

# Outer Continental Shelf Delimitation in the Western Caribbean Sea (Nicaragua *v.* Colombia II): what lessons to learn from the East China Sea dispute on the viability of maritime delimitation between different bases of continental shelf entitlement?<sup>1</sup>

## **Delimitação da Plataforma Continental Estendida no Mar do Caribe (Nicarágua *v.* Colômbia II): quais lições temos a aprender da disputa do Mar do Sul da China acerca da viabilidade da delimitação marítima entre diferentes entendimentos sobre plataforma continental?**

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**Abstract:** The controversy between Nicaragua and Colombia before the ICJ now concerns maritime delimitation beyond 200 nm. One of the main legal issues in this case is whether international law allows for delimitation to take place where alternative bases of continental shelf entitlement, namely, natural prolongation and distance, are opposed. As alleged by Nicaragua, its natural prolongation extends beyond 200 nm and overlaps with Colombia's distance-based continental shelf entitlement. Nicaragua endorses the principle of equal division and accordingly, advocates for the viability of maritime delimitation. In Colombia's view, the distance criterion has priority and trumps natural prolongation. In this work, the author analyses the legal discourse already voiced on the occasion of the dispute in the East China Sea, in order to identify instances of parallelism and symbiotic contribution with the question of the delimitation of the continental shelf beyond 200 nm in the Western Caribbean Sea.

**Keywords:** Continental Shelf beyond 200nm – ICJ – Nicaragua *v.* Colombia.

**Resumo:** A controvérsia entre Nicarágua e a Colômbia, antes da CIJ, diz respeito à delimitação marítima além de 200nm. Uma das principais questões jurídicas neste caso é se o direito internacional permite que a delimitação ocorra onde opiniões divergentes acerca da titularidade sobre a plataforma continental, ou seja, as teses opostas de prolongamento natural e distância. Como alegado pela Nicarágua, seu prolongamento natural se estende além de 200nm e se sobrepõe ao direito de plataforma continental

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baseado na distância da Colômbia. A Nicarágua endossa o princípio de divisão igualitária e, portanto, defende a viabilidade da delimitação marítima. Já na opinião da Colômbia, o critério da distância tem prioridade e supera o prolongamento natural. Neste trabalho, o autor analisa o discurso jurídico já manifestado por ocasião da disputa no Mar da China Oriental, a fim de identificar ocorrências de paralelismo e contribuição simbiótica com a questão da delimitação da plataforma continental para além de 200mn no Mar do Caribe.

**Palavras-chave:** Plataforma Continental Estendida – CIJ – Nicarágua *v.* Colômbia.

## 1. Introduction

In 2003, Professor Colson expressed the view that, prior to 1982, facts relating to natural prolongation claims “were impossible for a judge or arbitrator to determine in light of the competing factual presentations before them” (COLSON, 2003, p. 102). At the moment, he praised the fact that UNCLOS Article 76 had brought to international law “agreed categories of geological and geomorphological facts that are legally relevant for the purposes of determining title to the outer continental shelf, together with a specialized technical commission to confirm those facts.” (COLSON, 2003, p. 102). Colson was moreover enthusiastic about the new conventional rule and its institutional apparatus, and even went on to saying that “[w]hen the [Commission on the Limits of the Continental Shelf] has done its work, the facts relevant to the outer continental shelf will be drawn as clearly as a coastline on a nautical chart.” (COLSON, 2003, p. 102).

At that time, Professor Colson also depicted four possible maritime delimitation scenarios beyond 200 nm, some of which had already arisen in practice or were likely to arise, in confirmation that “geological and geomorphological factors will re-emerge in the law of maritime delimitation of the outer continental shelf.” (COLSON, 2003, p. 107). Professor Colson’s proposals for resolution of the four scenarios had a fundamental premise: that maritime delimitation beyond 200 nm “entails the same process of evaluation of equidistance and the reasons for adjusting the equidistant line as is now” (COLSON, 2003, p. 103). His discrete prediction was that “the

consolidated law of maritime boundary delimitation [will be] secure”, but geological and geomorphological facts will arise as relevant for the determination of title, among other relevant facts and circumstances, in the purpose of achieving an equitable solution (COLSON, 2003, p. 107).<sup>3</sup>

This paper focuses on scenario number one, where Professor Colson describes a relevant maritime area of 500 nm, with both States A and B claiming a 200 nm EEZ of their own. In scenario 1, State A enjoys a wide continental margin extending through the entire 200 nm distance, and beyond, along the entire 100 nm strip and into the 200 nm zone of State A. In contrast, State B’s continental margin abruptly drops off to the seabed within 75 nautical miles of its coast. Accordingly, State B does claim continental shelf rights beyond the 200 nm limit. In harmony with its general standpoint and probably influenced by the weight of the 1985 Judgment of the ICJ in Libya/Malta (ICJ, 1985, p. 13), Professor Colson proposed a solution where “in concept”: (i) State B is entitled to its entire 200-nm zone, to the exclusion of any claim of State B in that zone based on natural appurtenance; and (ii) State A is entitled to the entire 100 nm strip.

In contrast with Professor Colson’s optimistic approach to the role of UNCLOS Article 76 and the CLCS in maritime dispute settlement, the *praxis* of outer continental shelf delimitation has proved highly contentious, partly due to the difficulties faced by UNCLOS State parties in exhausting the procedure provided for in UNCLOS Article 76 and to secure a recommendation by the Commission on the Limits of the Continental Shelf

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<sup>3</sup> Colson (2003, p. 103) explains that: “Such relevance does not mean that geomorphological or geological facts operate to the exclusion of other relevant facts in the delimitation of the outer continental shelf; nor does it mean that they cannot be assessed within the legal framework that has now emerged. Within that framework, sometimes facts pertaining to coastline are dominant; sometimes they are set aside in the search of an equitable solution. Sometimes facts pertaining to the conduct of the parties play a role, but often they do no. There is no reason why the facts pertaining to title over the outer continental shelf cannot find a place within this mix so as to achieve the equitable solution the law calls for.”

(CLCS)<sup>4</sup>, and partly due to the absence of clarity with respect to the law applicable to maritime delimitation beyond 200 nm where alternative bases of entitlement to the continental shelf are invoked.

The East China Sea dispute between China and South Korea *vis-à-vis* Japan (ECS) currently illustrates about the difficulty to provide a definite solution to Colson's scenario number one. With China and South Korea claiming outer continental shelf rights within Japan's basic 200 nm continental shelf and EEZ, while at the same time denying Japan's effective prolongation throughout the 200 nm strip, the case has given rise to an interesting literature that asks whether it is appropriate or legally consistent, as dictated by the ICJ in the Libya/Malta case, to detach geology and geomorphology of any relevance for maritime delimitation in areas less than 400 nm (OLURUNDAMI, 2016, p. 717- 740). The content of the China and South Korea's claims seems to also challenge the plausibility of Professor Colson's proposed solution for scenario number one. Importantly although not decisive in this article, Japan challenged China and South Korea's submission before the CLCS, and there are currently no final and binding outer continental shelf limits in the area.

In the Western Caribbean Sea, the outer continental shelf delimitation dispute between Nicaragua and Colombia develops with respect to materially identical questions. Nicaragua claims continental shelf rights beyond 200 nm without having secured a recommendation by the CLCS, arguably as a result of Colombia's protest under paragraph 5 (a) of Annex 1 to the CLCS's Rules of Procedure<sup>5</sup>, and the subsequent decision of the CLCS to defer consideration of the submission (CLCS, 2014, p. 15-16,

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<sup>4</sup> On this matter, see VEGA-BARBOSA, 2018, p. 103-17; LANDO, 2017, p. 137-73; ITLOS, 2012, p. 119, para. 407; PCA, 2006; ICJ, 2007, p. 759, para. 319; ICJ, 2012e, p. 624; PCA, 1992, p. 293; KWIATKOWSKA, 2013, p. 225-226; ELFERINK, 2006, p. 275; SUAREZ, 2013, p. 345; KWIATKOWSKA, 2012, p. 108; KUNOY, 2013, p. 67; KUNOY, 2010, p. 241.

<sup>5</sup> "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute." (CLCS, 2008).

para. 83). Moreover, Nicaragua's outer continental shelf delimitation claim includes areas within Colombia's 200 nm basic entitlement, which is said to possess a narrow continental margin as the result of a substantial disruption of its natural prolongation. Although the written submissions of Nicaragua in the case concerning the *Question of the Delimitation of the Continental Shelf beyond 200 nm from Nicaragua's coast* are not yet public, this position was expressed in its Reply in the *Territorial and Maritime Dispute* as follows:

- a) For Nicaragua, there is clear topographical and geological continuity between the Nicaraguan land mass and the Nicaraguan Rise which is a shallow area of continental crust extending from Nicaragua to Jamaica. Its southern limit is sharply defined by the Hess escarpment, separating the lower Nicaraguan Rise from the deep Colombian Basin. This therefore represents the natural prolongation of the Nicaragua landmass.
- b) For Colombia, there is a sharp geological discontinuity between the Colombian landmass situated on the South American Plate and the oceanic crust of the Caribbean Plate. This continental-ocean boundary is overlain in part by the thick sediments of the Magdalena Rise. The natural prolongation of the Colombian landmass in contrast, is therefore limited to a narrow zone on the southern margin of the Colombian Basin." (ICJ, 2009, p.84, para 3.28).

The dispute in the Western Caribbean Sea between Nicaragua and Colombia can still be distinguished from that in the ECS for at least three reasons. First, Colombia is not a party to UNCLOS. Second, the relevant maritime area in *Nicaragua v. Colombia* extends beyond 400 nm. Third, although lacking final and binding outer continental shelf limits, in the sense of UNCLOS Article 76 (8), the dispute in the Western Caribbean Sea will be decided by the ICJ.

Despite these differences, the cases in the ECS and in the Western Caribbean Sea allow for a complementary approach to the understanding of challenges posed by maritime delimitation where alternative bases of continental shelf entitlement are opposed. This is due to a big extent to the

fact that in both disputes the narratives for contradiction are similar and based on materially identical legal arguments.

In light of the aforementioned, this article has three main parts. Part one is descriptive of the content and nature of the disputes in the ECS and in the Western Caribbean Sea. Part two introduces the contemporary academic approaches to the dispute in the ECS. Part three presents the opinion of the author with respect to the lessons to be learnt from the dispute in the ECS and their applicability in the Western Caribbean Sea. Finally, some conclusions are presented.

Before turning to the analysis, some clarifications are due. This manuscript does not enter into the debate concerning the establishment of the outer edge of the continental margin beyond 200 nm in the absence of a recommendation by the CLCS. It rather presupposes, without taking position on the matter, that China, South Korea and Nicaragua's claims of extended continental shelf rights are correctly and sufficiently substantiated on the basis of UNCLOS Article 76 (4) (5) (6) (7) and (8). Moreover, the author has intentionally avoided to participate in current discussions concerning the controlling concept in UNCLOS Article 76, either outer edge of the continental margin or natural prolongation (HUANG; LLIAO, 2014, p. 281-307; GUDLAUGSSON, 2004, p. 61). The notions of "natural prolongation" and "outer edge of the continental margin" are thus used interchangeably. Notwithstanding its relevance for a discussion of outer continental shelf delimitation in areas less than 400 nm, this article does not deal nor elaborates upon the current dispute in the Timor Sea either (SERDY, 2008, p. 941). As already clarified, the selected source of reference for the Western Caribbean Sea dispute is the controversy in the ECS. There, the wide-margin States, just as it is the case of Nicaragua, have claimed outer continental shelf rights within Japan's distance-based continental

shelf entitlement<sup>6</sup>. Finally, an important starting point in this article is the absence of agreement as between the States concerned with respect to the viability and legal basis applicable to this form of maritime delimitation<sup>7</sup>. This is consistent with the general purpose of the author to advance the understanding of the law applicable to a dispute concerning the very validity of maritime delimitation beyond 200 nm where alternative bases of entitlement are opposed.

## 2. Description of the Disputes

### 2.1 The ECS Dispute

The maritime delimitation dispute in the ECS concerns both, a scientific question asking whether the Okinawa Trough substantially disrupts the continuity of the continental shelves thereby constituting a natural boundary, and a juridical one, pertaining to the legal value, if any, of the geomorphology of the seabed and the geology of the subsoil in the maritime delimitation of a relevant area that is less than 400 nautical miles (ZHANG, 2008, p. 125; JIANJUN, 2010, p. 143). In respect to this last question, China and South Korea share the view that, *vis-a-vis* Japan, a substantial fracture in the natural prolongation of the latter calls for the median line methodology to be exempted, since it would not be conducive to an equitable result (JIANJUN, 2010, p. 146; ZHONGHAI, 2008, p. 355). Pending delimitation, South Korea and China have agreed to bilateral provisional arrangements with Japan in the disputed area. As provided for in UNCLOS Article 83 (3), such arrangements shall be without prejudice to

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<sup>6</sup> In its submission before the CLCS, Australia has excluded areas within the 200 nm of any other State (UN, 2004).

<sup>7</sup> Should States decide to enter into negotiation or agree to maritime delimitation by an international adjudicative body, the relevant questions would concern the rights of third States and the international community as a whole. See ITLOS, 2012a; PCA, 2014.

the final delimitation and, accordingly, are not prejudicial nor supportive of any of the parties' claims in the relevant area.

In the ECS, China (UN, 2009) and South Korea<sup>8</sup> made preliminary submissions before the CLCS where they presented scientific data in respect to the outer limits of their continental shelves beyond 200 nm. The submissions were made on 11 May 2009, two days before the deadline accepted by the Meeting of State Parties for the filing of preliminary information for those States for which UNCLOS entered into force before the publication of the CLCS Technical Guidelines. While in each case the submission is partial, China and South Korea have located their proposed outer limits in the submarine feature known as the Okinawa Trough.<sup>9</sup>

This geographical setting determines a three-party delimitation scenario with relevance within and beyond the 200 nm limit. As explained by Gao, “distance between the axis of the Okinawa Trough and the coasts of China and Korea is more than 200 nautical miles, while the Trough is well within the 200-nautical mile distance from the coast of Japan.” If China’s boundary claim and methodology were to be accepted, China would acquire sovereign rights to about two-thirds of the ECS’ continental shelf (OLORUNDAMI, 2016, p. 723)<sup>10</sup>. In Japan’s view, the Okinawa Trough is not a natural boundary but a mere causal indent which does not amount to a disruption of the unity of the continental shelf. Japan endorses ICJ’s jurisprudence after

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<sup>8</sup> On 26 December 2012, the Republic of Korea submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the Convention, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured (UN, 2012).

<sup>9</sup> In its executive summary, China submitted that: “[t]he shelf of ECS [East China Sea], the slope of ECS and the Okinawa Trough form a passive continental margin. The Okinawa Trough is the natural termination of the continental shelf of ECS” (UN, 2012b). In turn, at paragraph 1.5 of the 26 December 2012 submission, the Republic of Korea recalled that “the outer limits of the continental shelf in the East China Sea beyond 200 M from the baselines from which the breadth of the territorial sea of Korea is measured are located in the Okinawa Trough, where the seabed and subsoil of the East China Sea comprises a continuous continental landmass extending from Korea’s coast to the limits specified in the Convention” (UN, 2012).

<sup>10</sup> For a comparison of the ranges and legal basis of the respective claims of China and Japan see ZHANG, 2008, p. 128.

1969, thereby advocating in favour of a maritime boundary divided along an equidistant median line, taking into consideration the relevant circumstances, without attaching any special weight to natural prolongation (KIM, 2008, p. 223; DYKE, 2003, p. 512).

China and South Korea's proposed outer continental shelf limits situate in the deepest point of the Okinawa Trough. Although it is true that the outer limits proposed by China do not extend within the Joint Development Zone agreed upon between Korea and Japan, and that Korea has presented China and Japan with assurances that its outer continental shelf claim is without prejudice to the rights of third States, in its Verbal Note of 28 December 2012, in respect to China's submission, Japan requested the CLCS "not to consider the submission" because "[t]he distance between the opposite coasts of Japan and the People's Republic of China in the area with regard to the submission is less than 400 nautical miles;". Japan further advanced that "delimitation of the continental shelf in this area shall be effected by agreement between the States concerned in accordance with Article 83 of [UNCLOS]". In Japan's view, it is "undisputable that the People's Republic of China cannot unilaterally establish the outer limits of the continental shelf in this area". Moreover, after invoking paragraph 5 (a) of Annex I to the Rules of Procedure of the CLCS, which conditions CLCS's action in cases of pending maritime disputes to consent by the contending parties, Japan clarified that "[i]n the area, which is the subject of the submission, the delimitation of the continental shelf is yet to be determined", and that it "does not give such prior consent to the consideration of the submission by the Commission" (UN, 2013c).

Through its Verbal Note of 5 August 2013, China responded that Japan's objection "has no ground in [UNCLOS]" and therefore "does not affect or impede China's submission on the outer limits of its continental shelf beyond 200 nautical miles, nor the consideration of the submission by the Commission". China submitted that its submission was in conformity

with UNCLOS Article 76 (10) and, as made clear in the submission itself, neither the submission nor the recommendation by the CLCS prejudice “the future delimitation of the continental shelf in the ECS between the People’s Republic of China and Japan.” (UN, 2013a).

Taking into account the communications of the States, on 24 September 2013 the CLCS decided to “defer further consideration of the submission and the *notes verbales* until such time as the submission was next in line for consideration, as queued in order in which it was decided”. The intended purpose of the CLCS in the intervening period was “to take into account any further developments that might occur”, in particular, the recourse by the parties to the “avenues available to them”, including provisional arrangements of a practical nature (CLCS, 2013, p.13, para. 61).

An identical protest was filed by Japan on 11 January 2013 (UN, 2013i), with a reaffirmation on 30 April 2013 (UN, 2013c) and 28 August 2013 (UN, 2013d), against South Korea’s submission of 26 December 2012. Although South Korea’s response replicates China’s formulation on the independent character of delineation and delimitation<sup>11</sup>, it also raises important points which are relevant for an analysis on the viability of continental shelf delimitation where different bases of continental shelf entitlement are invoked by the litigating States. In South Korea’s position, there is nothing in UNCLOS that supports the arguments that the “establishment of the outer limits of the continental shelf beyond 200 nautical miles in an area where the distance between States with opposite coasts is less than 400 nautical miles cannot be accomplished under the provisions of the Convention”. The underlying argument supporting Korea’s assertion is that the two sources of continental shelf entitlement in UNCLOS Article 76 (1) are distinct and independent with no priority having been afforded to any of

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<sup>11</sup> South Korea adds that the work of the Commission would be auxiliary to the task of delimitation and fully consistent with the objectives of UNCLOS Article 83 (1), in that it “would likely facilitate the process of reaching agreement by clarifying the nature of the underlying seabed, and the extent and outer limits of the continental shelf in the area” (UN, 2013f).

them. Accordingly, Japan “cannot use its entitlement based on the distance criterion to negate Korea’s entitlement based on geomorphological considerations, or to block the Commission from issuing a recommendation with regard to the existence and limits of the continental shelf in the East China Sea.” (UN, 2013f). As in the case of the Chinese submission, the CLCS decided to defer consideration in order to analyse the behaviour of the parties in the period where South Korea’s submission was still in the queue (CLCS, 2013, p. 14, para. 68).

## 2.2 The Western Caribbean Sea Dispute

The scientific and associated legal debates currently outstanding in the ECS replicates almost identically in the current dispute between Nicaragua and Colombia in the Western Caribbean Sea. Beyond the limitations posed by the parties’ decision to preserve confidentiality of their written submissions until the initiation of the oral proceedings, the contours and particularities of this case can be amply discerned through analysis of the arguments already expressed by the States before the ICJ, first in the already concluded *Territorial and Maritime Dispute* and, second, in the preliminary proceedings of the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*. The relevant positions can also be found in the positions expressed by both States before the CLCS.

### 2.2.1 Action before the CLCS

On 24 June 2013, Nicaragua submitted information on the limits of the continental shelf beyond 200 nm from the baselines from which the breadth of the territorial sea is measured in the southwestern part of the Caribbean Sea. As presented in the Executive Summary of the submission, Nicaragua made recourse to the “Hedberg Formula” thereby fixing sixty

nautical-mile arcs measured from the proposed foot of slope.<sup>12</sup> Nicaragua's submission was protested first by Colombia, Costa Rica and Panama on the basis that Nicaragua's claim cover areas "not belonging to it", and was moreover "detrimental to our [Colombia, Costa Rica and Panama] rights in the area". (UN, 2013i; UN, 2013k). On 24 September 2013, Colombia followed the triple objection with a general reservation to Nicaragua's submission. Colombia's note introduces several points which are worth been noted.

A first line of argument for Colombia was the fact that, as a State non-Party to UNCLOS, Nicaragua's submission and the work of the CLCS is not opposable nor does it affect its rights in the continental shelf. In a second instance, Colombia underlined that Nicaragua's submission refers to maritime areas that belong to Colombia, and that such rights derive under customary international law from its continental coasts and in equal footing, from its insular formations (UN, 2013k). Colombia followed this action with a note verbal of 5 February 2014, where it reaffirmed its previous position but also expressed its confidence that the [CLCS] will refrain from considering Nicaragua's submission of 24 June 2013.

Nicaragua's response substantially incarnates the delineation-delimitation functional independence formulation, thereby asserting that its submission "is without prejudice to the delimitation of the continental shelf between Colombia, Costa Rica and Panamá." (UN, 2013k). At first, Nicaragua's assurances that its submission does not concern areas belonging to third States only referred to Panamá and Costa Rica. With respect to Colombia, such an assurance was included in Nicaragua's

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<sup>12</sup> "The Hedberg *formulae* is enshrined in Article 76 (4) (a) (ii), according to which, the outer edge of the continental margin beyond 200 nm may also be established by: "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." (SMITH; TAFT, 2000, p. 19).

communication of 20 December 2013, in response to Colombia's individual verbal note (UN, 2013c; UN, 2013d; UN, 2013f).<sup>13</sup>

In light of this diplomatic interchange, on 19 May 2014 the CLCS stated that “the Commission decided to defer further consideration of the submission and the communications until such time as the submission was next in line for consideration, as queued in the order in which it was received.” In the intervening period, the CLCS is “to take into account any further developments that might occur throughout the intervening period, during which States may wish to take advantage of the avenues available to them, including the provisional arrangements of a practical nature outlined in annex I to its rules of procedure”. (CLCS, 2014, p. 15-16, para. 83). At this very moment it still unclear whether the CLCS has understood Colombia's verbal note as the equivalent to an objection under paragraph 5 (a) of Annex I to its Rules of Procedure and is therefore inactive with respect to Nicaragua's submission.

Finally, it must be highlighted that, in its submission of 24 June 2013, Nicaragua expressly indicated that in the Judgment of 19 November 2012 in the *Territorial and Maritime Dispute* between Nicaragua and Colombia (ICJ, 2012e, p. 624), the ICJ “did not determine the boundary of the continental shelf of Nicaragua and Colombia beyond this 200-nautical-mile limit”. Yet, in the next section of the submission, entitled “Disputes and Areas of Overlapping Interest”, Nicaragua informed the CLCS that “there [was] no unresolved land or maritime disputes related to this submission”. (UN, 2013m).

On 16 September 2013, Nicaragua filed a new application before the ICJ, asking for maritime delimitation beyond 200 nm from its coasts, in the areas not delimited by ICJ in the 19 November 2012 Judgment. On 17 March 2016, the ICJ ruled in favour of the admissibility of Nicaragua's

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<sup>13</sup> A similarly action was taken in respect to Costa Rica's and Panama's individual protest (UN, 2013k; UN, 2013l).

request for maritime delimitation beyond the boundaries fixed in the 19 November 2019 Judgment in the *Territorial and Maritime Dispute* (ICJ, 2016, p.100). Importantly, the ICJ decided to assess the merits of the delimitation claim, absent a final recommendation by the CLCS, after upholding the independence between the delineation and delimitation of the continental shelf (ICJ, 2016, p.100, para. 110-115).

### 2.2.2 The Territorial and Maritime Dispute before the ICJ

Before the ICJ, Nicaragua's claim to a mainland-to-mainland-coast delimitation *vis-à-vis* Colombia, in an area beyond 500 nm, was first presented in the *Territorial and Maritime Dispute*, Nicaragua v. Colombia (ICJ, 2012e, p.624). Although in 2012 the ICJ had no chance to pronounce on the merits of Nicaragua's extended continental shelf claim, the arguments presented by the parties in that chapter of the triple saga were extensive and incisive with respect to the technical and legal problems here discussed.

In its Reply to Colombia's Counter-Memorial (ICJ, 2009), Nicaragua asserted that under UNCLOS Article 76 it has an entitlement extending to the outer limits of the continental margin (ICJ, 2009a, p. 88, para.3.34). Nicaragua also submitted that the most relevant feature in the Southwest Caribbean is the *Nicaraguan Rise*, a large area extending for approximately 500 nm from the Nicaraguan-Honduran landmass in the southwest to Jamaica in the northeast. As explained in Nicaragua's Reply, the Nicaraguan Rise is separated in the south from the Colombian basin by a feature of linear character known as the *Hess Escarpment* (ICJ, 2009, p. 88, para.3.21). Nicaragua also commented on the geology of Colombia's continental margin, asserting that "Colombian Basin lies between the Hess Escarpment and the continental slope of Colombia and South America". In Nicaragua's description, the oceanic crust of the Colombian Basin is

subducted beneath the South American Plate along the north coast of Colombia forming a deep ocean trench.” (ICJ, 2009, p. 83, para.3.24).

With respect to the delimitation *vis-à-vis* Colombia, Nicaragua expressed the view that, in case of overlap, “then the principle of equal division of the areas of overlap should be the basis of the maritime delimitation” (ICJ, 2009, p. 88, para.3.34). This was said to be the case since the final section of the continental shelf of Nicaragua is subjacent to the Exclusive Economic Zone (EEZ) of Colombia. In Nicaragua’s understanding, delimitation should be performed without ascribing priority to any of the bases of entitlement (ICJ, 2009, p. 93-94, para.3.47). In furtherance of its position, Nicaragua recognized that the situation presented before the Court is not one which UNCLOS Article 76 was intended to cover, a consideration said to militate against any *ex ante* priority or hierarchy among the alternative bases of continental shelf entitlement (ICJ, 2009, p. 95, para.3.54). Nicaragua also said that not only were there no *a priori* reasons supporting priority, but the fact that rights over the EEZ depend on express declaration and do not arise by operation of law would place them in a weaker stance than rights over the continental shelf which do not depend on occupation or proclamation (ICJ, 2009, p. 96, para.3.55).

In its Rejoinder, Colombia firstly noted that there are no areas of outer continental shelf in the Western Caribbean Sea because “there are no maritime areas that lie more than 200 nautical miles from the nearest land territory of the riparian States”, a fact said to be corroborated by the decision of Caribbean States not to make submissions before the CLCS in respect of this area (ICJ, 2010, p. 138, para.4.37).

In the oral proceedings of the *Territorial and Maritime Dispute*, Professor Robin Cleverly, on behalf of Nicaragua, made some observations with respect to the relevant geological data. He explained that “all the Caribbean and Central America is underlain by the Caribbean tectonic plate which is approximately 1,500 x 500 miles, extending from the Pacific in the

west as far as Barbados in the east, and includes the landmass of Nicaragua and Central America in the west.” In his description, to the south lies the South American Plate on which Colombia sits (ICJ, 2012e, p. 10, para.4).

Subsequently, Professor Cleverly went on to note the apparent consensus in the scientific community that “there is a clear distinction between the Caribbean Plate and the South American Plate”, this being a factor distinguishing the scenarios the ICJ was seized with in the Libya/Malta and Tunisia/Libya cases (ICJ, 1985, p.13). In his words, the “geological material that forms Colombia and northern South America has a common origin, distinct from that of the Caribbean Plate.” A subduction zone in the southern margin of the Caribbean Plate, that slides beneath the mass of South America, was stated to separate the continental crust of Colombia from the oceanic crust of the deep seabed. As explained by Cleverly, “[s]uch a plate boundary is one of the most fundamental geological discontinuities.” (ICJ, 2012e, p. 11, para.6).

Professor Cleverly’s scientific description was followed by Professor Lowe’s legal analysis. As counsel for Nicaragua, Professor Lowe affirmed that in “international law there is a single continental shelf, “without any distinction being made between the shelf within 200 nautical miles and the shelf beyond that limit”. He then went on to argue that the “continental shelf is overlain, but is not extinguished or superseded, [EEZ]”. (ICJ, 2012b, p. 22, para.4). Professor Lowe also asserted that Colombia’s “natural prolongation falls, for the most part, well short of 200 nautical miles from the coast” (ICJ, 2012a, p. 23, para.9). Then, upon clarification that both, Nicaragua’s entitlement to its physical continental shelf and Colombia’s entitlement under the distance criterion are both automatic, Professor Lowe contended that, in maritime delimitation, no State is legally guaranteed to preserve its full entitlement. In his legal opinion, “the need for delimitation arises precisely because it is not possible to give every State its full *prima facie* entitlement” (ICJ, 2012a, p. 27, para.30).

Colombia responded by asserting that Nicaragua's case was conceptually dependent upon the establishment of outer limits beyond 200 nm based on the geological characteristics of the Nicaraguan Rise, a task not completed by Nicaragua on the basis of the mandatory procedure enshrined in UNCLOS Article 76 for State parties (ICJ, 2012b, p. 55, para.53). In Colombia's position, in spite of some similarities in the conventional law applicable to the continental shelf within and beyond 200 nm, it is clear that the establishment of entitlement beyond the distance criterion is concerned with geology and geomorphology and "depends on meeting the conditions set out in paragraphs 4 to 7 of Article 76, and satisfying the requirements in paragraph 8 of Article 76, if that State is a party to the Convention" (ICJ, 2012c, p. 55, para.49).

As counsel for Colombia, Professor James Crawford qualified Professor Lowe's proposal as a paradox where the further away the continental shelf lies with respect to the State's baselines, the more rights that State has (ICJ, 2012d, p. 33, para.8). Then, Professor Crawford interpreted ICJ's dictum in *Libya/Malta* as evidence that in areas where both States can claim 200 nm, not merely "where the coasts are within 200 nm of each other" (ICJ, 2012d, p. 34, para.13), each State "has an entitlement to a 200-mile continental shelf congruent with its entitlement to an EEZ of a similar distance and irrespective of the geomorphology of the underlying sea-bed" (ICJ, 2012d, p. 34, para.13).

On this basis, Professor Crawford expressed the opinion that in the event of a delimitation scenario where the natural prolongation of one State "intrudes into another State's shelf entitlement as defined by the width of its EEZ", the latter takes priority over the former (ICJ, 2012d, p. 34, para.13). This position was stated to find support in practice, where States have consistently refrained from making outer continental shelf claims within other States' 200 nm. In addition, Professor Crawford advanced two so-called harmful effects which would arise out of a decision in favour of

Nicaragua's claim, first, the likelihood for new conflicts among sovereigns to arise in respect of natural resources, second, the likelihood for litigation on maritime delimitation to be further complicated by a highly confusing technical narrative.

In its Judgment of 19 November 2012, after noting that Nicaragua had only presented preliminary information to support its outer continental shelf delimitation claim, and that accordingly Nicaragua had not “established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast,” the ICJ decided that it was “not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua”.

### 2.2.3 The Outer Continental Shelf Delimitation case before the ICJ

Nicaragua's unsuccessful request for an outer continental shelf delimitation *vis-à-vis* Colombia in the *Territorial and Maritime Dispute* was followed with another submission of 16 September 2013 before the ICJ. The dispute was said to concern the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia. In its Judgment of 17 March 2016, the ICJ dismissed Colombia's preliminary objections against the jurisdiction of the Court and the inadmissibility of Nicaragua's first claim (ICJ, 2016).

While the ICJ upheld Colombia's contention against the admissibility of Nicaragua's second submission – a rather unusual request for the establishment of a provisional regime of conduct in the area of overlapping entitlements pending delimitation –, the case is currently pending

resolution on the merits with respect to Nicaragua's request for the ICJ to adjudge and declare: "The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012."

The request in Nicaragua's submission is certainly wide and allows for an interpretation that the delimitation scenario can also concern maritime delimitation in areas where both Colombia and Nicaragua allege outer continental shelf rights. Nonetheless, there are several elements that allow to conclude that the delimitation scenario currently before the ICJ will oppose the outer continental shelf claim of Nicaragua, against Colombia's 200 nm basic continental shelf entitlement and EEZ. First, Colombia has already contended that in the area claimed by Nicaragua "there are no maritime areas that lie more than 200 nautical miles from the nearest land territory of the riparian States", a fact said to be corroborated by the decision of Caribbean States not to make submissions before the CLCS in respect of this area (ICJ, 2010, p. 138, para.4.37).

In the absence of a claim of extended continental shelf rights by Colombia, Nicaragua's request of maritime delimitation beyond the boundaries fixed in the Judgment of 19 November 2012 would be plausible eastward from the yellow dotted line marking the limit of Nicaragua's 200 nm limit (ICJ, 2012e, p. 624, para.714), either *vis-à-vis* the 200 nm basic entitlement of Colombia's most eastward islands, or Colombia's continental coast projection as measured from Cartagena. This seems to be clear from the following statement by Professor Elferink, as Counsel for Nicaragua:

[E]ven if the Court were to find that it would not be possible to determine the continental shelf boundary between the mainland coasts by a line defined by fixed points, Nicaragua submits that there is no reason to refrain from doing so as regards the boundary of the continental shelf between Nicaragua and the islands of San Andrés and Providencia, which is an essential part of the delimitation before the Court (ICJ, 2015b, p. 35, para. 25).

Moreover, in the last intervention of Nicaragua during the public sittings of the preliminary phase of the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*, Nicaragua's Agent amply referred to areas licensed by Colombia for the exploration and exploitation of hydrocarbons "not only involving Nicaraguan waters – established by the Court's Judgement of November 2012 – but also in areas beyond 200 nautical miles from the Nicaraguan coast, which are precisely the areas claimed by Nicaragua in these proceedings". (ICJ, 2015b, p. 51, para. 33). Finally, Nicaragua's discourse on the relationship between delineation and delimitation of the outer limits of its continental shelf beyond 200 nm is premised on its assertion, before the CLCS, that its continental margin extends into Colombia's 200 nautical mile entitlement. Note for example the following statement by Nicaragua's Agent:

Thus if the Commission were to find that the continental shelf of Nicaragua reaches up to the point indicated by Nicaragua within the potential 200-nautical-mile-EEZ of Colombia, that does not give Nicaragua automatic rights over all that area without proper delimitation (ICJ, 2015b, p. 48, para. 23).

Accordingly, it is possible to expect that Nicaragua's Memorial, not yet public, contains a claim of outer continental shelf delimitation in relation to Colombia's 200 nm basic entitlement<sup>14</sup>.

### 2.3 The basis for comparative assessment

Based on the previous description of the content and extent of the States' claims in the disputes in the ECS and the Western Caribbean Sea, there are at least two similarities that give ground for a referential assessment. First, in the absence of scientific certainty, agreement or *ex*

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<sup>14</sup> According to ICJ's Order of 28 April 2016, since Colombia filed preliminary objections before the filing of Nicaragua's Memorial, the latter was scheduled to be delivered on 28 September 2016.

*ante* international acquiescence on the effective prolongation of the continental margins beyond 200 nm, or on the substantive disruption of the continental shelf continuity within 200 nm, China, South Korea and Nicaragua had sought to exhaust the procedure provided for in UNCLOS Article 76 for the delineation of the outer limits of their continental shelves. In this context, a common feature is the difficulty in establishing final and binding outer limits given Japan's and Colombia's (material) invocation of paragraph 5 (a) of Annex I to the CLCS' Rules of Procedure. Under said provision, where a land or maritime dispute exists, "the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute", unless "prior consent [is] given by all States that are parties to such a dispute". The concurrent analysis of the ECS and the Western Caribbean Sea cases illustrate that where paragraph 5 (a) is activated, the possibilities for the definite fixing of a maritime boundary are very limited, and difficulties tend to exacerbate where a solution is sought before international adjudicative bodies.

Second, the ECS and the Western Caribbean cases are both fertile for a discussion on the plausibility of maritime delimitation where independent bases of continental shelf entitlement are confronted. This is the case where an outer continental shelf claim is invoked in areas less than 400 nm (ECS), or where an outer continental shelf is opposed to a basic 200 nm entitlement beyond 200 nm regardless of the distance (Western Caribbean Sea). Concurrent and comparative assessment is possible because both in the ECS and in the Western Caribbean Sea cases, there is at least one party arguing that (i) its natural prolongation extends beyond 200 nm<sup>15</sup>; (ii) the opposite State has a narrow continental margin due to a substantial

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<sup>15</sup> "The geomorphological and geological features show that the continental shelf in the East China Sea (hereinafter referred to as 'ECS') is the natural prolongation of China's land territory, and the Okinawa Trough is an important geomorphological unit with prominent cut-off characteristics, which is the termination to where the continental shelf of ECS extends. The continental shelf in ECS extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of China is measured" (UN, 2013l; UN, 2013j).

disruption of the natural prolongation within the 200 nm limit; and (iii) maritime delimitation between outer continental shelf claims and 200 nm basic entitlements is legally viable or, conversely, the distance criterion should trump natural prolongation.

The Western Caribbean Sea dispute can still be distinguished from that in the ECS in light of Nicaragua's decision to find adjudication of its outer continental shelf delimitation *vis-à-vis* Colombia's 200 nm basic entitlement before the ICJ. Although China has repeatedly stated its reticence to advance maritime delimitation disputes before international adjudicative bodies (PAN, 2009 p. 161), the Western Caribbean Sea case has already provided States worldwide with valuable information about the type of legal difficulties which may arise where a continental shelf delimitation claim beyond 200 nm is presented before an international court or tribunal, without final and binding outer limits. In fact, the Western Caribbean Sea case before the ICJ has already proven to be a test to the general consistency and pragmatic application of the functional independence approach to delineation and delimitation (JOHNSON; ELFERINK, 2006, p. 166). Litigation in this case is moreover likely to provide important answers, or at least encourage further academic elaboration with respect to the type of legal obstacles an international court may have to confront when dividing alternative bases of title over the continental shelf.

### 3. Outer Continental Shelf delimitation between different and independent titles: legal discourse on the occasion of the ECS Dispute

It is widely questioned whether the ICJ had it right in the 1985 Libya/Malta case, where it expressed that “in so far as sea-bed areas less than 200 miles from the coast are concerned”, no role should be ascribed to geophysical or geological factors (MAGNÚSSON, 2015, p. 17; DAVENPORT, 2013, p. 306; HIGHET, 1993, p. 176). In that case, Libya relied on ICJ's

previous and seminal dictum in the 1969 *North Sea Continental Shelf* cases according to which “delimitation is to be effected...in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other” (ICJ, 1969, p. 3, para. 95).

Yet, upholding the Maltese argument, the Court noted that, under the new developments in international law, a coastal State is authorized to claim continental shelf rights up to 200 nm “whatever the geological characteristics of the corresponding sea-bed and subsoil”, a reason why in areas less than 400 nm, geological and geophysical factors should be dismissed for the establishment of entitlement or the delimitation of the overlapping entitlements (ICJ, 1985, p. 13, para. 39). The following excerpt is cited given its relevance in the present work:

It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the ‘rift zone’ cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary (ICJ, 1985, p. 13, para. 39).

While recognizing the huge impact the 1985 ICJ’s Judgment in Libya/Malta had in subsequent international legal scholarship (COLSON, 2003, p. 101; CHARNEY, 2002, p. 1029; HIGHET, 1989, p. 91; SCHOFIELD, 2013, p. 223), Fayokemi Olorundami (2016, p. 717) recently revisited the conceptual consistency of the decision. In her view, doctrinal statements subsequent and adhering to the 1985 ICJ’s Judgment in Libya/Malta “are not based on an analysis of the decision in light of the law, but on a presumption that the decision of the Court is authoritative, settled and applicable in all cases” (OLORUNDAMI, 2016, p. 725).

According to Olorundami (2016), the ICJ was right in underlying that under contemporary international law a coastal State is entitled to claim a

200 nm continental shelf irrespective of any other consideration. Nevertheless, she posits that it was incorrect for the Court to materially divide the continental shelf into an inner (within 200 nm) and an outer continental shelf (beyond 200 nm), as was also incorrect to dictate that in respect to the former the bases of title had to be identical.<sup>16</sup> By saying that in areas within 200 nm natural prolongation is irrelevant, the Court further supported the argument that the distance criterion has a “primary” role.

That there is in international law a single continental shelf concept seems to be a sufficiently peaceful statement. Such premise finds support both in legal literature (MOSSOP, 2017; MAGNÚSSON, 2012, p. 238; LEGAUL, HANKEY, 1985, p. 983) and international jurisprudence. The inherency clause enshrined in UNCLOS Article 77 (3) (RIBEIRO, 2010, p. 191), and the continental shelf delimitation provision in UNCLOS Article 83, none of which distinguish between an inner and outer continental shelf, also underpin this formulation. A more complex question is whether ICJ had it wrong in asserting that in areas less than 400 nm geology and geomorphology are irrelevant for the verification of title and division of overlapping entitlements. The main thesis in Olorundami’s statement is that “Article 76(1) does not contemplate equality of the geographical and geological realities of all States or uniformity of entitlement of the States involved in a given delimitation exercise” because it was envisioned and drafted on the assumption that some States have wide continental margins while others have narrow continental margins (OLORUNDAMI, 2016, p. 727).

The ordinary meaning of UNCLOS Article 76 (1) would be confirmatory of this position, since the clause “or” is clearly indicative that

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<sup>16</sup> “In the inner continental shelf (which in the mind of the Court is primary), the criterion for entitlement is 200 nautical miles while in the outer continental shelf (which the Court assumes to be secondary), geological and geomorphological factors may play a role; and the inner continental shelf must first be apportioned before any consideration of the outer continental shelf may arise” (OLORUNDAMI, 2016, p. 726).

States have two alternatives in the substantiation of their title (NORDQUIST; ROSENNE, 1993, p. 841). The author was still careful to note that the delimitation scenario in Libya/Malta was less than 200 nm, actually extending to no more than 183 nm. In this scenario, the only relevant basis of entitlement was in fact distance because no State was entitled to claim continental shelf rights beyond 200 nm. Accordingly, it is the Court's decision to extend its thesis to an area less than 400 nm that Olorundami (2016, p. 730) considers in contradiction with the law applicable. The critique is that, the position of the Court implies that, in areas less than 400 nm, the title of a State that claims a long natural prolongation is dependent and materially precluded by the distance criterion upon which its neighbouring State relies.

Olorundami also addressed ICJ's reasoning in Libya/Malta with respect to the then recently recognized EEZ. In 1985, the Court considered that since the 200 nm limit was a common feature to the continental shelf and to the EEZ, distance should be given "greater importance". In the Court's view, the result of this common feature is that there can be a continental shelf without an EEZ, but there can be no EEZ without a continental shelf. In Olorundami's opinion, far from supporting the assertion that geology and geophysical factors are irrelevant in areas less than 400 nm, the fact that there can be a continental shelf without an EEZ indicates that, in some cases, including where an outer continental shelf claim is made in areas within 400 nm, the EEZ may be immaterial to continental shelf delimitation, thereby authorizing the use of geological and geomorphological factors, which are exclusive to the continental shelf, albeit solely to one of the alternative basis of entitlement provided for in UNCLOS Article 76 (1).

A second line of argument in Olorundami's piece is common to other approaches favouring the plausibility of maritime delimitation between alternative bases of continental shelf entitlement, and the priority of

natural prolongation over the distance criterion and the EEZ more generally.<sup>17</sup> This argument invokes UNCLOS Article 56 (3), according to which coastal States rights in the EEZ “with respect to the seabed and subsoil shall be exercised in accordance with Part VI”. These words are said to mean that the delimitation of the EEZ should consult factors which are pertinent to the continental shelf “and not the other way around, that is, for continental shelf delimitation to be subjected to the distance criterion which is characteristic and unique to the EEZ (OLORUNDAMI, 2016, p. 732). In this sense, in respect to the dispute concerning the Timor Gap, a controversy in an area less than 400 nm, Chris Cook (1981, p. 165) argues that UNCLOS Article 56 (3) means that rights in the EEZ are derivative from the continental and “thus subordinate to it”.

Other scholars elaborate on the basis of the inherency clause enshrined in UNCLOS Article 77 (3), to further advocate for the supremacy of natural prolongation where a claim of outer continental shelf rights inserts into another States’ 200 nm basic entitlement. In this reasoning, primacy is the result of the legal recognition that rights over the continental shelf exist *ipso facto* and *ab initio*, whereas rights over the EEZ only appertain to a coastal State as a result of express proclamation. This means that a distance-based entitlement to the continental shelf or the entitlement to an EEZ cannot imply a deprivation from the outer continental shelf rights that a State has *ipso facto* and *ab initio* (EVANS, 1989, p. 55).

Tara Davenport (2013, p. 214) has brilliantly summarized arguments in this face of the coin as follows:

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<sup>17</sup> In his Separate Opinion in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judge Zhiguo Gao observed (ITLOS, 2012b, p. 226): “It is my firm view that natural prolongation retains its primacy over all other factors and that legal title to the continental shelf is based solely on geology and geomorphology, at least as far as the continental shelf beyond 200 nm is concerned. The statement to the contrary makes one wonder how the jurisdiction of a coastal State can jump so far, without geological and geomorphological continuity from its land mass, to the outer edge of the continental margin up to even 350 nm”.

Accordingly, one could argue, first, that Article 76 implies a hierarchy between the outer continental shelf and the distance-based continental shelf and this is reflected in the history and plain reading of Article 76 itself. The distance-based continental shelf was not motivated by a desire to redefine the conceptual basis of continental shelf jurisdiction but to 'accommodate and facilitate the emerging EEZ regime'. The ICJ in the *Tunisia/Libya Case* arguably supported this interpretation when it observed that the definition of the continental shelf in Article 76 contains two parts, and that natural prolongation of the land territory was the main criterion and that distance of 200 nautical miles was, 'in certain circumstances, the basis of the title of a coastal State'. The *Libya/Malta Case* also arguably recognized this when it stated that when 'the continental margin does not extend as far as 200 nautical miles from the shore, natural prolongation [...] is in part defined by distance from the shore.

The subsequent analysis in Olerundami's text concerns the notion of single maritime boundary, a result that can only be obtained when the delimitation of the continental shelf and the EEZ is carried out through criteria that is common to both spaces and which does not favour one in detriment of the other. As correctly stated by Olerundami's, there is ample agreement that this approach is correct where States require the same line to delimit *ex ante* dissimilar maritime spaces. Yet, her concern is that in *Libya/Malta* the ICJ seems to have created a new rule according to which "States have to delimit a single maritime boundary whenever the delimitation of the continental shelf is in issue, in areas less than 400 nautical miles". In other words, by giving priority to distance in every delimitation scenario that is less than 400 nm, the Court effectively dismissed the possibility that the parties ask for a delimitation of only the continental shelf, as was indeed the requests of the parties in *Libya/Malta* (OLORUNDAMI, 2016, p. 734).

Thus, what the Court did in *Libya/Malta* was to render inapplicable the criteria which was relevant for the only maritime space that was asked to be divided, in order to favour a maritime zone, the EEZ, which was not included in the States' request for delimitation. The problem is of course that, in scenarios that are less than 400 nm it is always possible for one

State to claim rights beyond 200 nm, in which case natural prolongation is not only a relevant consideration, but the very factor that UNCLOS Article 76 requires the coastal State to prove as the basis of entitlement. The concern is exacerbated when it is recalled that the regulation of the EEZ and the continental shelf, as independent maritime spaces, was envisioned to protect the rights of the wide-margin states to jurisdiction over the continental shelf beyond the 200-mile limit. This would mean that the general statement of the ICJ in *Libya/Malta* contradicts the express intention of States parties to UNCLOS (OLORUNDAMI, 2016, p. 735).

Olorundami (2016, p. 740) then concludes that in the ECS dispute China should not be deprived of the possibility of invoking natural prolongation for the establishment of its inherent outer continental shelf rights *vis-à-vis* Japan's basic continental shelf entitlement or EEZ. Her final remark is that "[a] simultaneous recognition of the entitlements of both China and Japan on the basis of natural prolongation and distance respectively will ensure that each party is allowed to enjoy its entitlement as provided for under international law". This way, the author aligns with a part of academic scholarship that pleads in favour of a compromise formula where no basis of continental shelf entitlement takes precedence over the other. Tara Davenport describes the relevant rule of delimitation in this context as follows:

A coastal State is entitled to a 200 nautical mile continental shelf only when the continental margin of that coastal State does not extend up to that distance, that is, the geological shelf is less than 200 nautical miles. Distance is clearly the basis of entitlement in such cases. However, a coastal State whose continental shelf extends beyond its territorial sea, 'through the natural prolongation of its territory to the outer edge of the continental margin,' it is the outer continental margin and not distance that forms the basis of entitlement. Accordingly, the distance criteria and the outer continental margin criteria are two distinct bases of entitlement for both wide margin States and narrow margin States separately. Distance is the basis for title when the physical continental margin does not extend up to 200 nautical miles whereas natural prolongation is the basis of title when the continental margin does not extend beyond 200 nautical miles" (DAVENPORT, 2013, p. 318).

This possibility has a fundamental conceptual underpinning which is symmetry in the bases of entitlement to the continental shelf and the EEZ. As described by Davenport, since the distance-based continental shelf or basic continental shelf was negotiated and accepted in order to accommodate and harmonize the recognition for a 200 nm EEZ, in a scenario where alternative bases of entitlement are opposed, “there is **symmetry** in an overlap between *entitlement to extended continental shelf* and *distance-based shelf* and an overlap between *entitlement to extended continental shelf* and *EEZ* as **both essentially involve an overlap between title based on natural prolongation/outer continental margin and titled based on distance**” (DAVENPORT, 2013, p. 318 – highlighted).

#### 4. What to expect for the Western Caribbean Sea Dispute?

Tara Davenport has expressed the view that “there is nothing in the text of UNCLOS that prohibits extended continental shelf entitlements in areas less than 400 nautical miles” (DAVENPORT, 2013, p. 311). Yet, after a thorough description of the arguments favouring the primacy of one of the alternative bases of entitlement over the other, as well as the compromise formula which would arguably open the door for maritime delimitation in this context, she reached the conclusion that “the validity of an extended continental shelf in areas less than 400 nautical miles is an issue that has not been conclusively decided under international law” (DAVENPORT, 2013, p. 311).

Thus, in respect to the ECS dispute, her appreciation is that currently “there are arguments that can be made supporting China’s entitlement beyond 200 nautical miles as well as against China’s entitlement beyond 200 nautical miles.” (DAVENPORT, 2013, p. 311). Moreover, there are

arguments favouring the compromise formula where the two definitions of the continental shelf are fully operational within the delimitation task. In the absence of sufficient agreements as to the law applicable, Davenport is of the opinion that resolution of this type of dispute before adjudicative bodies should not present as attractive nor as suitable for a definitive resolution.

The author aligns with Tara Davenport's final conclusion. Yet, in an attempt to further assist in the clarification of the law applicable to the current litigation in the Western Caribbean Sea, and certainly to the dispute in the ECS, this final part analyses the conceptual consistency of some of the arguments expressed by States and scholars on the occasion of the disputes in the ECS, and intoned similarly by Counsel for Nicaragua and Colombia before the ICJ.

As previously mentioned, in the *Territorial and Maritime Dispute* before the ICJ, Colombia denied the legal viability of maritime delimitation when the outer continental shelf of one State "intrudes into another State's shelf entitlement as defined by the width of its EEZ". This proposition is said to find support in general State practice, as well as in the specific one in the Western Caribbean Sea. In this last region, States are stated to have consistently refrained from extending their claims of outer continental shelf entitlement into areas within the 200 nm of third States. Moreover, in voice of Professor James Crawford, Colombia went as far as to clarify that the 1985 Judgment of the ICJ in *Libya/Malta* was applicable in every case a State claims a 200 nm, not merely "where the coasts are within 200 nm of each other". (ICJ, 2012d, p. 34, para.13). In said cases the EEZ takes priority over any claim based on the border edge of the shelf's natural prolongation.

Nicaragua's proposition is more straightforward. As explained by Professor Lowe, Nicaragua champions on behalf of the single continental shelf theory and endorses the principle of equal division of overlapping

entitlements irrespective of the origin of the title. In Nicaragua's view, delimitation should be performed without ascribing priority to any of the bases of entitlement (ICJ, 2009a, p. 93-94, para.3.47). In any case, if existent, hierarchy should favour continental shelf entitlement along the edge of the continental margin, which law recognizes as appertaining to the coastal State *ab initio* and *ipso jure*. Again, these set of arguments means that, although the relevant area in the Western Caribbean Sea dispute is more than 500 nm, the legal elaboration in respect to the ECS is fully applicable in the former and, accordingly, are adequate to inform ICJ's decision in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.

As can be seen, one part of the dispute between Nicaragua and Colombia has already concerned as is likely to keep concerning the applicability of the legal rule upheld by the ICJ in the Libya/Malta case. This line of argument would arguably benefit Colombia's case if the Court is ready to accept Professor Crawford's proposition that customary international law law, if given such strong character rather than that of an *obiter dictum* in an already 38.1.d decision, is also applicable in areas beyond 400 nm. Under the shield of the 1985 Judgment, Colombia will be expected to argue that the outer maritime delimitation requested by Nicaragua includes areas within Colombia's distance-based entitlement, and accordingly, geology and geophysical factors should be given no significance. The expected result of such narrative is two-fold: first, to prevent Nicaragua to avail of the full extent of its continental margin to claim benefits inside Colombia's 200 nm basic continental shelf; second, to secure that the alleged substantial disruption of Colombia's continental shelf within its own 200 nm has no diminishing impact in the delimitation.

We shall recall at this point that this work presupposes, without taking position on the matter, that the scientific components of the so-called

wide margin States have been correctly and sufficiently substantiated in light of UNCLOS Article 76. On this theoretical assumption, the author is of the opinion that the previous elaboration in Libya/Malta should not play a definitive role in the parties' argumentation in the Western Caribbean Sea litigation, and moreover, that the 1985 Judgment is not likely to increase predictability. The basis for this statement are two interrelated reasons. First, although there are several factors that authorize a referential and comparative analysis of the factual and legal circumstances in the ECS and the Western Caribbean Sea disputes, the ICJ Judgment of 1985 in Libya/Malta, under Article 38 of the ICJ Statute, lacks binding force for Colombia and Nicaragua (QUINTANA, J.J, 2015, p. 150). Second, the fact that the dispute in the Western Caribbean Sea develops in an area well beyond 200 nm, will probably amount to a compelling reason authorizing the Court to depart from its previous Judgment in Libya/Malta, or to at least address the case *de novo* and afresh (ICJ, 2008, p. 412-429, para. 54; ICJ, 2015a, p. 3, para. 389). Accordingly, legal argumentation of the parties in the new delimitation case should be based on a conceptual and principled approach to the law applicable of maritime claims, including the general principles supporting the 1985 Judgment in Libya/Malta, in which case the question of "primacy" will be of paramount importance.

An important question in the ECS and Western Caribbean Sea disputes revolves around precedence or hierarchy between the two basis of continental shelf entitlements. From the outset, the author submits that none of the arguments described in this work provide a convincing legal rationale that justify ascribing supremacy to any of the confronted sources of entitlement. In the author's view, such narrative is only visible, consistent and consented with respect to the territorial sea. Due to space limitations, this section will focus on arguments seeking to favour the primacy of the outer continental shelf over the EEZ.

A common argument among those favouring maritime delimitation of alternative bases of continental shelf entitlement is paradoxically one that presupposes that that rights in the EEZ concerning the seabed and subsoil shall be exercised in accordance with Part VI. This is said to signify that maritime delimitation of the EEZ can be carried out by reference to the legal regime governing the continental shelf. In this sense, although it is true that the words “in accordance with” mean “in agreement with” or “in conformity with”, none of those statements support the proposition that the division of the EEZ can be done by reference to the procedure and criteria governing a completely independent area.

By making recourse to the general rule of interpretation enshrined in Article 31 of the Vienna Convention on the Law of the Treaties, several conclusions arise which contradict the aforementioned opinion. First, UNCLOS Article 55 clearly provides that the legal regime for the EEZ is “specific”, which means that, unless it is expressly provided that a particular aspect of this area shall be governed by the regulation included in a different section, it is Part V which must be consulted.<sup>18</sup> This is confirmed by the fact that UNCLOS Part V pertains to the EEZ, while UNCLOS part VI concerns the continental shelf. Such ordering is arguably an indication of the drafters’ intention to recognize the existence of two independent maritime spaces. This was moreover the documented intention of wide-margin States in the Third United Nations Convention on the Law of the Sea, who opposed the absorption of the continental shelf by the EEZ (ICJ, 1985, p. 13; MOSSOP, 2017, p.9; FIETTA, CLEVERLY, 2016, p. 288; LEGAULT; HANKEY, 1985, p. 981; COTTIER, 2015, p. 121). Second, while UNCLOS Article 56 (3) provides that the coastal State rights in the seabed and subsoil shall be exercised in accordance with Part VI, it is UNCLOS

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<sup>18</sup> “Article 55. Specific legal regime of the exclusive economic zone. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”

Article 57 which defines the “[b]readth” of the EEZ. UNCLOS Article 57 contains an independent regulation according to which “[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

This provision is adamant in its adherence to a “distance” criterion and, although preceded by UNCLOS Article 56 (3), contains no reference to UNCLOS Part VI. Finally, one must not set aside the more obvious consideration that, since both UNCLOS Article 56 (3) and Article 76 contain a reference to a “200 nautical miles” distance criterion, with the latter being accompanied by a recognition of an alternative bases of entitlement beyond that distance, should the drafters have intended the EEZ and continental shelf to be concurrently delimited, both within and beyond 200 nm, a single delimitation provision would have been introduced for both areas. This is certainly not the case, with article UNCLOS Article 58 governing the resolution of disputes regarding attribution of rights and jurisdiction in the EEZ in independent and arguably different terms than UNCLOS Article 83 (ICJ, 1985, p. 13, para. 34).

Another source of debate concerns the overall consistency of the ICJ’s ruling in the Libya/Malta case. Should the parties decide to bring the content of paragraph 34 in the 1985 Judgment into play, the ruling will most probably become a bullseye. Olorundami is certainly right in criticising ICJ’s decision to prefer a feature common to the EEZ and the continental shelf, where only the continental shelf had been requested to be delimited, that is, absent a request for a single maritime boundary.

Nevertheless, Olorundami fails to provide an answer to the also very likely scenario that maritime delimitation in areas less than 400 nm is not requested through a special agreement but through unilateral application before an international court or tribunal. In this case, it is not the agreement of the parties which would have displaced the EEZ from the relevant delimitation request, but the individual decision of one of the

States concerned, whose interests is to favour natural prolongation. The problem in this case is that, as a necessary result of the request of the wide-margin State, a portion of the 200 nm EEZ of the narrow-margin State will have no “seabed and subsoil” in relation to which the rights provided in UNCLOS Part V can be “exercised in accordance with Part VI”. In other words, absent consent by all States parties to the dispute, and contrary to ICJ’s proposition in *Libya/Malta*, which Olorundami seems comfortable in accepting, there would be an EEZ without a corresponding continental shelf (ICJ, 1985, p. 13, para. 34).<sup>19</sup>

Olorundami’s analysis presupposes that in areas less than 400 nm a request for the boundary to delimit only one maritime space will always come as result of a mutual consent, or that it is immaterial that such a request comes as an individual plea. Yet, the ECS and the Western Caribbean Sea disputes show that where such a request comes from the interested wide-margin States it is met with express opposition by the opposing narrow-margin State. In this sense, it must be bear in mind that, as clarified by the ICJ in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, “the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice” (ICJ, 2001, p. 93, para. 174). Although there is not enough ground to sustain that the “single maritime boundary” methodology is now a norm of customary international law, it is not clear either that States are in any form obliged to accept a form of maritime delimitation that allows for rights in the EEZ to be detached from its correlative continental shelf rights (SHARMA 1987, p. 209; ANDERSON, 2005; VEGA-BARBOSA; MARTÍNEZ, 2016, p. 806).

Some words should now be expressed in relation to Tara Davenport’s “symmet[ric]” theory, as explicatory of the compromise formula that favours

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<sup>19</sup> As stated by the ICJ, “[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf” (ICJ, 1985, p. 13, para. 34).

maritime delimitation of alternative bases of continental shelf entitlement. In the author's understanding, such elaboration does not appear fully consistent with one of the fundamental bedrocks supporting the compromise formula: the independent character of the EEZ and the continental shelf. Indeed, the explanation assumes, without explaining, that maritime delimitation between an extended continental shelf and distance-based continental shelf, that is a delimitation based on alternative bases of continental shelf title, is a viable and plausible legal exercise. In this sense, while the validity of continental shelf delimitation between distance and natural prolongation-based arguments will certainly validate maritime delimitation between an outer continental shelf claim and an EEZ claim, the first proposition is yet to be convincingly explained.

One argument expressed exclusively in the framework of the Western Caribbean Sea advocates for the existence of a consistent general and regional State practice mandating outer continental shelf rights not to extend within other States' distance-based continental shelf. As mentioned before, although voiced during the oral proceedings of the *Territorial and Maritime Dispute*, this argument was not examined in its merits by the ICJ since at the moment the Court was not in a position to delimit the continental shelf between Nicaragua and Colombia beyond 200 nm from the Nicaraguan coast *vis-à-vis* Colombia.

This formulation raises important questions concerning the necessary subjective element (*opinio juris*) in customary international law. The main one is whether States' decision to refrain from including areas within other's State distance-based continentals shelf in their submissions before the CLCS is a reflection of a legal conviction, or rather a matter of convenience and practicality<sup>20</sup>. This difficulty must be analysed on the basis of

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<sup>20</sup> In any case, as Andrew Serdy correctly underlines, one must bear in mind that nothing in UNCLOS Article 76 suggest that coastal States are "under a positive duty to submit to the CLCS information on every possible area of continental margin beyond 200 nautical miles from their baselines, whether or not they wanted to exercise continental sovereign rights there." (SERDY, 2008, p. 945).

paragraph 5 (a) of Annex 1 to the Rules of Procedure of the CLCS, according to which,

[i]n cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute” (CLCS, 2008, p. 22).

As clearly provided for at paragraph 5 (a), should the CLCS be advised about the existence of a dispute in respect of a specific submission made under UNCLOS Article 76 (8) it “shall not consider and qualify” said submission absent “prior consent given by all States that are parties to such dispute”. The provision clearly provides that the impossibility to consider and qualify the submission emerges as mandatory upon corroboration that there is a pending dispute, while review once consent is given is a discretionary prerogative of the CLCS<sup>21</sup>. Moreover, the practice of the CLCS suggests that it has adopted a cautious approach once paragraph 5 (a) has been triggered (BUSCH, 2016, p. 105; BIA, 2012, p. 107), including a low threshold for the establishment of said dispute (ELFERINK, 2009, p. 551). This may be explained by its exclusive technical and scientific character and its limitations when compared to international courts and tribunals. In this sense, should Colombia decide to argue before the ICJ that said practice is constitutive of a universal or regional customary norm of international law, it will also be Colombia’s burden of proof to demonstrate that said practice was followed by States based on the conviction that law mandates to respect the 200 nm basic continental shelf entitlement of their neighbours, rather than a consequence of their decision, out of convenience and practicality, to avoid the activation of paragraph 5 (a) and the consequent impossibility for the CLCS to review and qualify the relevant submission.

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<sup>21</sup> For a highly progressive view in this respect see LEE, 2014, p. 605-619.

## 5. Conclusions

Currently, public international law is in urgent need to provide a definitive answer to several questions associated with the law of maritime claims beyond 200 nm. One of those questions concern the viability of maritime delimitation where alternative bases of continental shelf entitlement are opposed. Although academic approaches to the dispute in the ECS have provided a valuable source of reference for the understanding of this contemporary legal issue, the absence of sufficiently convincing arguments have already increased unpredictability in the Western Caribbean Sea dispute currently pending before the ICJ. In the current state of legal indeterminacy, the litigation before the ICJ emerges as an unprecedented opportunity for the parties to discuss and give an opinion on the viability question on the basis of general principles of international law. For the ICJ is more sensitive and limited. In an area where the law seems to be dark at its very best, the ICJ is expected to promote legal and exercise restraint through strict adherence to the inherent limitations of its international judicial function.

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