(1), it was clear from the language of Article 76(1) that the concept of 'the outer edge of the continental margin' was the essential element in determining the extent of the continental shelf.[169] It held that entitlement to a continental shelf beyond 200 nm should be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76(4), rather than the concept of natural prolongation set out in Article 76(1). Natural prolongation was not an independent basis for entitlement. Instead, natural prolongation should be interpreted in the context of the subsequent provisions of Article 76, in particular Article 76(4). The ITLOS thus favoured geomorphological considerations over geological considerations for the purposes of delimitation of the continental shelf beyond 200 nm.[170]

The ITLOS rejected a twofold test proposed by Bangladesh that required geological features (i.e. natural prolongation) and geomorphological features (i.e. the 'outer edge of the continental margin' tests set down in Article 76(4)) in order to prove entitlement to a continental shelf beyond 200 nm. In doing so, the ITLOS appears to have taken a more restrictive approach than the ICJ in the *Libya/Malta* case, which left open the possibility of geological and geomorphological features playing a role establishing entitlement to the continental shelf beyond 200 nm.[171]

6.6.7 Delimitation methodology of the continental shelf beyond 200 nm

The *Bangladesh/Myanmar* case was the first case where an international court or tribunal delimited competing entitlements to the continental shelf beyond

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(p. 173) 200 nm. The ITLOS noted that Article 83 does not distinguish between the continental shelf within and beyond 200 nm.[172] It underlined that, in view of the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presented a unique situation, which had been acknowledged in the course of negotiations at the UNCLOS III.[173] It concluded that the delimitation method to be employed for the continental shelf beyond 200 nm should not differ from that within 200 nm and applied the equidistance/relevant circumstances method to delimitate the continental shelf beyond 200 nm, extending the line established for the single maritime boundary.

In the *Bangladesh/Myanmar* case, it was clear that both States could claim a continental shelf beyond 200 nm based on the thickness of sedimentary rocks criterion in Article 76(4)(a)(i). Having previously held that geological factors were not determinative of the question of delimitation, it made sense in the particular circumstances of that case for the ITLOS to disregard geomorphological factors and to apply the equidistance/relevant circumstances method to delimit the continental shelf beyond 200 nm. This is consistent with the approach of international courts and tribunals in relation to delimitation of the continental shelf within 200 nm, where geographic criteria (i.e. coastal geography) have prevailed as equitable considerations over area-specific criteria such as geomorphological or geological features.[174]

In doing so, the ITLOS did not appear to consider the fact that the delimitation undertaken within 200 nm was a single maritime boundary for both the continental shelf and the EEZ.[175] Excluding geological and geomorphological factors appears to be justified when delimiting a single maritime

boundary within 200 nm, because they have no relevance to the water column that is being delimited.[176] However, no water column is delineated beyond 200 nm and the justification for excluding geological and geomorphological factors falls away. Absent special circumstances which completely exclude the consideration of geological and geomorphological factors (as was the case of the Bay of Bengal), they should continue to be relevant to the delimitation of the continental shelf beyond 200 nm.

References

(p. 174) 6.7 Seeing Through a Glass Darkly: Recent Developments and their Impact upon the Law of the Continental Shelf

In the 70 years since the origins of a legal theory of the continental shelf were first enunciated in the mid-1940s, continuing through the negotiation and signature of UNCLOS in 1982, and the subsequent development since 1994 of the law of the continental shelf, there can be few areas of the international law of the sea that have developed or evolved as much as Part VI and the associated provisions concerning the continental shelf.

In part, it is the great mineral wealth in the continental shelf that has spurred coastal States to assert their claims to a continental shelf and to seek resolution through negotiation and increasingly before international courts and tribunals. In parallel with these disputes, States have found themselves under a time pressure to present their submissions for an extended continental shelf in circumstances where any other party to the dispute can through simple protest prevent consideration or qualification of the submissions.

At times, there has been an overlap between the two processes. In perhaps a first step towards resolving some of the disputes in the South China Sea, Vietnam and Malaysia presented a joint submission in 2009 from which it would appear that they had reached agreement over the delimitation of their formerly disputed continental shelf within 200 nm; their submission was protested by China, some of whose own claims to a continental shelf in the South China Sea are now, perhaps indirectly, the subject of an Annex VII arbitration brought by the Philippines.

The Philippines' Notification and Statement of Claim, presented to China on 22 January 2013, puts into sharp relief a number of principles under UNCLOS pertinent to the continental shelf, but which international courts and tribunals have previously not decided. Among these are the long-standing question of what constitutes an 'island' and what a 'rock' for the purposes of Article 121 and the extent to which different features form part of the continental shelf or may generate their own maritime zones including a continental shelf under UNCLOS Part VI.

It remains to be seen whether or not a decision on these questions will increase the number of 'islands' having a claim to a continental shelf beyond 200 nm. But while it may be said that the practical impact of a decision in that case may be limited, given that many coastal States having a claim to an extended continental shelf should have already presented their submissions, this ignores a number of other coastal States—including China—with extended continental shelf claims who, under SPLOS/72&183 have only presented preliminary information of their claims, as well as those States who have more recently acceded to UNCLOS such as (p. 175) Thailand (2011) and Timor-Leste (2013) and a third category of those coastal States yet to ratify UNCLOS, including the United States and Peru.

Delineation of the extended continental shelf may then be far from complete. Even on its present caseload, there are currently 70 submissions before the CLCS of which recommendations have been made in relation to 18. Such is the extent of the backlog that in 2011, when it had only 55 submissions, the CLCS estimated that its work would not be complete until 2032. This estimate excludes the preliminary information submitted by 46 States.

It is unclear to what extent claims to the continental shelf will be assisted by recent developments

in delimitation practice and jurisprudence. Since the first Annex VII delimitation claim in 2006, *Barbados v Trinidad and Tobago*, a question has been extant as to the jurisdiction of a single body to delimit a single continental shelf. The 2012 decision of ITLOS in *Bangladesh/Myanmar*, however, seems to settle the question that one tribunal may delimit the continental shelf 'in its entirety'. In that case, there was no dispute that, 'as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 [nm] could fall within the jurisdiction of [ITLOS]', for the very reason that Article 76 'embodies the concept of a single continental shelf'.

If, in so doing, ITLOS drew a distinction between delimitation of the continental shelf and the delineation of its outer limits, thus making clear that the CLCS would still be the competent body responsible for the delineation of the outer limits of the continental shelf, its decision also opened the way to the creation of the 'grey area' where one State may have sovereign rights over an area of the continental shelf, while a second State may have sovereign rights over the superjacent EEZ. ITLOS recognized the jurisdictional difficulties in such a scenario, stating that pursuant to the principle reflected in the provisions of Articles 56, 58, 78, and 79, and in other provisions of UNCLOS, each State 'must exercise its rights and perform its duties with due regard to the rights and duties of the other'.[177] It noted that were many ways in which the parties could ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements.

The reasoning of ITLOS is appealing: arrangements such as joint development agreements already exist in State practice, and arrangements whereby different jurisdictions exist in relation to the seabed and superjacent water column are not unknown to international law.[178] However, given that the parties to such disputes

References

(p. 176) will have originally resorted to international legal fora in the absence of their ability to find a political solution, the idea of leaving parties to find a further political solution to definitively resolve such issues may be considered optimistic.[179] This may be especially the case where, as in *Bangladesh/Myanmar*, the parties' dispute came about because of their long-standing inability to reach agreement on a boundary and their resort to arms over sharing the mineral wealth of the disputed area.

Footnotes:

1 United Nations Environment Programme and GRID-Arendal, *Continental Shelf: The Last Maritime Zone* (2009) 27 <http://www.unep.org/dewa/Portals/67/pdf/Continental_Shelf.pdf> accessed 10 May 2014.

2 Francis Shepard, *Submarine Geology* (3rd edn, Harper and Row, 1973) 197–8 .

3 United Nations, Division for Ocean Affairs and the Law of the Sea, 'Continental shelf—general description' (2012) <http://www.un.org/depts/los/clcs_new/continental_shelf_description.htm> accessed 10 May 2014. The legal definition, as will be described, results in significantly different depths being acceptable in law. Submissions to the Commission on the Limits of the Continental Shelf, for example, vary in depth from a few metres to more than 8,000 metres. See United Nations Environment Programme (n 1) 28.

4 Technologies found in S Tani, Cabinet Counsellor, The Secretariat of the Headquarters for Ocean Policy 'Continental shelf survey of Japan', <http://www.gmat.unsw.edu.au/ablos/ablos08folder/session4-paper4-tani.pdf> accessed 10 May 2014; also see the summary in P Prows, 'Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property law (and What Is to Be Done About It)' (2007) 42 *Texas Int'l LJ* 241, 274 .

5 Figure drawn from the total of total areas under national jurisdiction excluding the outer continental shelf, United Nations Environment Programme (n 1) 28.

6 The US Extended Continental Shelf Project estimates that the United States' continental shelf

beyond 200 nm is likely to be at least 1 million square kilometres. In more concrete terms an area that large is about twice the size of the State of California.

[7] The 34 States commonly thought to be in a position to claim the greatest shelves (i.e. those stretching beyond 200 nm) include Australia, Brazil, Canada, Denmark, Japan, Russia, Spain, United Kingdom, and United States. For the full list, see TL McDorman 'The Role of the Commission on the Limits of the Continental Shelf: A Technical body in a Political World' (2002) 17(3) *IJMCL*, 301, 323 ; see also Ocean & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)* (1998) <http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm> accessed 10 May 2014; and PJ Cook and CM Carleton (eds), *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford University Press, 2000) 3 , which states that as many as 54 coastal States may have shelves beyond 200 nm.

[8] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof (London/Moscow/Washington, 11 Feb. 1971) 955 UNTS 115. On four regional treaties with similar objects, see RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, 1999) 429 .

[9] Recent years have also seen the development of commercial food fisheries in, for example, Queen Conch with attendant population declines, stock collapses, and closure of the fisheries in question. <http://www.cites.org/eng/com/ac/19/E19-08-3.pdf> accessed 10 May 2014; NOAA Fisheries, 'Queen Conch *(Strombus gigas)*' (updated 15 Mar. 2013), <http://www.nmfs.noaa.gov/pr/species/invertebrates/queenconch.htm> accessed 20 June 2014.

[10] On the question of whether nor not coral qualifies as a 'mineral' within the meaning of UNCLOS, see Prows (n 4) 298–303.

[11] DP O'Connell, 'Sedentary Fisheries and the Australian Continental Shelf' (1955) 49 *AJIL* 185 . See also CJB Hurst, 'Whose is the Bed of the Sea? Sedentary Fisheries Outside the Three-Mile Limit' (1923–24) 4 *BYIL* 34, 41 on legislation from Tunis, Ireland, and Mexico.

[12] M Gianni, 'High Seas Bottom Trawl Fisheries and their Impacts on the Biodiversity of Vulnerable Deep-Sea Ecosystems: Options for International Action', Report prepared for IUCN/the World Conservation Union, Natural Resources Defense Council, WWF International and Conservation International (June 2004) <http://www.greenpeace.org/international/Global/international/planet-2/report/2004/5/high-seas-bottom-trawl-fisheri.pdf> accessed 10 May 2014.

[13] S Arico and C Salpin, *Bioprospecting of Genetic resources in the Deep Seabed: Scientific, Legal and Policy Aspects*, UNU-IAS Report (2005) 27, <http://i.unu.edu/media/unu.edu/publication/28370/DeepSeabed1.pdf> accessed 10 May 2014.

[14] UNGA, 'Ocean and the law of the sea: Report of the Secretary-General, addendum', UN Doc A/60/63/Add.1, paras 79 and 215–16.

[15] For more on the genetic resources of the sea, refer to Chapter 13; and for marine scientific research, to Chapter 14.

[16] Ambassador Pardo Speech, 1 Nov. 1967, session beginning 10:30 am, General Assembly, Twenty-second Session, Official Records, First Committee, 1515th UN Doc A/C.1/PV, paras 18, 21–2 <http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf> accessed 20 June 2014.

[17] Churchill and Lowe (n 8) 141–2.

[18] Churchill and Lowe (n 8) 141.

[19] 'Offshore Increasingly Important to Oil Industry' (Reuters, 6 July 2010), <http://uk.reuters.com/assets/print?aid=UKLDE6640YV20100706> accessed 10 May 2014.

[20] Churchill and Lowe (n 8) 141.

[21] 'Shell to Develop World's Deepest Offshore Oil Platform' (Reuters, 8 May 2013),

<http://www.reuters.com/assets/print?aid=USL2N0DP1I420130508> accessed 10 May 2014.

[22] V Prescott, 'Resources of the Continental Margin and International Law' in Cook and Carleton (n 7) 77.

[23] 'In the matter of an arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi' (1952) 1 *ICLQ* 247, 253.

[24] R Lapidoth, '*Freedom of Navigation—Its Legal History and Its Normative Basis*' (1974–1975) 6 *J Mar L & Com* 259, 261 . See also PT Fenn Jr, 'Justinian and the Freedom of the Sea' (1925) 19 *AJIL* 716 .

[25] TTB Koh, 'The Origins of the 1982 Convention on the Law of the Sea' (1987) 29 *Malaya L Rev* 1 1–2 .

[26] H Grotius, *The Freedom of the Seas* [1633], in LB Sohn and JE Noyes (eds), *Cases and Materials on the Law of the Sea* (Transnational Publishers, 2004) 46 . See also PT Fenn, 'Origins of the Theory of Territorial Waters' (1926) 20 *AJII* 465 ; and HSK Kent, 'Historical Origins of the Three-mile Limit' (1954) 48 *AJIL* 537 .

[27] Koh (n 25) 4, 6.

[28] League of Nations, Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law (Territorial Waters) (1926), reproduced in (1926) 20 *AJIL* Spec. Sup., 109 (League of Nations Sub-Committee Report (Territorial Waters)). The Hague codification conference, although unsuccessful, did provide a valuable foundation upon which the International Law Commission (ILC) expressly relied (L Dolliver and M Nelson, 'Reflections on the 1982 Convention on the Law of the Sea' in D Freestone, R Barnes, and D Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 28 , fn 1, Doc A/2693 (1954) II *YBILC* 152, para 56).

[29] League of Nations Sub-Committee Report (Territorial Waters) (n 28) 107 and 119.

[30] On this point, see e.g. Hurst (n 11) for an argument from this period that recognizing special property rights for a State (to exploit sedentary fisheries) on its continental shelf does not conflict in any way with common enjoyment of the fisheries or navigation in the superjacent waters.

[31] R Young, 'Recent Developments with Respect to the Continental Shelf' (1948) *AJIL* 849, 849–50 .

[32] Treaty between His Majesty in Respect of the United Kingdom and the President of the United States of Venezuela Relating to the Submarine Areas of the Gulf of Paria (signed 26 Feb. 1942) 205 LNTS 121 (Gulf of Paria Treaty).

[33] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press) 285 .

[34] The 1942 Gulf of Paria Treaty was, it may bear noting, terminated by agreement in 1991 and replaced with the Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas (signed 18 Apr. 1990) 1654 UNTS 293. This new treaty makes express reference to the various areas established pursuant to UNCLOS, including the continental shelf, and makes even clearer the resource exploitation impetus. Article 7, for example, discusses the unity of deposits stretching across the negotiated border; and Art. 8 requires communication of drilling and exploration activities within 500 m of the border.

[35] J-F Pulvenis, 'The Continental Shelf Definition and Rules Applicable to Resources' in R-J Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, 1991) vol. 1, 315, 325 .

[36] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012) 270 .

[37] *Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 28 Sept. 1945, reproduced in (1946) 40 *AJIL* Sup 45.

[38] Typology of State considerations derived from Pulvenis (n 35) vol. 1, 326–7.

[39] Commonwealth of Australia Gazette, 11 Sept. 1953 No. 56, reproduced in (1954) 48 *AJIL* Sup. 102.

[40] Y Tanaka, *The International law of the Sea* (Cambridge University Press, 2012) 133 .

[41] Pulvenis (n 35) vol. 1, 327.

[42] SV Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer, 2008) 30 .

[43] Pulvenis (n 35) vol. 1, 327–8.

[44] Suarez (n 42) 31.

[45] Pulvenis (n 35) vol. 1, 328.

[46] T Treves, *1958 Geneva Conventions on the Law of the Sea* (United Nations, 2008) <http://legal.un.org/avl/ha/gclos/gclos.html> accessed 10 May 2014) . *North Sea Continental Shelf Cases,* Judgment [1969] ICJ Rep 3, 39, para 63.

[47] For one such critical voice see S Oda, 'Proposals for Revising the Convention on the Continental Shelf' (1968) 7 *Colum J Transnat'l L* 1 .

[48] UNGA Res 1514 (XV) 14 Dec. 1960.

[49] Koh (n 25) 15; H Caminos, 'Sources of the Law of the Sea' in Dupuy and Vignes (n 35) vol. 1, 85–7.

[50] Pulvenis (n 35) vol. 1, 329–30.

[51] Pulvenis (n 35) vol. 1, 328–9.

[52] R Barnes, D Freestone, and DM Ong, 'The Law of the Sea: Progress and Prospects' in Freestone et al. (n 28) 13–14.

[53] Suarez (n 42) 40.

[54] Ambassador Pardo Speech (n 16) para 104.

[55] UNGA Res 2467A (XXIII) (21 Dec. 1968). The UN had previously passed UNGA Res 2340 (XXII) (18 Dec. 1967) to establish an Ad Hoc Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction.

[56] UNGA Res 2467A (XXIII) (21 Dec. 1968).

[57] UNGA Res 2750 C (XXV) (17 Dec. 1970).

[58] United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 Dec. 1982, entered into force 16 Nov. 1994) 1833 UNTS 3 (UNCLOS).

[59] Pardo Speech (n 16) (3pm resumed session), para 16.

[60] TTB Koh, 'A Constitution for the Oceans', Statements made at the Final Session of the Conference at Montego Bay (6 and 11 Dec. 1982) 3, <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf> accessed 10 May 2014).

[61] Declaration incorporating the 'Gentlemen's Agreement' made by the President and endorsed by the Conference at its 19th meeting on 27 June 1974, approved by the UNGA on 16 Nov. 1973, reproduced in (1974) 13 ILM 1209.

[62] Tanaka (n 40) 27.

[63] For a summary of arguments against and in favour of the procedure, as seen at the time of negotiations, see B Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75 *AJIL* 324, 325 ff .

[64] Koh (n 60) 3.

[65] Informal Composite Negotiating Text, revision 1, A/CONF.62/WP.10/Rev.1 (28 Apr. 1979) 18.

[66] Buzan (n 63) 334.

[67] Informal Single Negotiating Text, A/CONF.62/WP.8/Part II (7 May 1975).

[68] Revised Single Negotiating Text Part Two, A/CONF.62/WP.8/Rev.1/Part II (6 May 1976).

[69] Suarez (n 42) 42.

[70] BH Oxman, 'The Third United Nations Conference on the Law of the Sea' in Dupuy and Vignes (n 35) vol. 1, 243.

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

[72] UNCLOS, Art. 78(1).

[73] 'Isobath' denotes a line connecting points of equal water depth—International Hydrographic Organisation, *Hydrographic Dictionary* (5th edn, Monaco, 1994) Part I, vol. 1, 63 and 118 .

[74] UNCLOS, Art. 77(1).

[75] Convention on the Continental Shelf (Geneva, adopted 29 Apr. 1958, entered into force 10 June 1964) 499 UNTS 311, Art. 2(4) (Continental Shelf Convention).

[76] See e.g. I Azzam, 'The Dispute Between France and Brazil over Lobster Fishing in the Atlantic' (2008) 13(4) *ICLQ* 1453–9 .

[77] Tanaka (n 40) 142–3.

[78] UNCLOS, Art. 84.

[79] M Hayes, *The Law of the Sea: The role of the Irish Delegation at the Third UN Conference* (Royal Irish Academy, 2011) 40 ; Tanaka (n 40) 135; R Smith and G Taft, 'Legal Aspects of the Continental Shelf' in PJ Cooke and CM Charleton (eds), *Continental Shelf Limits: The Legal and Scientific Interface* (Oxford University Press, 2000) 17, 18 .

[80] TTB Koh, 'Negotiating a New World Order for the Sea' (1983–1984) 24 *Va Int'l LJ* 772 .

[81] A concept embodied in UNCLOS Art. 82; see also International Law Association (ILA), Report on Article 82 of the 1982 UN Convention on the Law of the Sea (UNCLOS), Rio de Janeiro Conference (2008) 2.

[82] *North Sea Continental Shelf Cases*, Judgment [1969] ICJ Rep 3, 31, paras 43 ff. Moreover, the judgment did not clearly indicate whether jurisdiction over the continental shelf extended to all areas having continental rather than oceanic crust, i.e. whether different geological factors were relevant in determining natural prolongation; Hayes (n 79) 40.

[83] Smith and Taft (n 79) 17.

[84] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 43, para 118.

[85] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 50, para 139; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40, 91, paras 167 ff.

[86] UNCLOS, Art. 76(3) refers to 'land mass' as opposed to 'continental landmass' in order to guarantee the equal treatment of island States; C Reichert, 'Determination of the Outer Continental Shelf and the Role of the Commission on the Limits of the Continental Shelf' (2009) 24 *IJMCL* 387, 390.

[87] This distinction between establishing title within 200 nm and beyond 200 nm was recognized by the ICJ in the *Libya v Malta* case, where it rejected the argument that natural prolongation of the land territory into and under the sea was the primary basis of title to the continental shelf up to 200 nm: 'For juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone': see *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 33, para 34 and 35, paras 39–40.

[88] Tanaka (n 40) 135; Smith and Taft (n 79) 19.

[89] UNCLOS, Art. 76(7).

[90] UNCLOS, Art. 1(1).

[91] UNCLOS, Part XI, in particular Arts 136 and 137 and s 4.

[92] Second Report of the ILA Committee on Legal Issues of the Outer Continental Shelf, Report of the Seventy-Second Conference (2006) 215, 234 (ILA Second Report). Given that the preceding paragraphs of Art. 76 deal with the delimitation of the continental shelf beyond 200 nm, the term 'outer limits of the continental shelf' in Art. 76(9) should be taken to refer to the outer limits of the continental shelf beyond 200 nm. Note that several members of the ILA Committee advanced the view that Art. 76(9) applies also to the outer limit of the continental shelf at 200 nm. See also AG Oude Elferink, 'Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective' (2006) 21 *IJMCL* 269, 282.

[93] ILA Second Report, 236. As the wording of UNCLOS, Art. 76(9) leaves open the possibility that a coastal State may establish outer limit lines which have not been considered by the CLCS or which have not been established 'on the basis of' its recommendations, the reference to 'permanently' in Art. 76(9) must exclude circumstances of challenge by other States, particularly given the 'without prejudice' language of Art. 76(10) in relation to delimitation.

[94] Smith and Taft (n 79) 20.

[95] UNCLOS, Annex II, Art. 2(1).

[96] UNCLOS, Annex II, Art. 2(4).

[97] Tanaka (n 40) 138.

[98] Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 Apr. 2008, CLCS/40/Rev.1, Rule 11 (CLCS Rules of Procedure).

[99] UNCLOS, Annex II, Art. 3(1).

[100] UNCLOS, Annex II, Art. 5.

[101] UNCLOS, Annex II, Art. 6(2).

[102] UNCLOS, Annex II, Art. 6(3).

[103] CLCS Rules of Procedure, Rule 55(2).

[104] UNCLOS, Annex II, Art. 4.

[105] Scientific and Technical Guidelines of the Commission on the Continental Shelf, Adopted by CLCS on 13 May 1999 at its Fifth Session, UN Doc CLSC/11 (CLCS Scientific and Technical Guidelines).

[106] Suarez (n 42) 129.

[107] Suarez (n 42) 129.

[108] CLCS Scientific and Technical Guidelines 2.2.6 and 2.2.8.

[109] Eleventh Meeting of the States Parties to UNCLOS (29 May 2001) UN Doc SPLOS/72.

[110] Smith and Taft (n 79) 21.

[111] Eighteenth Meeting of States Parties to UNCLOS (20 June 2008) UN Doc SPLOS/183.

[112] This was raised by the CLCS in a letter from the Chairman of the CLCS to the President of the Eighth Meeting of States Parties to UNCLOS (12 Mar. 1998) UN Doc SPLOS/26, para 5 and was considered but not decided at the Eighth Meeting of States Parties to UNCLOS, Report of the Eighth Meeting of States Parties to UNCLOS (4 June 1998) UN Doc SPLOS/31, para 52.

[113] ILA Second Report, 239; First Report of the ILA Committee on Legal Issues of the Outer Continental Shelf, Report of the Seventy First Conference (2004) 815–17 (ILA First Report). See, however, McDorman (n 7) 303–4: 'there is nothing in the mandate of the Commission that would preclude a non-party to the LOS Convention from utilising the Commission'.

[114] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force on 27 Jan. 1980) (1980) 1155 UNTS 331, Art. 36.

[115] *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, PCIJ Rep Series A/B

No. 46 (1932), 147–8.

[116] AG Oude Elferink, '"Openness" and Article 76 of the Law of the Sea Convention: The Process Does Not Need to Be Adjusted' (2009) 40 *ODIL* 36, 38 .

[117] Statement by the Chairman of the CLCS on the Progress of Work of the CLCS (14 Sept. 2004) UN Doc CLCS/42, para 17.

[118] The Introduction to the CLCS Scientific and Technical Guidelines explicitly acknowledge this. See also the remarks of Judge Dolliver Nelson describing the CLCS as a 'judicial or at least quasi-judicial body' in his Opening Remarks to the International Journal of Maritime and Coastal Law Symposium on the Outer Continental Shelf in (2006) 21 *IJMCL* 267, 268.

[119] AG Oude Elferink, 'The Establishment of Outer Limits of the Continental Shelf Beyond 200 Nautical Miles by the Coastal State: The Possibilities of Other States to Have an Impact on the Process' (2009) 24 *IJMCL* 535, 536; ILA Second Report, 228–9; ILA First Report, 778–9.

[120] ILA Second Report, 230 and ILA First Report, 780. In 2011, the CLCS considered a proposal for a mechanism to seek advice on matters of interpretation of certain provisions of UNCLOS other than those contained in Art. 76 and Annex II, as well as in the Statement of Understanding. However, this was withdrawn and the CLCS decided not to pursue the issue further; Statement by the Chairman of the CLCS on the Progress of Work of the CLCS (30 Apr. 2012) UN Doc CLCS/74.

[121] UNCLOS, Art. 76(7) and Annex I, Art. 3. See also ILA Second Report, 230 and ILA First Report, 779.

[122] Art. 76(8) UNCLOS.

[123] See also the comments of the ITLOS in *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 407.

[124] ILA Second Report, 231–3; ILA First Report, 802; see also LDM Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (2009) 24 *IJMCL* 419 .

[125] This is clear from the drafting history of UNCLOS; during the Ninth Session of UNCLOS III, the words 'on the basis of' were replaced by the words 'taking into account'; see Report of the Chairman of the Second Committee (29 Mar. 1980) UN Doc A/CONF.62/L.51, para 6(b).

[126] For example, where the CLCS recommendations locate the foot of the slope at a different location than that contained in the coastal State's original submissions, the coastal State is arguably able to establish any outer limit line that it considers appropriate, as long as it respects the recommendation in respect of the foot of the slope; see Oude Elferink (n 92) 281.

[127] ILA Second Report, 232–3.

[128] UNCLOS, Annex II, Art. 8. What constitutes a reasonable period of time will depend on the circumstances of each case, and may be a considerable amount of time if the coastal State has to gather further data (ILA Second Report, 242–3; ILA First Report, 818).

[129] ILA Second Report, 231–2; ILA First Report, 803.

[130] ILA Second Report, 245–8; ILA First Report, 782–5.

[131] Oude Elferink (n 116) 39–40; see the comments of the United States on the Executive Summary of the Brazilian submission: Letter of the Deputy Representative of the United States of America to the Legal Counsel of the United Nations, 25 Aug. 2004, <http://www.un.org/depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_los_usatext.pdf> accessed 11 May 2014.

[132] B Kwiatkowska, 'Submissions to the UN Commission on the Limits of the Continental Shelf: The Practice of Developing States in Cases of Disputed and Unresolved Maritime Boundary Delimitations or Other Land or Maritime Disputes, Part One' (2013) 28 *IJMCL* 219, 230

[133] MH Nordquist et al (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1993) vol. II, 1017 ; see further Kwiatkowska (n 132) 233–6; ILA

Second Report, 236–8; ILA First Report, 809–11.

134 Oude Elferink (n 116) 38; Statement by the Chairman of the CLCS on the Progress of the Work of the Commission (14 Sept. 2004) UN Doc CLCS/42.

135 Kwiatkowska (n 132) 247.

136 See e.g. the Recommendations of the CLCS on the partial submission made by Mexico in respect of the western polygon in the Gulf of Mexico, which took into account the 9 June 2000 Continental Shelf Treaty between the USA and Mexico, <http://www.un.org/depts/los/clcs_new/submissions_files/mex07/mex_rec.pdf> accessed 11 May 2014. See also the Recommendations of the CLCS on the 2001 Submission made by Russia (8 Oct. 2002) UN Doc A/57/57/Add.1, para 39, which requested Russia to provide it with the charts and coordinates of the delimitation lines as they would represent the outer limits of the continental shelf of Russia beyond 200 nm in the Barents Sea and the Bering Sea, following the entry into force of maritime boundary delimitation agreements with Norway in the Barents Sea, and with the United States of America in the Bering Sea. Note that CLCS did not appear to take into account the Annex VII decision in the *Barbados v Trinidad and Tobago Case* when making its Recommendations on the submissions made by Barbados; see Summary of Recommendations of the CLCS in regard to the submission made by Barbados on 8 May 2008 (15 Apr. 2010), <http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf> accessed 11 May 2014. However, it has recently refused to consider Myanmar's submission in light of Bangladesh's observation that Myanmar had not 'amended, modified or in any way altered its submission to take account' the judgment of the ITLOS in the *Bangladesh/Myanmar* case (see Statement by the Chairman of the CLCS (1 Apr. 2013) UN Doc CLCS/78).

137 See e.g. Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in Western Gulf of Mexico beyond 200 Nautical Miles (Washington, 9 June 2000) 2143 UNTS 417; Agreement between the Government of the French Republic and the Government of Barbados on the Delimitation of Maritime Areas between France and Barbados (Bridgetown, 15 Oct. 2009) 2663 UNTS; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland Concerning the Delimitation of Areas of the Continental Shelf between the Two Countries (Dublin, 7 Nov. 1988) 1564 UNTS 217.

138 Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (Adelaide, 25 July 2004) 2441 UNTS 235; Australian Ministry of Foreign Affairs and Trade, Press Release (25 July 2004), <http://www.foreignminister.gov.au/releases/2004/fa112a_04_bg.html> accessed 11 May 2014.

139 CLCS Rules of Procedure, Annex I, para 2(a).

140 CLCS Rules of Procedure, Annex I, para 2(b).

141 CLCS Rules of Procedure, Annex I, para 5(a).

142 CLCS Rules of Procedure, Rule 46.

143 Statement by the Chairman of the CLCS on the Progress of Work in the Commission (1 Oct. 2009) UN Doc CLCS/64, para 40; Statement by the Chairman of the CLCS on the Progress of Work in the Commission (16 Sept. 2011) UN Doc CLCS/72, para 22; *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 387–9.

144 BM Magnusson, 'Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?' (2013) 28 *IJMCL* 465, 466 .

145 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 376; see also *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 45, para 125; Suarez (n 42) 224.

146 UNCLOS, Art. 83(1).

[147] UNCLOS, Art. 83(2).

[148] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 6, 101, paras 115–16; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 71, para 190; see also *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13, 46, para 60; *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* [2001] ICJ Rep 40, 91, paras 176 and 111, para 230; *Land and Maritime Boundary (Cameroon v Nigeria:* Equatorial Guinea intervening) [2002] ICJ Rep 303, 441–2, paras 288–90; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf* (2006) 27 RIAA 147, 214, para 238 and 230, para 304; *Guyana v Suriname (Arbitration under Annex VII of UNCLOS)* (2008) 47 ILM 166, 212, para 342; *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 238–40. The ICJ in *Romania v Ukraine* [2009] ICJ Rep 6 slightly diverged from previous case law by viewing the disproportionality test as a separate final check to ensure an equitable delimitation and not as a 'relevant consideration' in a two-stage process. The Court in the *Nicaragua v Colombia Case* acknowledged that 'the three-stage process is not, of course, to be applied in a mechanical fashion' (Merits, Judgment, 19 Nov. 2012, 72, para 194).

[149] It may also use other methods such as the bisector method, though equidistance remains the general rule *(Territorial and Maritime Dispute (Nicaragua v Honduras)* [2007] ICJ Rep 659, 745, para 281). No legal consequences flow from the use of the terms 'median line' and 'equidistance line', since the method of delimitation in each case involves constructing a line each point on which is an equal distance from the nearest points on the two relevant coasts (*Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 6, 101, para 116; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 71, para 191).

[150] *Arbitration between Barbados and the Republic of Trinidad and Tobago* (2006) 27 RIAA 147, 214, para 238.

[151] *Case Concerning Delimitation of Maritime Areas between Canada and France* (1992) 31 ILM 1145, 1171, para 79.

[152] *Delimitation of Maritime Areas between Canada and France* (1992) 31 ILM 1145, 1171, para 79. Note that UNCLOS had not yet entered into force.

[153] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 147, 209, para 217.

[154] *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 377.

[155] Statement by the Chairman of the CLCS on the progress of work on the Commission (1 Oct. 2009) UN Doc CLCS/64, para 40; Statement by the Chairman of the CLCS on the progress of work in the Commission (16 Sept. 2011) UN Doc CLCS/72, para 22; *Dispute Concerning the Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 387–89.

[156] *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 390–92.

[157] *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 393.

[158] *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, paras 407–13. It also noted that several submissions made to the CLCS, including the first submission made to the CLCS, included areas in respect of which there was an agreement between the States concerned effecting the delimitation of their continental shelf beyond 200 nm.

[159] *Case Concerning Territorial and Maritime Dispute (Nicaragua v Honduras)*, Judgment [2007] ICJ Rep 659, 759, para 319.

[160] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 45–6, paras 126–31.

[161] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Separate Opinion of Judge Donoghue, paras 17–30; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Declaration of

Judge ad hoc Mensah, paras 9–12; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Declaration of Judge ad hoc Cot, para 20.

162 *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Separate Opinion of Judge Donoghue, paras 17–30; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Declaration of Judge ad hoc Mensah, para 8; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Declaration of Judge ad hoc Cot, para 19.

163 For an argument that the ICJ's jurisdiction to delimit the outer continental shelf is subject to the determination that the CLCS has made recommendations with regard to the area of the outer continental shelf subject to dispute, see B Kunoy, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf' (2010) 25 *IJMCL* 237 .

164 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 443 and 370.

165 See further Magnusson (n 144) 465; RR Churchill, 'The *Bangladesh/Myanmar* Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1 *CJICL* 137, 146–50 .

166 *North Sea Continental Shelf Cases*, Judgment [1969] ICJ Rep 3, 31, paras 43 ff.

167 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 432.

168 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 434.

169 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 429.

170 The ITLOS referred to the 'test of appurtenance' contained in the CLCS Scientific and Technical Guidelines, which applies the formulae set out in UNCLOS, Art. 76(4) to determine whether a coastal State is entitled to delineate the outer limits of the continental shelf beyond 200 nm; *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 436–37, referring to CLCS Scientific and Technical Guidelines 2.2.6 and 2.2.8.

171 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 35, para 3.

172 See further Suarez (n 42) 224.

173 *Dispute Concerning the Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras 444–46.

174 See e.g. *Delimitation of Continental Shelf (United Kingdom v France)* (1977) 18 RIAA 3, 60–1, paras 107–09; *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* [1982] ICJ Rep 18, 58, para 67; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* [1984] ICJ Rep 246, 273–8, para 45–59; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 35, paras 39–40; *Arbitration between Barbados and the Republic of Trinidad and Tobago* (2006) 27 RIAA 147, 212, para 228; *Guyana v Suriname (Arbitration)* (2008) 47 ILM 166, 215, para 356; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, 19 Nov. 2012, 79, para 214.

175 Churchill (n 165) 149.

176 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA)* [1984] ICJ Rep 246, 326–7, paras 192–95; Churchill (n 165) 150; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 35, paras 39–40.

177 *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para 475.

178 See the Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone and Certain Seabed Boundaries (Perth, 14 Mar. 1997); Treaty between Australia and the Independent State of Papua New Guinea concerning

Sovereignty and Maritime Boundaries in the area between the Two Countries, including the area known as the Torres Straight and Related Matters (Sydney, 18 Dec. 1978) 1429 UNTS 207.

179 See further Churchill (n 165) 150–1; C Schofield and A Telesetsky, 'Grey Clouds or Clearer Skies Ahead? Implications of the Bay of Bengal Case' (2012) 3 *Law of the Sea Reports* 1 . See also the Statement by the Chairman of the CLCS (1 Apr. 2013) UN Doc CLCS/78, where the CLCS refused to consider Myanmar's submission to the CLCS in light of Bangladesh's observation that Myanmar had not 'amended, modified or in any way altered its submission to take account' the judgment of the ITLOS in *Dispute Concerning Delimitation of the Maritime Boundary (Bangladesh/Myanmar)*, 14 Mar. 2012.