

# Between Villa Schröder (ITLOS) and the Peace Palace (ICJ): Diverging Approaches to Continental Shelf Delimitation Beyond 200 Nautical Miles

*Ioannis Konstantinidis*<sup>1</sup>

## Structured Abstract

Article Type: Research Paper

*Purpose*—Maritime boundary disputes are among the most common types of disputes in international law. Since their establishment, international courts and tribunals are faced with cases relating to the delimitation of maritime zones. The delimitation of the continental shelf beyond 200 nautical miles is a delicate process because of the involvement of the Commission on the Limits of the Continental Shelf, which examines submissions and makes recommendations on the outer limits of the continental shelf beyond 200 nautical miles. This article highlights certain aspects of the obscure relationship between the Commission on the Limits of the Continental Shelf and international courts and tribunals.

*Design, Methodology, Approach*—Focusing on the recent jurisprudence of the International Tribunal for the Law of the Sea and the International Court of Justice, this study attempts to deconstruct and analyze the judges' reasoning, in a situation where an international court or tribunal is asked to delimit the continental shelf beyond 200 nautical miles, prior to the recommendations of the Commission on the Limits of the Continental Shelf.

*Vipod Residence APT A-32-3, 6 Jalan Kia Peng, 50450, Kuala Lumpur, Malaysia, Telephone: +60169102751, email: ioannis.konstantinidis@gmail.com*



---

Journal of Territorial and Maritime Studies / Volume 3, Number 2 / Summer/Fall 2016 / pp. 28–52 /  
ISSN 2288-6834 (Print) / © 2016 McFarland & Company, Inc.

---

*Findings*—Based on recent jurisprudence, it could be argued that the approach adopted by the International Tribunal for the Law of the Sea constitutes a turning point in continental shelf delimitation beyond 200 nautical miles. It plays a major role in filling certain institutional and inter-institutional weaknesses of the Convention, in cases where States ask international courts or tribunals to resolve a boundary dispute involving the delimitation of the continental shelf beyond 200 nautical miles, prior to the Commission’s recommendations.

*Practical Implications*—Useful for both academics and practitioners, this study provides a comparative analysis of the approaches adopted by international courts and tribunals concerning the relationship between the Commission of the Limits of the Continental Shelf and international judicial organs.

*Originality, Value*—This article highlights the importance of the declarations, separate and dissenting opinions of certain judges, who raise concerns and propose solutions to certain institutional *lacunae* of the United Nations Convention on the Law of the Sea.

Key words: admissibility, article 76, continental shelf beyond  
200 nautical miles, delimitation,  
international courts and tribunals, jurisdiction

## Introductory Remarks

The outer limits of national jurisdiction are of great importance in the law of the sea, as they constitute the limits of the international seabed area (hereinafter referred to as the “Area”).<sup>2</sup> Within these two areas, different regimes apply. The coastal State has sovereign rights over its continental shelf, while the legal regime applicable to the Area is prescribed by Part XI of the United Nations Convention on the Law of the Sea (hereinafter referred to as the “Convention” or “UNCLOS”),<sup>3</sup> the relevant annexes and the 1994 Agreement relating to the Implementation of Part XI of the Convention (hereinafter referred to as the “1994 Agreement”).<sup>4</sup> The Area and its resources are the common heritage of mankind<sup>5</sup> and the International Seabed Authority (hereinafter referred to as the “Authority”) is the international organization charged with organizing and controlling the activities in the Area.

The exercise by the Authority and the coastal State of their respective rights over these distinct areas necessitates the delimitation between the Area and areas of national jurisdiction. According to Article 76 of the Convention, the continental shelf consists of the seabed and subsoil that extends to the outer edge of the continental margin, or to a distance of 200 nautical miles if the outer edge of the continental margin does not extend up to that distance. When the continental margin extends beyond 200 nautical miles, the Commission on the Limits of the Continental Shelf (the “Commission” or the CLCS) intervenes in the establishment of the outer limits by the coastal States and endorses the validity of the claims. Pursuant to Article 76 of the Convention, the coastal State shall make a submission to the Commission, which in turn makes recommendations. Final and binding outer limits of the

continental shelf are established by the coastal State on the basis of the Commission's recommendations. Those limits constitute at the same time the limits of the Area.

However, the above scenario does not always match the reality of practice. Once it issues its recommendations, the Commission plays no role in the establishment of the outer limits. The Commission is unable to control whether the established limits follow its recommendations. More importantly, the procedure of the establishment of the outer limits of the continental shelf is relatively slow, mainly for two reasons. First, the Commission has received a significant number of submissions over the past few years, resulting in a dramatic increase of its workload.<sup>6</sup> Not being a permanent organ, the Commission holds meetings for a specific number of weeks per year. It seems that it will need several years in order to examine all submissions that it has received to date. Second, pursuant to paragraph 5(a) of Annex I to the Rules of Procedure of the Commission, in the event that there exists a land or maritime dispute, the Commission shall not consider a submission made by any of the States concerned in the dispute.<sup>7</sup> However, the Commission could proceed with the examination of the submission, subject to the prior consent given by all States that are parties to such a dispute or to the resolution of the dispute. In fact, several States have opposed the examination of submissions by the Commission due to existing disputes. In this case, the procedure before the Commission is simply blocked and as a consequence the coastal State cannot establish its outer limits.

In view of this procedural impasse, could parties to a dispute request an international court or tribunal to delimit their continental shelf beyond 200 nautical miles? In other words, do international courts and tribunals have jurisdiction to delimit the continental shelf beyond 200 nautical miles prior to the Commission's recommendations?

It is the purpose of the present paper to address this question by focusing on the recent jurisprudence of the International Tribunal for the Law of the Sea (hereinafter referred to as the "Tribunal" or ITLOS) and the International Court of Justice (hereinafter referred to as the "Court" or ICJ).<sup>8</sup> It provides an in-depth analysis of the diverging approaches adopted by ITLOS in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*,<sup>9</sup> and by the ICJ in the *Territorial and Maritime Dispute*,<sup>10</sup> opposing Nicaragua and Colombia.<sup>11</sup> Finally, it highlights the importance of the reasoning developed by ITLOS and proposes solutions that could be taken into account by international courts and tribunals in similar cases.

## **Divergence Between ITLOS and the ICJ**

### *The Landmark Decision of the Tribunal to Delimit the Continental Shelf Beyond 200 Nautical Miles*

Prior to delimiting the continental shelf beyond 200 nautical miles between Bangladesh and Myanmar, the Tribunal had to determine whether it had jurisdiction

to proceed. Recognizing that the parties to the dispute had accepted its jurisdiction by way of declaration in accordance with Article 287 of the Convention,<sup>12</sup> it held that the subject-matter of the dispute fell within its jurisdiction *ratione materiae* and that it was in a position to delimit the territorial sea, the exclusive economic zone and the continental shelf up to 200 nautical miles between the parties.<sup>13</sup> Neither Bangladesh nor Myanmar contested its jurisdiction on these matters.

The question of whether it had jurisdiction to delimit the continental shelf beyond 200 nautical miles was much more challenging. Myanmar objected by specifying that even if the Tribunal had jurisdiction, it should not exercise it. According to Myanmar, a decision on the continental shelf beyond 200 nautical miles would prejudice the rights of third parties, including rights related to the Area.<sup>14</sup> In addition, Myanmar contended that the establishment of the outer limits of the continental shelf by the coastal State is a prerequisite for the Tribunal to rule on the delimitation of the continental shelf beyond 200 nautical miles. Furthermore, it stressed that the role of the Commission is essential in this process, given that the coastal State shall establish the outer limits of its continental shelf on the basis of the Commission's recommendations, in accordance with Article 76(8) of the Convention. Myanmar stressed that the first step in the delimitation process is the formulation and adoption of the recommendations by the Commission:

To reverse the process, as Bangladesh urges the Tribunal to do, to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.<sup>15</sup>

Myanmar thus proposed that the Tribunal suspend the delimitation process until the Commission makes its recommendations.<sup>16</sup>

As far as Bangladesh is concerned, it was of the view that the Tribunal was expressly authorized by the Convention to decide on the delimitation of the continental shelf beyond 200 nautical miles. Bangladesh observed that Article 83 of the Convention deals with the delimitation of the entire continental shelf, as it does not make any distinction between the continental shelf within and beyond 200 nautical miles.<sup>17</sup>

ITLOS pointed out that there is a single continental shelf and that there is no distinction between the continental shelf within and beyond 200 nautical miles. In reply to Myanmar's argument regarding the Area, the Tribunal observed that:

[A]s is evident from the Parties' submissions to the Commission, the continental shelf beyond 200 nm that is the subject of delimitation in the present case is situated far from the Area. Accordingly, the Tribunal, by drawing a line of delimitation, will not prejudice the rights of the international community.<sup>18</sup>

Having rejected Myanmar's first argument, the Tribunal confirmed that there is a series of steps that must be followed in the delimitation process. It noted that a disagreement on the base points to be used in the delimitation does not constitute an obstacle to the delimitation, and that this applies similarly to the non-established outer limits of the continental shelf.<sup>19</sup> Moreover, the Tribunal assessed the roles of

the Commission and the Tribunal with regard to the continental shelf beyond 200 nautical miles. It admitted that, in accordance with Article 76(8) and Annex II of the Convention, the right of the coastal State to establish final and binding limits is of pivotal importance, and it recalled the essential role of the Commission in this process.<sup>20</sup>

However, it stated that there is a clear distinction between the delimitation of the continental shelf under Article 83 of the Convention and the delineation of its outer limits according to Article 76 and Annex II of the Convention. In the Tribunal's view, the Commission plays an important role in the delineation of the outer limits and this role is without prejudice to the delimitation of the continental shelf through recourse to the dispute settlement procedures of Part XV of the Convention.<sup>21</sup>

It also indicated that the judicial delimitation of the continental shelf is without prejudice to the exercise by the Commission of its functions in the process of the delineation of the outer limits. To support its argument, ITLOS referred to cases where the Commission had issued its recommendations following the delimitation of the continental shelf beyond 200 nautical miles between States by way of agreement.<sup>22</sup>

Similarly, the Tribunal examined the cases where the ICJ and arbitral tribunals determined that they had no jurisdiction to delimit the continental shelf beyond 200 nautical miles, in particular the case between Canada and France<sup>23</sup> and the case between Nicaragua and Honduras.<sup>24</sup> It concluded that it was not relevant to refer to those cases because "the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."<sup>25</sup>

Having dealt with the general questions relating to its jurisdiction to decide on the delimitation of the continental shelf, the Tribunal had to address the specific circumstances of the case in order to determine whether it would exercise its jurisdiction. It pointed out that, according to the argument raised by Bangladesh, in the case of a dispute resulting from the delimitation of the continental shelf between States with adjacent or opposite coasts, the Commission cannot examine the submission without the prior agreement of the parties concerned. In that particular case, in its *note verbale* to the Commission dated 23 July 2009, Bangladesh requested the Commission not to consider the submission of Myanmar.<sup>26</sup> Myanmar did the same on 31 March 2011.<sup>27</sup> As a result, the Commission decided to suspend the examination of the submissions made by both States.<sup>28</sup> Given the positions of the parties to the dispute, the Tribunal informed the parties that if it decided not to delimit the continental shelf beyond 200 nautical miles, the delimitation of the continental shelf would remain a pending issue:

The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. [...] A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only

fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.<sup>29</sup>

It concluded that any inaction on behalf of the Commission and the Tribunal would make it impossible for State Parties to the Convention to fully enjoy their rights over the continental shelf.

Having concluded that it had jurisdiction, ITLOS had to determine if there were entitlements to continental shelf and whether those entitlements overlapped. Myanmar initially contested the Tribunal's jurisdiction to decide on the existence of the entitlements of the parties, arguing that this process fell under the functions of the Commission.<sup>30</sup> In its reply, the Tribunal emphasized that there is a distinction between the entitlement to continental shelf beyond 200 nautical miles and the outer limits of the continental shelf.<sup>31</sup> It concluded that the basis of entitlement to a continental shelf depends on State sovereignty over its land territory<sup>32</sup> and that this does not require the coastal State to establish the outer limits of its continental shelf. The Tribunal seems to propose that the absence of outer limits does not prevent it from deciding on issues relating to entitlement and delimitation:

Therefore, the fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.<sup>33</sup>

The main question was whether there were overlapping entitlements to continental shelf beyond 200 nautical miles. In the absence of overlapping entitlements, there was no delimitation issue. Bangladesh was of the view that the natural prolongation was the most important criterion for the entitlement to continental shelf beyond 200 nautical miles. It emphasized that Myanmar lacked any entitlement because of a fundamental discontinuity between the landmass of Myanmar and the seabed beyond 200 nautical miles.<sup>34</sup> ITLOS rejected Bangladesh's approach:

Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose.<sup>35</sup>

The Tribunal recalled that, in accordance with Article 76 of the Convention, the Commission is charged with analyzing the scientific and technical data submitted to it by the coastal State, but it is under the obligation to interpret and apply Article 76. In addition, it contended that, in that particular case, the parties did not contest the scientific and technical evidence submitted to the Commission and that the disagreement between the Parties concerned mostly the interpretation of Article 76 and the continental margin. The Tribunal underlined that the data submitted to the Commission by the parties relating to their entitlement to a continental shelf beyond 200 nautical miles were based to a great extent on the thickness of sedimentary rocks pursuant to the formula contained in Article 76, paragraph 4(a)(i), of the Convention. As a result, it was convinced that there exists a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200

nautical miles. In this respect, the Tribunal observed that its conclusion in relation to the entitlement to a continental shelf was based on the particular geological characteristics of the seabed of the Bay of Bengal. This particularity had been made available during the negotiations of Third United Nations Conference on the Law of the Sea. With regard to the overlapping entitlements, the Tribunal was of the view that the parties had provided the Commission with the elements proving that their entitlements overlap in the disputed area.<sup>36</sup>

The Tribunal's final conclusion was that there was a continental shelf to delimit. This conclusion was mainly based on the uncontested scientific and technical evidence presented by the parties.<sup>37</sup> Both States agreed on the existence of a continental shelf beyond 200 nautical miles in the Bay of Bengal and in order to convince the Tribunal, they relied on academic and scientific publications.<sup>38</sup>

The Tribunal seized the opportunity to explain the roles conferred to the Commission and to international courts and tribunals. It rightly pointed out that Article 76 of the Convention contains both scientific and legal elements: the Commission, being a scientific and technical organ, is charged with issuing recommendations on the scientific and technical aspects of the application of Article 76, while the Tribunal is competent in matters concerning the interpretation and the application of the legal aspects of the same article. ITLOS decided to proceed with the delimitation of the continental shelf beyond 200 nautical miles because the scientific evidence in that particular case was not contested.

Although its jurisdiction to delimit the continental shelf beyond 200 nautical miles seems to be incontestable, the admissibility of such a request remains ambiguous. For this reason, the Tribunal seems to suggest that the admissibility of similar requests be assessed on a case by case basis: "The Tribunal observes that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."<sup>39</sup>

### *Tales from the Peace Palace: A Conservative Approach?*

To date, the ICJ has decided on two cases involving the delimitation of the continental shelf beyond 200 nautical miles. In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*,<sup>40</sup> the Court had the opportunity to put forward an interesting reasoning that differs from the one developed by ITLOS. Having indicated that it would proceed with the delimitation of the maritime boundary between the disputing parties without specifying a terminal point of the maritime boundary in order not to prejudice the right of third parties, the ICJ concluded that:

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.<sup>41</sup>

The reasoning of the ICJ does not follow the approach adopted by ITLOS. According to the ICJ, the jurisdiction to delimit the continental shelf beyond 200 nautical miles is subject to the final recommendations made by the Commission. The Court seems to suggest that there is an overlap between the functions of the Commission and those of an international court or tribunal with regard to the continental shelf beyond 200 nautical miles.

More recently, on 19 November 2012, the ICJ rendered its judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia.<sup>42</sup> In its application and memorial, Nicaragua requested that the Court determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia following a median line between their mainland coasts. In its reply—more specifically at point I. 3 of its final conclusions—Nicaragua asked the Court to determine a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both parties.<sup>43</sup>

Although the above request had not been brought before the ICJ throughout the proceedings, the Court decided that it was admissible as it did not modify the subject-matter of the dispute.<sup>44</sup> In fact, Nicaragua's request not only modified the legal basis for the delimitation—the distance criterion was replaced by natural prolongation—but also its primary objective, which was a single maritime boundary. Despite the admissibility of the request, the ICJ decided not to uphold it.

The reasoning behind the ICJ's decision is revealing and helps us understand the position of the Court with regard to the delimitation of the continental shelf beyond 200 nautical miles. Prior to analyzing it in detail, it is worth specifying that during the case, Nicaragua had not made a submission to the Commission. It only provided the Commission with preliminary information. The Commission does not examine preliminary information. Such a submission serves the purpose of preserving the right of a coastal State to make a full submission in the future.<sup>45</sup> Furthermore, the applicable law in that case was customary international law, Colombia not being a State Party to the Convention.

In order to support its request, Nicaragua referred to the Bay of Bengal case before ITLOS. In reply, the ICJ explained that:

Nicaragua relies on the judgment of 14 March 2012 rendered by ITLOS in the Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS, pp. 1–151 [hereinafter Bay of Bengal case]. ITLOS in this judgment did not, however, determine the outer limits of the continental shelf beyond 200 nautical miles. The Tribunal extended the line of the single maritime boundary beyond the 200-nautical-mile limit until it reached the area where the rights of third States may be affected (Judgment of 14 March 2012, para. 462).<sup>46</sup>

Furthermore, the ICJ pointed out that in the Bay of Bengal case, the parties to the dispute had already made their continental shelf submission to the Commission and that the delimitation effected by the Tribunal in accordance with Article 83 of the Convention did not prevent the Commission from adopting its final recommen-



dations on the outer limits of the continental shelf. In this point, the ICJ followed the jurisprudence of ITLOS by reiterating that the Convention makes a clear distinction between the delimitation of the continental shelf and the delineation of its outer limits.<sup>47</sup>

More significantly, the Court referred to its own jurisprudence, relying on its statements in the case between Nicaragua and Honduras:

[A]ny claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.<sup>48</sup>

Having recalled the procedure prescribed by Article 76 of the Convention, the ICJ stressed that Nicaragua had only submitted preliminary information to the Commission:

The Court observes that Nicaragua submitted to the Commission only “Preliminary Information” which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which “shall be submitted by the coastal State to the Commission” in accordance with paragraph 8 of Article 76 of UNCLOS.<sup>49</sup>

According to the ICJ, not having followed the procedure prescribed by Article 76, Nicaragua did not prove that its continental margin extended sufficiently to overlap with the 200 nautical mile continental shelf to which Colombia is entitled.<sup>50</sup>

Although the reasoning of the Court follows the analysis put forward in the case between Nicaragua and Honduras, certain points require further clarification. The explanation advanced by the ICJ seems to suffer from a series of uncertainties, which were highlighted by certain Judges in their opinions and declarations appended to the judgment. Judge J. E. Donoghue expressed reservations in her separate opinion.<sup>51</sup> Although she agreed with the decision of the Court to reject the request of Nicaragua, she pointed out that the reference of the ICJ to the 2007 judgment in the case between Nicaragua and Honduras left her perplexed. First of all, she commented on the reference made by the ICJ to the procedure prescribed by Article 76 of the Convention:

The Court today appears to suggest that it will not entertain a proposed delimitation of continental shelf beyond 200 nautical miles of the coast of a State party to UNCLOS unless the procedures contemplated in UNCLOS Article 76 have been completed, even if the second State involved in the delimitation is not an UNCLOS State party. The stated rationale is that Nicaragua has obligations to other UNCLOS States parties. Nicaragua has obligations to its treaty partners, of course, but the Court offers scant explanation for its conclusion that those obligations preclude delimitation in this case.<sup>52</sup>

In addition, she referred to one of the key problems of the Commission:

The Commission’s expectation that decades will elapse before it will complete the work resulting from the submissions that it has received to date makes it especially unfortunate that the Court has extended its statement from the 2007

*Nicaragua v. Honduras* Judgment to apply not only to a proposed delimitation between two States parties to UNCLOS, but also to a proposed delimitation as between one UNCLOS State party and one State that is not a party to UNCLOS.<sup>53</sup>

She then explained the respective roles of the Commission and international courts and tribunals with the view to highlighting the current challenges of those *fora*:

This would leave some UNCLOS States parties in an unsatisfactory situation. If an area is not delimited and therefore remains the subject of a dispute, the Commission will not make recommendations about the outer limits (absent the consent of all involved States). And if the outer limits have not been established on the basis of Commission recommendations, the Court's 2007 statement suggests that it will not proceed with a delimitation. In effect, each institution holds the door open and waits for the other to walk through it.<sup>54</sup>

She concluded that such a situation "constricts the ways in which this Court and the Commission can contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes."<sup>55</sup>

In his declaration, Judge *ad hoc* T. Mensah, former president and Judge at ITLOS, disagreed with the reasoning of the ICJ to reject Nicaragua's request concerning the continental shelf beyond 200 nautical miles:

In particular, I do not consider that the reference to the Court's statement in the case of *Nicaragua v. Honduras*, to the effect that "any claim to 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."<sup>56</sup>

In his view, such a statement was incontestable in the case between Nicaragua and Honduras, where both States were parties to the Convention. However, it was not relevant in the case between Nicaragua and Colombia, the latter not being a party to the UNCLOS. Judge *ad hoc* T. Mensah expressed his fears about the reasoning of the ICJ:

My concern is that the present Judgment might be interpreted to suggest that a court or tribunal should, in every case, automatically rule that it is not able to decide on a dispute relating to the delimitation of the continental shelf beyond 200 nautical miles whenever one of the Parties to the dispute has not followed, or is unable to follow, the procedure set out in Article 76 of UNCLOS. Rather, I think the possibility should be left open that, in principle, a court or tribunal may be able and willing to adjudicate on a dispute relating to delimitation of the continental shelf beyond 200 nautical miles depending on the information presented to it on the geology and geomorphology of the area in which delimitation is sought.<sup>57</sup>

In his declaration, Judge *ad hoc* J.-P. Cot does not seem to share the ICJ's reasons for rejecting the request of Nicaragua, concurring with Judge *ad hoc* T. Mensah:

In the present case, the Court should have confined itself to examining the evidence set forth during the judicial proceedings in order to reject Nicaragua's claim for a delimitation of its continental shelf beyond 200 nautical miles. On this point, I fully support the views expressed by Judge *ad hoc* Mensah.<sup>58</sup>

The reasoning of the ICJ seems to suffer from its initial position, according to which a State must follow all stages prescribed by the Convention, including the receipt of the Commission's recommendations, prior to bringing a case involving the delimitation of the continental shelf beyond 200 nautical miles before an international court or tribunal.

It is worth noting that this approach was not followed by the arbitral tribunal which adjudicated recently the delimitation between Bangladesh and India in the Bay of Bengal. Constituted pursuant to Annex VII of the Convention, the tribunal rendered its award on 7 July 2014.<sup>59</sup> It is worth noting that three out of five arbitrators were Judges of ITLOS.<sup>60</sup> One of the main issues in that case was the delimitation of the continental shelf beyond 200 nautical miles. Although the parties to the dispute had made their submissions to the Commission, the Commission could not examine them because of the dispute between the parties. The crucial question, again, was whether the arbitral tribunal had jurisdiction to proceed with the delimitation. Having referred to existing jurisprudence, in particular to the case between Bangladesh and Myanmar, the arbitral tribunal concluded that:

However, recalling the reasoning of the International Tribunal for the Law of the Sea in Bangladesh/Myanmar (Judgment of 14 March 2012, paragraphs 369–394), the Tribunal sees no grounds why it should refrain from exercising its jurisdiction to decide on the lateral delimitation of the continental shelf beyond 200 nm before its outer limits have been established.<sup>61</sup>

The tribunal relied on Article 76 of UNCLOS and the procedure before the Commission in order to emphasize the distinct yet complementary roles of the Commission and a judicial forum.<sup>62</sup> Furthermore, it declared that the inaction or the refusal of the tribunal to delimit the continental shelf would have prevented the parties from enjoying their rights over the continental shelf and would not have been in conformity with the purpose and objective of the Convention:

In the view of the Tribunal, the consequence of these decisions by the CLCS is such that, if the Tribunal were to decline to delimit the continental shelf beyond 200 nm, the outer limits of the continental shelf of each of the Parties would remain unresolved, unless the Parties were able to reach an agreement. In light of the many previous rounds of unsuccessful negotiations between them, the Tribunal does not see that such an agreement is likely. Accordingly, far from enabling action by the CLCS, inaction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not consider that such an outcome would be consistent with the object and purpose of the Convention.<sup>63</sup>

This tribunal decided clearly not to follow the ICJ's approach. It seems that it sought to clarify the imprecise interpretation given by the ICJ in the case between Nicaragua and Honduras and the case opposing Nicaragua and Colombia. The tribunal's reasoning reinforces and reiterates its support for the approach adopted by ITLOS, endorsing its contribution to the delimitation of the continental shelf beyond 200 nautical miles.

## Harmonious Coexistence Between Law and Science

The decision rendered on 14 March 2012 in the case between Bangladesh and Myanmar is important for several reasons. As pointed out by C. Schofield:

[I]t represents the first venture into maritime boundary delimitation on the part of the ITLOS; it is the first adjudication of a maritime boundary in Asia; and it is the first judicial delimitation of a maritime boundary for parts of the continental shelf located seaward of the 200-nm.<sup>64</sup>

By deciding on its jurisdiction to delimit the continental shelf beyond 200 nautical miles, the Tribunal seized the opportunity to refer to the institutions established by the Convention and to their respective roles. In doing so, it sought to demonstrate that it was the competent international judicial forum to deal with any question relating to the effective implementation of the Convention. The Tribunal's *excès de zèle* is likely due to the fact that the Bay of Bengal case was the first delimitation case brought before it since its establishment. Furthermore, one of the core issues of the dispute concerned the delimitation of the continental shelf beyond 200 nautical miles, which is still one of the most controversial issues in the modern law of the sea. In any event, the Tribunal's approach allowed it to establish itself as a major player in the law of the sea dispute settlement, and to put forward the complementary relationship between law and science in the delimitation process.

The Tribunal's contribution to the delimitation of the continental shelf beyond 200 nautical miles is incontestable and is not limited to the judgment in the Bay of Bengal case. Several Judges of the Tribunal participated in the debate by appending declarations, which expressed separate and dissenting opinions. Although hesitant to recognize the Tribunal's jurisdiction regarding the delimitation of the continental shelf beyond 200 nautical miles, Judge T. M. Ndiaye made a series of concrete and invaluable suggestions that should be taken into account by international courts and tribunals in the future, as they tackle certain shortcomings of the Convention, while contributing to the harmonious coexistence and collaboration of the law of the sea institutions.

### *The Castalian Spring: Enlightening Observations by the Tribunal's Judges*

Raising the question of whether the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nautical miles was a multi-step process. First, the Tribunal had to find out whether Article 83 of the Convention applied to the delimitation of the continental shelf beyond 200 nautical miles. Second, given that the Commission had not made its recommendations to Bangladesh and Myanmar, the Tribunal had to examine the parties' potential entitlements to a continental shelf beyond 200 nautical miles. Finally, having decided on the entitlement and the overlap issues, the Tribunal proceeded with the delimitation.

Out of twenty-two Judges, twenty-one voted in favor of the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nautical miles. Only Judge T. M.

Ndiaye voted against. According to Article 30(3) of the Statute of the Tribunal, Judges have the right of appending declarations, offering separate and dissenting opinions, analyzing several aspects of the judgment and making proposals.

Judge R. Wolfrum welcomed the Tribunal's decision:

Finally, it is to be emphasized that the Tribunal breaks new ground on the delimitation of the continental shelf beyond 200 nm, an issue that mostly has been avoided by international courts and tribunals thus far. I consider that this part of the Judgment positively contributes to the international case law on maritime delimitation, although some additional reasoning might have enhanced its being fully accepted by other international courts and tribunals.<sup>65</sup>

Judge T. Treves aligned himself with this position, while pointing out that the most significant contribution of the Tribunal's judgment is the recognition of the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nautical miles. The joint declaration of *ad hoc* Judges T. Mensah and B. H. Oxman is also consistent with this view:

We agree with the Tribunal's conclusion that there is no need in this case for the Tribunal to decline to delimit the continental shelf beyond 200 miles until such time as the Commission on the Limits of the Continental Shelf has made its recommendations and each Party has had the opportunity to consider its reaction.<sup>66</sup>

The *ad hoc* Judges did not miss the opportunity to specify that the Tribunal's judgment is without prejudice to the right of the parties, in accordance with paragraph 8 of Article 76 of the Convention, to fix the final and binding limits of their continental shelf on the basis of the recommendations of the Commission.<sup>67</sup> In his separate opinion, Judge J.-P. Cot noted that the Tribunal's decision to delimit the continental shelf beyond 200 nautical miles promotes the effective cooperation of the Tribunal with the remaining institutions charged with implementing the Convention, and most importantly the Commission.<sup>68</sup>

Despite his disagreement with certain points of the Tribunal's decision—including the interpretation of the notion of natural prolongation and the way it dealt with the parties' entitlement to continental shelf—Judge Z. Gao did not raise objections to the jurisdiction of the Tribunal.<sup>69</sup>

The same applied to Judge A. A. Lucky, who claimed in this dissenting opinion that:

I find no substance in the argument that this Tribunal does not have the jurisdiction to delimit the continental shelf in the Bay of Bengal beyond 200 nm. The Parties have agreed to the jurisdiction and the scientific and technical evidence is provided in the reports of the experts.<sup>70</sup>

Only Judge T. M. Ndiaye voted against the decision of the Tribunal, stating his reasons in his separate opinion. With prudence and precision, he analyzed several aspects of the judgment, including the jurisdiction of the Tribunal to delimit the continental shelf beyond 200 nautical miles. In his view, the main issue was whether the Tribunal could delimit the continental shelf prior to the approval of the parties' claims by the Commission, in accordance with Article 76(8) of the Convention. His

analysis led him to conclude that the power to assess scientific and technical evidence provided by the parties in relation to their continental shelf beyond 200 nautical miles falls within the competence of the Commission:

The Tribunal complicated its task by delimiting the continental shelf beyond 200 nautical miles even though the Commission has not pronounced upon the outer limits of each Party's continental shelf.<sup>71</sup>

He continued by highlighting the preliminary objection raised by Myanmar and the suspension of the examination of the submissions of the parties by the Commission due to the *notes verbales* sent to the Commission in this respect.<sup>72</sup> He then turned to the question of the entitlement of the parties to a continental shelf. Once the entitlements had been confirmed, their extent had to be established. In his view, the Tribunal failed to complete this task:

The great weakness in the present Judgment is that it does not succeed in determining Bangladesh's and Myanmar's precise entitlements to the continental shelf beyond 200 nautical miles. Nor does it succeed in establishing the extent of those entitlements.<sup>73</sup>

It is worth recalling that in order to determine the parties' entitlement to a continental shelf beyond 200 nautical miles, ITLOS argued that it relied on the information and the scientific reports prepared by the parties. It added that the submissions made by the parties to the Commission made it clear that their continental self beyond 200 nautical miles was located far from the Area. However, by that time, none of the submissions had been considered by the Commission. As a result, Judge T. M. Ndiaye sustained that the delimitation line proposed by the Tribunal prejudiced the rights of the international community, since the Commission had not examined the submissions made by the parties. He recalled that:

It must be kept in mind that judges find entitlements; under no circumstances may they grant them. Owing to the nature of the judicial function and the nature of entitlements, it is all the more imperative that courts rely on existing law, however uncertain may be the principles or rules deriving from the requirement of an equitable solution.<sup>74</sup>

In his view, without overlapping and equal entitlements to a certain area, there is no maritime delimitation, supporting the hypothesis that the Tribunal should not have proceeded with the delimitation of the continental shelf beyond 200 nautical miles. The fundamental idea behind his reasoning is that ITLOS does not have jurisdiction to grant entitlements to a continental shelf beyond 200 nautical miles. This function is performed by the Commission. Once the Commission examines the scientific and technical data, it approves the entitlement or alternatively it invites the coastal State to make a new or a revised submission. Only the Commissions' recommendations endorse the entitlement of the coastal State to a continental shelf beyond 200 nautical miles.

## *The Tribunal as Guarantor of the Integrity of the Convention*

The Tribunal's judgment in the Bay of Bengal case is an historic decision for several reasons.<sup>75</sup> The most important aspect of the judgment is the Tribunal's decision to proceed with the delimitation of the continental shelf beyond 200 nautical miles prior to the recommendations of the Commission—a question that had been avoided by the majority of international courts and tribunals.

A detailed examination of the part of the judgment dealing with the jurisdiction of the Tribunal to delimit the continental shelf beyond 200 nautical miles reveals that the crucial question concerned the articulation of the roles of the Commission and the Tribunal. In fact, according to ITLOS, there is only one legal continental shelf and it is in a position to delimit it.<sup>76</sup> The particularity of the case was due to the fact that the Commission had not issued its recommendations to the parties. The Tribunal estimated that it was crucial to know if the parties had overlapping entitlements to a continental shelf beyond 200 nautical miles. Absent that information, the question brought before the Tribunal was only hypothetical.<sup>77</sup> In fact, according to B. Kunoy:

[A] dispute regarding overlapping claims to such an outer continental shelf is, in the technical sense, only hypothetical until the Commission has endorsed the outer limits of the continental shelf proposed by relevant coastal States.<sup>78</sup>

This means that the outer limits as proposed by the States prior to the Commission's recommendations are subjective and not binding on third States. However, the fact that a State Party to the Convention makes a submission to the Commission could suggest that it applies *prima facie* article 76 of the Convention in good faith.<sup>79</sup> If this interpretation is accepted, the request to delimit the continental shelf beyond 200 nautical miles before an international court or tribunal could be admissible. However, the Tribunal did not content itself with the fact that the parties had made their submissions to the Commission. It decided to further develop its reasoning:

Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.<sup>80</sup>

In addition, the Tribunal examined the uncontested scientific evidence concerning the unique geological characteristics of the Bay of Bengal and the proof presented during the proceedings by the parties. It concluded that there was a thick layer of sedimentary rocks extending from the coast of Myanmar to an area located beyond 200 nautical miles.<sup>81</sup> By proceeding in this manner, it highlighted the complementarity of the roles of the Commission and the Tribunal with regard to the continental shelf beyond 200 nautical miles, offering the possibility to the parties to find a solution to their dispute:

The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed

Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.<sup>82</sup>

It has to be reminded that the Tribunal was aware of the fact that Bangladesh had objected to the examination of Myanmar's submission by the Commission. As a result, according to the Commission's Rules of Procedure, the Commission did not have the right to examine that submission. Cognisant of this institutional impasse, the Tribunal stressed the danger of this situation:

The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. The Tribunal notes that the record in this case affords little basis for assuming that the Parties could readily agree on other avenues available to them so long as their delimitation dispute is not settled.<sup>83</sup>

Considering the importance of the situation and the fact that such an impasse would compromise the effective implementation of the Convention and prevent States Parties from enjoying their rights over their continental shelf, the Tribunal decided that it had jurisdiction to delimit the continental shelf beyond 200 nautical miles:

In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.<sup>84</sup>

Furthermore, the Tribunal specified that its decision did not overlap with the functions of the Commission.<sup>85</sup>

As discussed, the majority of the Judges voted in favor of the Tribunal's decision, except for Judge T. M. Ndiaye. In his view, the major problem in that case was the fact that the submissions of both Myanmar and Bangladesh had not been examined by the Commission, and as a result their entitlements to a continental shelf beyond 200 nautical miles had not been confirmed. That situation should have prevented the Tribunal from exercising its jurisdiction.<sup>86</sup>

By proceeding with the delimitation, it seems that the Tribunal granted indirectly entitlements to continental shelf to the parties, a function which is disapproved by Judge T. M. Ndiaye. The Convention provides for a distinct procedure concerning the grant of entitlements. The main actor in this procedure is the Commission and not the Tribunal. He nonetheless recognized that the Commission could not act, as it cannot examine a submission in case of a dispute.

However, he highlighted the complementarity of the roles of the institutions established by the Convention:

The International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, the International Seabed Authority and the Meeting of



States Parties to the Convention are organs set up by the Convention. And each must assume a given role assigned to it under the Convention, that of guardian and authoritative interpreter being for the Tribunal.<sup>87</sup>

In his view, it is the Commission the institution charged with assessing the validity of potential entitlements, not the Tribunal. As a result, the Tribunal should have come up with a solution, allowing the Commission to confirm the entitlements of the parties. If this had been the case, he would probably have been able to agree with the remaining Judges.

In his separate opinion, he proposed that ITLOS seek a preliminary ruling from the Commission. Having explained the function of preliminary rulings in the context of the European Union,<sup>88</sup> he concluded:

For this reason, the Tribunal should have referred the matter to the Commission at this stage in the proceedings, without there being any need for one of the Parties to request it to do so, since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case. It is for the Tribunal to judge whether to make the referral.<sup>89</sup>

In his view, the Tribunal should have had recourse to the president of the Meeting of States Parties to the Convention (hereinafter referred to as “SPLOS”) and the president of the Commission in order to find a way to lift the suspension of the examination of Myanmar’s submission. This would have required a protocol of agreement with the Commission,<sup>90</sup> in the context of which the Commission would have been invited to issue its recommendations to the parties within one year. By following this process, the Tribunal could have ruled on the continental shelf beyond 200 nautical miles in a separate phase. According to the Judge, the Tribunal has the right to choose the terms in which it wishes to respond to the requests of the parties. As a result, it could have examined separately the question of the delimitation of the continental shelf beyond 200 nautical miles. Such a proposal would have guaranteed the respect for the role of the Commission, offering a solution to a procedural impasse.

Judge T. M. Ndiaye is fully aware of the fact that the Convention does not provide for any *liaison* between the Commission and the Tribunal. However, despite the limited functions of SPLOS,<sup>91</sup> this organ has already responded to a procedural challenge of this kind, namely the deadline of the parties to make a submission to the Commission. In the same way, States Parties to the Convention should take into account the proposal of Judge T. M. Ndiaye in order to include this issue in the agenda of SPLOS for discussion.

Additional solutions could be envisaged to help the Tribunal and other international courts and tribunals to tackle similar issues. Article 289 of the Convention provides that:

In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with

Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.<sup>92</sup>

Article 2 of Annex VIII of the Convention gives States Parties the right to designate two experts with generally recognized legal, scientific or technical expertise. This clause applies to all cases where a court or tribunal has jurisdiction to decide on disputes pursuant to Part XV of UNCLOS. It is further analyzed in Article 15 of the Tribunal's Rules of Procedure.<sup>93</sup> At first sight, the application of this article seems to be very important in a case where the delimitation of the continental shelf beyond 200 nautical miles is sought prior to the recommendations of the Commission.

For instance, it is worth examining the following case: A State Party makes its submission to the Commission, while a neighboring State requests the Commission, by sending a *note verbale*, not to examine the submission because there exists a dispute between the two States. Those States decide to bring the case before an international court or tribunal under Part XV of the Convention prior to the Commission's recommendations. The parties to the dispute or the court or tribunal could have recourse to Article 289 of the Convention. The participation of scientific and technical experts could help the courts and tribunals better understand the data allowing them to ascertain the existence of entitlement to a continental shelf beyond 200 nautical miles. On the basis of the experts' reports and the data presented by the parties, the Tribunal could base its decision whether or not to exercise its jurisdiction.

If this is the case, why has this article fallen into desuetude? As professor T. Treves points out:

In my view, the reason lies in that the scientific or technical experts as envisaged in Article 289 are too close to being judges or arbitrators: they sit with the tribunal and are to be drawn from the lists set out in Annex VIII for selecting specialized arbitrators, who should have not only technical, but also legal expertise. This may make the other judges or arbitrators, which have the responsibility of deciding the case, uncomfortable. Moreover, the fact that the experts under Article 289 are to be no fewer than two and selected in consultation with the parties may cast some doubt as to their effective independence, as it is likely that one of them will be closer (or perceived to be closer) to the positions of one party and the other to those of the other party.<sup>94</sup>

Professor T. Treves' explanation is honest and pragmatic. He considers that the reluctance to apply Article 289 is shared among States, judges and arbitrators. In any case, this article exists and could be used by international courts and tribunals. If we were to believe that the preliminary ruling mechanism and the recourse to SPLOS, as proposed by Judge T. M. Ndiaye, are not realistic solutions given the procedural barriers and State Parties' reluctance, additional solutions should be envisaged that could *legitimize* the jurisdiction of the Tribunal or of other courts and tribunals, in case States bring before them a boundary dispute involving the delimitation of the continental shelf beyond 200 nautical miles, prior to receiving the Commission's recommendations.

The possibility to have recourse to Article 289 seems to be realistic and efficient.

This procedure could allow a court or tribunal to better justify its decision to delimit the continental shelf beyond 200 nautical miles, absent the Commission's recommendations. As far as the continental shelf beyond 200 miles is concerned, science plays a major role. Scientific evidence confirms that a State meets the requirements giving rise to entitlement to a continental shelf beyond 200 nautical miles. In similar situations, applying Article 289 seems to be the most reasonable solution with the view to preventing a tribunal from deciding arbitrarily and violating the rights of third States and those of the international community.

## Current Challenges

The preceding proposals could be taken into account by the special chamber of the Tribunal in the on-going case between Ghana and Côte d'Ivoire. From a procedural point of view, this new case has several things in common with the Bay of Bengal case. Initially brought before an arbitral tribunal in accordance with Annex VII of the Convention, the case is now before a special chamber of the Tribunal following a *compromis* between the parties. Again, the case between Ghana and Côte d'Ivoire concerns, *inter alia*, the delimitation of the continental shelf beyond 200 nautical miles. Both States made their submissions to the Commission in 2009.<sup>95</sup> To date, the Commission has only adopted its recommendations in regard to the submission made by Ghana.<sup>96</sup>

Given the recent developments in the jurisprudence of the Tribunal, we believe that the question of the jurisdiction of ITLOS would not be an issue. Following the case between Bangladesh and Myanmar, it is highly likely that the special chamber of the Tribunal will determine that it has jurisdiction to delimit the continental shelf beyond 200 nautical miles. However, a potential issue could arise regarding the admissibility of such a request. It has to be recalled that in the Bay of Bengal case, the Tribunal mainly observed that its conclusion concerning the entitlement of the parties to a continental shelf beyond 200 nautical miles was based on the particular geological characteristics of the seabed in the Bay of Bengal and on the uncontested scientific and technical evidence presented by the parties. As a result, the Tribunal was convinced of the existence of a continental shelf beyond 200 nautical miles in that region. To our knowledge, the disputed area in the case between Ghana and Côte d'Ivoire does not present the particular geological characteristics of the Bay of Bengal.

If the special chamber decides that the request to delimit the continental shelf beyond 200 nautical miles is admissible, it has to come up with a credible solution to demonstrate that Côte d'Ivoire is entitled to a continental shelf beyond 200 nautical miles. The task is hard and challenging given that the Commission has not issued its recommendations in regard to the submission of Côte d'Ivoire. It seems that recourse to Article 289 of the Convention is one potentially desirable solution. The participation of scientific and technical experts would assist the Tribunal to better understand the data presented by the parties, allowing it to ascertain the exis-

tence of potential overlapping entitlements to a continental shelf beyond 200 nautical miles. This second case gives the Tribunal the opportunity to elucidate the obscure points of the first judgment and to gain once again the confidence of the States Parties to the Convention.

As regards the ICJ, there are currently two pending cases involving, *inter alia*, the delimitation of the continental shelf beyond 200 nautical miles. Following the 2012 judgment in the case between Nicaragua and Colombia, Nicaragua made its submission to the Commission on 24 June 2013. In September 2013, it brought a new case against Colombia before the ICJ. The 2013 case concerns the delimitation of the continental shelf beyond 200 nautical miles. Colombia raised preliminary objections contesting the jurisdiction of the Court. In Colombia's view, the request was inadmissible because the Commission had not made its recommendations to Nicaragua. Although this argument seems to be in line with the Court's reasoning in the 2012 judgment, the ICJ has recently found that Nicaragua's request was admissible.<sup>97</sup>

On 28 August 2014, Somalia brought a case against Kenya before the Court. In its application, Somalia asks the ICJ to delimit the maritime boundary between the two States, including the continental shelf beyond 200 nautical miles.<sup>98</sup> Both States made submissions to the Commission. To date, no recommendations have been issued. It is worth noting that both States have objected to the examination of the submissions by the Commission because of the existence of a dispute between them. As a result, the Commission cannot consider the submissions and issue recommendations. It remains to be seen whether the ICJ will clarify its controversial position, as adopted in the 2012 judgment in the case opposing Nicaragua and Colombia.

## Concluding Remarks

Twenty-two years following its establishment, the functioning of the Commission gives cause for concern. Due to institutional issues, the Commission is unable to proceed expeditiously with the examination of the submissions made by State Parties to UNCLOS. In addition, the Convention prevents it from considering a submission in case of maritime or territorial disputes between States. This situation leaves open the delimitation between the Area and the continental shelf beyond 200 nautical miles. It is therefore important to examine whether recourse to the dispute settlement procedures contained in Part XV of UNCLOS could provide solutions to the above issue. In practical terms, the main question is whether an international court or tribunal has jurisdiction to delimit the overlapping claims to a continental shelf beyond 200 nautical miles prior to the Commission's recommendations.

In light of recent international jurisprudence, it appears that the ICJ adopted a rather conservative approach. In the case between Nicaragua and Colombia, its reasoning implied that States must follow the procedure provided for in Article 76 of the Convention, confirming that an international court or tribunal can decide on the delimitation of the continental shelf beyond 200 nautical miles, provided that

the Commission has issued its recommendation. However, the ICJ's reasoning does not bring solutions to the blockage in case of maritime or territorial disputes between States and to the incapacity of the Commission to examine submissions expeditiously. Following this line of reasoning, the delimitation between States and the limits of the Area remain a pending issue.

Contrary to the approach recommended by the ICJ, ITLOS determined, in the Bay of Bengal case, that it had jurisdiction to delimit the continental shelf beyond 200 nautical miles between the parties, despite the fact that the Commission had not issued its recommendations. In so deciding, ITLOS was the first international tribunal to shed light on the relationship between the procedure before the Commission and the dispute settlement mechanisms of Part XV of the Convention. Therefore, the Tribunal highlighted the complementary roles of the institutions established by UNCLOS. Its historic decision paved the way for a more efficient and harmonious collaboration between the institutions established by the Convention. Its judgment constitutes a turning point in continental shelf delimitation and plays a major role in filling certain *lacunae* of the Convention.

This approach is in line with the separate opinion of Judge T. M. Ndiaye, who highlighted the potential role of SPLOS and put forward a more practical and refined reasoning: in case States request an international court of tribunal to delimit the continental shelf beyond 200 nautical miles prior to the Commission's recommendations, SPLOS could intervene and request the Commission to consider high-priority submissions. This course of action would allow the Tribunal to proceed with the delimitation, while respecting the procedure provided for in Article 76 of UNCLOS. However, the role of SPLOS is limited to administrative and budgetary issues. In addition, SPLOS has systematically avoided taking a position on substantive issues.<sup>99</sup>

It is hoped that both ITLOS and the ICJ will act wisely and make every effort to shed light on the obscure aspects of Article 76, and to ensure the effective implementation of the Convention.

## Notes

1. Responsibility for the information and views set out in this article lies entirely with the author.

2. Article 1(1) of the United Nations Convention on the Law of the Sea.

3. Adopted on 10 December 1982 and entered into force on 16 November 1994. For the current status of the Convention, see: [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en) (accessed 29 April 2016).

4. Adopted on 28 July 1994 and entered into force provisionally on 16 November 1994, in accordance with article 7(1) and definitively on 28 July 1996, in accordance with article 6(1) of the 1994 Agreement. For the current status of the 1994 Agreement, see: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-6a&chapter=21&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6a&chapter=21&lang=en) (accessed 29 April 2016).

5. Article 136 of the Convention. For a detailed analysis, see Kiss, Alexandre-Charles, "La notion de patrimoine commun de l'humanité," *Collected Courses of the Hague Academy of International Law* 175(II) (1982), pp. 99–256.

6. To date, the Commission has received seventy-seven submissions. See: [http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm) (accessed 29 April 2016).

7. See Konstantinidis, Ioannis, "Dispute Settlement in the Law of the Sea, the Extended Continental Shelf in the Bay of Bengal and the CLCS: Some Preliminary Observations on the Basis of the Case Bangladesh/Myanmar Before the International Tribunal for the Law of the Sea," *Aegean Review of the Law of the Sea and Maritime Law* 1(2) (2011), pp. 267–285, <http://dx.doi.org/10.1007/s12180-010-0015-1>.

8. The present analysis focuses exclusively on the jurisdiction of an international court or tribunal to delimit the continental shelf beyond 200 nautical miles. The delimitation methodology is not discussed in this paper.

9. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012.

10. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624.

11. For an analysis of relevant cases before *ad hoc* arbitral tribunals and arbitral tribunals constituted in accordance with Annex VII of the Convention, see Kunoy, Bjorn, "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," *International Journal of Marine and Coastal Law* 25(2) (2010), pp. 237–270, <http://dx.doi.org/10.1163/157180910X12665776638704>.

12. For the history of the dispute, see Konstantinidis, Ioannis (2011, pp. 272–274). For an analysis of Article 287 of the Convention, see Quéneudec, Jean-Pierre, "Le choix des procédures de règlement des différends selon la Convention des Nations Unies sur le droit de la mer," *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris: Pedone, 1991), pp. 381–387.

13. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, §§ 49–50.

14. It seems that Myanmar's position was based on the arbitral award in the case between Canada and France. *Case Concerning the Delimitation of Maritime Areas Between Canada and France, Award, 10 June 1992, RSA XXI*, pp. 265–341. See Dipla, Haritini, "La sentence arbitrale du 10 juin 1992 en l'affaire de la délimitation des espaces maritimes entre le Canada et la France." *Journal du droit international* 121(3) (1994), pp. 653–669.

15. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, Rejoinder of Myanmar, A.17, p. 204.

16. *Ibid.*, §§ 342–349.

17. *Ibid.*, § 350.

18. *Ibid.*, § 368.

19. *Ibid.*, § 370.

20. *Ibid.*, §§ 374–375.

21. *Ibid.*, §§ 374–378.

22. *Ibid.*, §§ 379–380.

23. *Case Concerning the Delimitation of Maritime Areas Between Canada and France*, *op. cit.*

24. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659.

25. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, § 384.

26. Permanent Mission of Bangladesh to the United Nations, Reaction of Bangladesh to the submission made by Myanmar to the Commission, 23 July 2009, p. 3

27. Permanent Mission of Myanmar to the United Nations, Reaction of Myanmar to the submission made by Bangladesh to the Commission, 31 March 2011.

28. See *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, CLCA/64, 1 October 2009, § 40, and *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work of the Commission*, CLCS/72, 16 September 2011, § 22.

29. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, § 390 and § 391.

30. *Ibid.*, § 400.
31. *Ibid.*, § 406.
32. *Ibid.*, § 409.
33. *Ibid.*, § 410.
34. *Ibid.*, § 417.
35. *Ibid.*, § 437.
36. *Ibid.*, §§ 442–449.
37. *Ibid.*, § 411 and § 446.
38. *Ibid.*, § 444.
39. *Ibid.*, § 384.
40. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *op. cit.* For an overview of the case, see Tanaka, Yoshifumi, “Reflections on Maritime Delimitation in the Nicaragua-Honduras Case.” *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 68(4) (2008), pp. 903–937.
41. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *op. cit.*, § 319.
42. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.* For an overview of the case, see Delabie, Lucie, “Le fragile équilibre entre prévisibilité juridique et opportunité judiciaire en matière de délimitation maritime: l’arrêt de la Cour internationale de Justice dans l’affaire du différend territorial et maritime (Nicaragua v. Colombie),” *Annuaire français de droit international* 58 (2012), pp. 223–252; Grossman, Nienke, “Territorial and Maritime Dispute (Nicaragua v. Colombia),” *American Journal of International Law* 107(2) (2013), pp. 396–403, <http://dx.doi.org/10.5305/amerjintelaw.107.2.0396>; Fietta, Stephen, and Cleverly, Robin, *A Practitioner’s Guide to Maritime Boundary Delimitation* (Oxford: UK, Oxford University Press, 2016); and Tanaka, Yoshifumi, “Reflections on the Territorial and Maritime Dispute Between Nicaragua and Colombia Before the International Court of Justice,” *Leiden Journal of International Law* 26(4) (2013), pp. 909–931, <http://dx.doi.org/10.1017/S0922156513000460>.
43. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.*, p. 636.
44. *Ibid.*, § 112.
45. See Oude Elferink, Alexander Gerald, “Meeting of States Parties to the UN Law of the Sea Convention: The Time Limit for Making Submissions to the Commission on the Limits of the Continental Shelf: The Current State of Affairs,” *International Journal of Marine and Coastal Law* 23(4) (2008), pp. 769–778, <http://dx.doi.org/10.1163/157180808X353966>.
46. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.*, § 125.
47. *Idem.*
48. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.*, § 126.
49. *Ibid.*, § 127.
50. *Ibid.*, § 129.
51. *Ibid.*, Separate opinion of Judge J. E. Donoghue.
52. *Ibid.*, § 26.
53. *Ibid.*, § 27.
54. *Ibid.*, § 30.
55. *Idem.*
56. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.*, Declaration of Judge *ad hoc* T. Mensah, § 2.
57. *Ibid.*, § 12.
58. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *op. cit.*, Declaration of Judge *ad hoc* J.-P. Cot, p. § 20.
59. For an overview, see Burke, Naomi, “Annex VII Arbitral Tribunal Delimits Maritime Boundary Between Bangladesh and India in the Bay of Bengal,” *ASIL Insights* 18(20) (2014), pp. 1–6; and Kałduński, Marcin, “A Commentary on Maritime Boundary Arbitration Between Bangladesh and India Concerning the Bay of Bengal,” *Leiden Journal of International Law* 28(4) (2015), pp. 799–848, <http://dx.doi.org/10.1017/S0922156515000436>.
60. Judge R. Wolfrum (president), Judge T. Mensah and Judge J.-P. Cot.
61. *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India, Award of 7 July 2014*, § 76.

62. *Ibid.*, § 80.
63. *Ibid.*, § 82.
64. Schofield, Clive, Telesetsky, Anastasia, and Lee, Seokwoo, “A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case,” *Ocean Development and International Law* 44(4) (2013), pp. 363–388, <http://dx.doi.org/10.1080/00908320.2013.808939>.
65. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, Declaration of Judge R. Wolfrum, p. 6.
66. *Ibid.*, Joint declaration of Judges *ad hoc* T. Mensah and B. H. Oxman., § 3.
67. *Id.*
68. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, Separate opinion of judge J.-P. Cot, p. 1.
69. *Ibid.*, Separate opinion of Judge Z. Gao. His principal disagreement concerned the delimitation method applied in the case and the way the provisional equidistance line was adjusted.
70. *Ibid.*, Separate opinion of Judge A. A. Lucky, p. 62.
71. *Ibid.*, Separate opinion of Judge T. M. Ndiaye., § 61.
72. *Ibid.*, §§ 62–65.
73. *Ibid.*, § 85.
74. *Ibid.*, § 88.
75. Magnússon, Bjarni Már (2013. 632–633).
76. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, §§ 362–363.
77. *Ibid.*, § 399.
78. Kunoy, Bjorn (2010, p. 248).
79. See Oude Elferink, Alexander Gerald, “The Continental Shelf Beyond 200 Nautical Miles: The Relationship Between the CLCS and Third Party Dispute Settlement,” in Alexander Gerald Oude Elferink and Donald Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Leiden, Netherlands: Martinus Nijhoff, 2004), p. 274.
80. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, § 443.
81. *Ibid.*, § 449.
82. *Ibid.*, § 373.
83. *Ibid.*, § 390.
84. *Ibid.*, § 392.
85. *Ibid.*, § 393.
86. See in this respect, Kunoy, Bjorn (2010, p. 270).
87. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, Separate opinion of Judge T. M. Ndiaye, § 104.
88. *Ibid.*, §§ 99–100. See the in-depth study by Barav, Ami, *Études sur le renvoi préjudiciel dans le droit de l’Union européenne* (Brussels Belgium: Bruylant, 2011). See also Farrell Miller, Alicia, “The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ?” *Hastings International and Comparative Law Review* 32(2) (2009), 669–692 and Tridimas, George and Tridimas, Takis, “National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure,” *International Review of Law and Economics* 24(2) (2004), pp. 125–145, <http://dx.doi.org/10.1016/j.irl.2004.08.003>.
89. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, *op. cit.*, Separate opinion of Judge T. M. Ndiaye, § 107.
90. *Ibid.*, § 110.
91. Contrary to other treaties, UNCLOS does not establish SPLOS as a Conference of the States Parties acting as the supreme organ of the Convention. SPLOS is not a fully-fledged institution. It is a diplomatic conference convened by the Secretary-General of the United Nations and has certain administrative and budgetary functions. See Treves, Tullio, “The Law of the Sea ‘System’ of Institutions,” *Max Planck Yearbook of United Nations Law* 2 (1998), pp. 325–340.



92. Article 289 of the Convention.

93. To date, this article has never been used. See Rao, Chandrasekhara P., and Gautier, Philippe (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden: Martinus Nijhoff, 2006), pp. 38–39. Surprisingly, the commentary does not refer to the legal expertise of the experts: “In accordance with article 289 of the Convention, in any dispute involving scientific or technical matters, the Tribunal may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts.” See also Rosenne, Shabtai, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff, 2007), pp. 235–250.

94. Treves, Tullio, (2012). “Law and Science in the Interpretation of the Law of the Sea Convention: Article 76 between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf,” *Journal of International Dispute Settlement* 3(3) (2012), pp. 483–491, 485, <http://dx.doi.org/10.1093/jnlids/ids012>. See also the interesting observations by Savadogo, Louis, “Le recours des juridictions internationales à des experts,” *Annuaire français de droit international* 50 (2004), pp. 231–258.

95. Ghana made its submission on 12 April 2009. Côte d’Ivoire made its submission on 8 May 2009. It is worth noting that, in response to the submission of Côte d’Ivoire, Ghana sent a *note verbale* to the Commission on 28 July 2009 underlining that: “Ghana wishes to underline that it has no objection to the submission made by Côte d’Ivoire which shall be without prejudice to the final delimitation of the boundary between Ghana and Côte d’Ivoire....” Ghana has thus decided not to object to the examination of Ivorian submission by the Commission.

96. See CLCS/85.

97. For more information, see *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, Preliminary Objections, I.C.J. 17 March 2016.

98. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, I.C.J.

99. See Harrison, James, “The Law of the Sea Convention Institutions,” in Rothwell, Donald R., Oude Elferink, Alexander Gerald, Scott, Karen N., and Stephens, Tim (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), pp. 387–390.

## Biographical Statement

Ioannis Konstantinidis is the Head of Investment Treaty Arbitration and International Law at the Kuala Lumpur Regional Centre for Arbitration (KLRCA). He has a BA from the University of Athens (Greece), an MA from the Institut d’Études Politiques de Paris (Sciences Po, Paris, France), an LLM (International Law and International Organisations) and a Ph.D. (International Law) from the Sorbonne Law School (École de Droit de la Sorbonne/Université Paris 1 Panthéon–Sorbonne, Paris, France). He has advised in connection with disputes heard at the International Court of Justice (ICJ) the International Tribunal for the Law of the Sea (ITLOS), the International Centre for Settlement of Investment Disputes (ICSID), and at a multitude of ad hoc and institutional arbitral fora (including under UNCLOS, PCA and UNCITRAL Rules). He also worked at ITLOS and the United Nations (UN)—Division for Ocean Affairs and the Law of the Sea.