Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?

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Abstract

If a coastal State claims a continental shelf beyond 200 nautical miles (nm) that intrudes into the 200-nm limit of another State, the problem arises as to whether there is a hierarchical relationship between natural prolongation and distance, the two criteria of entitlement to the continental shelf provided by Article 76 of the UN Convention on the Law of the Sea. A positive answer would mean that the continental shelf beyond 200 nm cannot encroach upon the 200-nm limit, otherwise there would be an area of overlapping entitlements which calls for maritime delimitation. This article attempts to analyse this problem from the perspectives of Article 76, relevant judicial cases, State practice, and the relationship between the regimes of the continental shelf and the Exclusive Economic Zone. It is submitted that the law is not conclusive, though a majority of coastal States tend to adopt a self-constraint approach. In addition, this problem brings further challenges to the law of maritime delimitation.

Keywords

natural prolongation – distance – hierarchy – continental shelf delimitation

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Introduction

The question whether there is a hierarchical relationship between natural prolongation and distance, the two criteria of entitlement to the continental shelf in Article 76, paragraph 1 of the United Nations Convention on the Law of the Sea (LOSC),\(^1\) arises when opposite coastal States claim the continental shelves based on different criteria, and hence a disputed area emerges. Theoretical or not, in practice disagreement over this issue has caused certain coastal States to be stalled in the process of negotiations on maritime delimitation and even leads to proceedings before the International Court of Justice (ICJ or the Court).\(^2\) The problem of priority is thus the crux of this situation and the theme of inquiry in this article.

The meeting of continental shelf entitlements based on natural prolongation and distance only arises between coastal States with opposite coasts,\(^3\) and only when one of them claims a continental shelf beyond 200 nautical miles (nm). Adjacent States do not encounter this problem, because even if one claims a continental shelf beyond 200 nm and the other does not, the area of overlapping entitlements ceases to exist when it reaches the 200-nm limit from the relevant coasts. Therefore, there is no issue of overlapping entitlements based on two different grounds. On the other hand, if both States claim

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2 In the East China Sea, the problem of the existence of continental shelf claims based on natural prolongation which exceed 200 nautical miles (nm) by China, South Korea and Japan has prevented the conclusion of delimitation agreements. See Jianjun Gao, ‘The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea’ (2010) 9(1) Chinese Journal of International Law (CJIL) 143–177. In the Caribbean Sea, the claim of Nicaragua to the continental shelf beyond 200 nm, which intrudes into the 200-nm limits of neighbouring States, has triggered adversarial proceedings before the ICJ. See Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan coast (Nicaragua v. Colombia), Preliminary Objections, Judgment 17 March 2016 (hereinafter Nicaragua v. Colombia II case), available at http://www.icj-cij.org/docket/files/154/18956.pdf, accessed 2 June 2017.

3 To avoid misunderstanding of the terminology, here I refrain from using the term “overlap” or “encroach”, which carry special legal consequences in this article. Whereas “overlap” indicates the possibility of delimitation based on overlapping entitlements, “encroach” indicates that the one “encroached” upon is supposed to be superior to the other. Therefore, here I adopt a neutral term “meet” to signify the fact that two entitlements based on different criteria exist over the same space.
the continental shelf beyond 200 nm, the area of overlapping entitlements continues to the area beyond 200 nm of both States, as in the **Bangladesh/Myanmar** case and **Bangladesh/India** case.4

Two scenarios in which the question of overlapping entitlements based on different criteria arises can be identified, according to the distance between the opposite coasts. The first is where the distance between the two opposite coasts is beyond 400 nm and the claimed continental shelf beyond 200 nm of one State meets the 200-nm shelf of the other State. In this scenario, delimitation issues would not arise should both States base their entitlements solely on the distance criterion (See Fig. 1). This is the situation in the **Nicaragua v. Colombia II** case, in which Nicaragua argued that its continental shelf beyond 200 nm overlapped with Colombia's 200-nm shelf.5 The second scenario is where the distance between the opposite coasts is less than 400 nm and one State still claims a continental shelf beyond 200 nm. This scenario is slightly different from the first one, because even without the claim to the continental shelf beyond 200 nm, there is a need for maritime delimitation (See Fig. 2). This situation occurs between Australia and Timor-Leste in the Timor Sea,6 and in the East China Sea between China and Japan7 and between Korea and Japan.8

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4 See *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* List of cases: No 16 Judgment of 14 March 2012, ITLOS Reports 2012, 1–58; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India), Award (7 July 2014)*, 2014.

5 **Nicaragua v. Colombia II** case, Preliminary objections (n 2) at para. 14.

6 It is suggested that the Timor Trough, which is a substantial seabed feature over 3000 metres deep in places running roughly parallel to the coast of the island of Timor, is shared by Indonesia and Timor-Leste, and lies much closer to that island than to the Australian continent. Australia might base its continental shelf claim on natural prolongation, whereas Timor-Leste's entitlement to the continental shelf is based on distance. Nevertheless, Australia did not include this area in its submission to the Commission on the Limits of the Continental Shelf (CLCS). See A Serdy, ‘Is There a 400-Mile Rule in UNCLOS Article 76(8)?’ (2008) 57 (4) International and Comparative Law Quarterly (ICLQ) 941–954, at pp. 941–942.


In both scenarios, the States whose 200-nm shelf was intruded upon, claim that the continental shelf beyond 200 nm cannot encroach upon the 200-nm limit, though the arguments differ slightly. Colombia argued that natural
prolongation cannot take precedence over distance if they come into conflict, whereas Japan contended that the distance between two opposite States is less than 400 nm, which hinted that no claim of continental shelf beyond 200 nm should arise. Both arguments hinge on the question whether distance criterion prevails over natural prolongation or not. If distance takes precedence, then the 200-nm shelf of one State cannot be encroached upon by the continental shelf beyond 200 nm of the other. In contrast, if no priority exists, the two criteria are equal and could overlap and therefore this situation calls for delimitation. Accordingly, there are two mutually exclusive approaches to this problem. One is the approach of hierarchy and the other is the approach of equality. The consequences following the two approaches are significantly different. If the hierarchy is established, the continental shelf beyond 200 nm should give way to the 200-nm shelf in cases where they meet. Colombia would therefore enjoy the continental shelf up to 200 nm. As to China, Korea and Japan, the outstanding delimitation issues would only concern their entitlements based on their respective distance criterion. On the other hand, if the approach of equality is followed, there is a need to divide the overlapping entitlements in accordance with the rules and principles of maritime delimitation.

Which approach is in line with the letter and spirit of the LOSC could be considered from many perspectives, as in the text of the LOSC no preference is given explicitly. This article first interprets Article 76 in order to determine if a hierarchical relationship between distance and natural prolongation has already been set out. Article 76 will be interpreted in the light of relevant judicial decisions and State practice, in particular the practice of coastal States making submissions to the Commission on the Limits of the Continental Shelf (CLCS). In addition, the relationship between the Exclusive Economic Zone (EEZ) and the continental shelf also provides a useful perspective. It is submitted that no such hierarchical relationship between natural prolongation

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11 The jurisprudence has established that maritime delimitation presupposes an area of overlapping entitlements. See Bangladesh/Myanmar case (n 4) at p. 117, para. 397. The task of delimitation consists in "resolving the overlapping claims by drawing a line of separation of the maritime areas concerned". Maritime Delimitation in the Black Sea (Romania v. Ukraine) [2009] ICJ Rep 61, at p. 89, para. 77.
and distance is discernible from the interpretation of Article 76 of the LOSC or from the relationship between the regimes of the continental shelf and the EEZ. Nevertheless, there is a strong tendency in the State practice that avoids encroaching upon neighbouring States’ 200-nm limit. The prospects of delimiting the overlapping entitlements based on different criteria are briefly discussed, followed by the conclusion.

Single Continental Shelf, Two Alternatives

Article 76 defines the continental shelf and its extent. The text of Article 76 offers no priority of one criterion over the other. In effect, paragraph 1 only provides that the continental shelf of a coastal State extends either to the outer edge of the continental margin, or to a distance of 200 nm, if the outer edge of the continental margin does not reach that distance. Therefore, Article 76 confers upon coastal States rights of the continental shelf and it offers two options with regard to the physical scope of the continental shelf, which should be taken in accordance with the specific situation of each particular coastal State. Maritime entitlements do not preclude the possibility of the co-existence of other valid entitlements over the same marine space.12 It is exactly because of the application of Article 76 that situations of overlapping continental shelves arise. In this respect, nothing in Article 76 prevents the overlapping of continental shelves based on different criteria; it is only one situation of the application of Article 76. As to the overlapping area resulting from such claims, paragraph 10 of Article 76 provides that “the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”. Therefore, Article 76 does not prohibit, but rather it permits the overlapping continental shelf entitlements. As to how to divide the overlapping entitlements, it is governed by Article 83 of the LOSC, as well as relevant customary rules.

However, one may consider that the 200-nm distance criterion is given as a minimum extent of the continental shelf.13 To be effective as a minimum extent, it should be secured from a continental shelf extending beyond 200 nm. If certain submarine features, located within 200 nm of one coastal State,


could be invoked by another State as that State’s outer edge of the continental margin, what purposes would the phrase “or to a distance of 200 nautical miles from the baselines ... where the outer edge of the continental margin does not extend up to that distance” in Article 76, paragraph 1 serve? However, this argument misunderstands the rule of entitlement and the rule of delimitation. Although Article 76 defines the entitlement, it is misleading to interpret it so that such an entitlement shall be guaranteed in relation to other States’ entitlements, which is a question of delimitation. After all, it is fundamental to understand that delimitation is a process of “granting by taking away”,14 and that there is “no general right of coastal States to the maximum reach of their entitlements, irrespective of the geographical situation and the rights of other coastal States”.15

Above all, it should be noted that in law there is a single continental shelf, rather than an inner continental shelf and a separate outer continental shelf by reference to the 200-nm limit.16 The concept of a single continental shelf signifies that the continental shelf within and beyond 200 nm falls within the same regime. Fundamentally, there is no difference between the continental shelf based on natural prolongation and the continental shelf based on distance. For one thing, coastal States enjoy the same exclusive rights over the continental shelf in its entirety. For another, such rights do not depend on occupation, effective or notional, or on any express proclamation.17

Nevertheless, it is noted that differences exist between the continental shelf within and beyond 200 nm with regard to certain rights and obligations, notably the difference in the procedure of the establishment of the outer limits and the revenue-sharing system imposed on the exploitation of the continental shelf beyond 200 nm.18 These differences might be considered as reflecting

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15 Bangladesh/India case (n 4) at pp. 143–144, para. 469.
16 See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, Reports of International Arbitral Awards (RIAA), Volume XXVII, pp. 147–251, at para. 213.
17 See Article 77, paragraph 3 of the LOSC.
18 Another difference is the restriction on coastal States’ discretion to withhold consent to scientific research on the continental shelf beyond 200 nm. Article 246, paragraph 6 states: “Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from...
the difference in the “quality” (or “intensity”) of the entitlement and therefore they support the priority of the continental shelf within 200 nm over the one beyond 200 nm.\textsuperscript{19} Although the difference in the “intensity” is visible, the conclusion that distance takes precedence over the natural prolongation criterion might be far-fetched. The differences outlined above are reminders of the compromises reached during the Third Conference on the Law of the Sea (UNCLOS III) in order to achieve the co-existence of two criteria for defining the continental shelf, which is part of the “package deal”.\textsuperscript{20} These differences are not meant to undermine the exclusive and inherent aspects of the continental shelf beyond 200 nm.\textsuperscript{21} More importantly, overemphasizing the differences between the continental shelf within and beyond 200 nm had to give way to a continental shelf within 200 nm due to these differences, it would immediately entail a separation of the continental shelf into one within 200 nm and the other beyond that distance. So far, international courts and tribunals are consistent in maintaining the concept of a single continental shelf.\textsuperscript{22} Unless further judgments or arbitral awards put the matter differently, it is unlikely that the above-mentioned differences lead to a distinct status of

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\textsuperscript{21} In fact, it is considered that the primacy of coastal State rights and jurisdiction over the resources of the continental shelf has been emphasized in Article 142, in which the circumstances where resource deposits in the Area “lie across limits of national jurisdiction” are addressed. Article 142, paragraph 1 provides that: “Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie”. See \textit{ibid.}, at p. 947.

\textsuperscript{22} Despite the \textit{Bangladesh/Myanmar} case and the \textit{Barbados v. Trinidad and Tobago} case, the Arbitral Tribunal constituted in accordance with Annex VII of the LOSC, in the Arbitral Award of the \textit{Bangladesh/India} case, also acknowledged the concept of a single continental shelf. See \textit{Bangladesh/India} case (n 4) at p. 21, para. 77 and p. 85, para. 299. Nevertheless, doubts exist over whether the concept of single continental shelf is maintained. See M D Evans, ‘Maritime Boundary Delimitation: Whatever Next?’ in J Barrett and...

Consequently, although two criteria are adopted for the entitlement to the continental shelf, it is in essence a single continental shelf that is embraced in Article 76 of the LOSC. The delimitation rule of the continental shelf in Article 83 confirms that no distinction is made between the continental shelf within and beyond 200 nm.\footnote{See Bangladesh/Myanmar case (n 4) at para. 361.} In principle, as a rule of entitlement, each claim invoking either criterion should be recognized, as long as it satisfies the requirements set out in Article 76. Therefore, Article 76 alone does not offer a solution to the question whether a priority exists between the two criteria when they come into conflict. In fact, if the concept of a single continental shelf is read rigorously, it entails more of equality than hierarchy.

**Judicial Decisions**

The ICJ and other international tribunals occasionally pronounced on the relationship between natural prolongation and distance in Article 76, paragraph 1. The ICJ first considered their relationship in the *Tunisia/Libya* case. Article 76 of the draft convention, which was under the consideration of the Court as representing the accepted “new trends” at the UNCLOS III,\footnote{The Court considered that “Article 76 and Article 83 of the draft convention are the provisions of the draft convention prepared by the Conference which may be relevant as incorporating new accepted trends to be taken into account in the present case”. See Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ Rep 18, at p. 48, para. 47.} was the same as its final version in the LOSC. The Court observed that the definition of the continental shelf:

> consists of two parts, employing different criteria. According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is *in certain circumstances* the basis of the title of a coastal
State. The legal concept of the continental shelf as based on the ‘species of platform’ has thus been modified by this criterion [emphasis added].

This statement could hardly be regarded as suggesting a hierarchy between natural prolongation and distance. Even though the Court considered natural prolongation as the main criterion, it acknowledged that the distance criterion had modified the legal concept of the continental shelf. Besides, neither party in this case invoked distance as the criterion of the entitlement to the continental shelf or developed arguments on the distance principle, and the Court did not consider this draft article helpful in affording criteria for delimitation in this case.

The Court in the Libya/Malta case, at which time the LOSC had been adopted but was not yet in force, made several observations regarding the relationship between distance and natural prolongation. The Court stated that:

This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental shelf margin does not extend as far as 200 miles from the shore, natural prolongation … is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf [emphasis added].

It is clear that the Court is not using the notion of natural prolongation in the physical sense. As pointed out by Judge Mbaye, a coastal State has a right to the continental shelf because it is the natural prolongation of its land territory, which is measured by reference to a geophysical fact (the outer edge of the continental margin) or an arithmetical fact (the 200-nm distance). It is in this sense that the notion of natural prolongation is in part defined by distance. Consequently, what “complementary” entails is that distance is one expression of the legal concept of natural prolongation, which is identical with the traditional definition of the continental shelf. The outer edge of the continental margin represents the other expression, which is a physical one. Judge Oda took issues with this statement by suggesting that Article 76 in effect

26 Ibid., at p. 48, para. 47.
27 Ibid., at pp. 48–49, para. 48.
28 Continental Shelf (Libyan Arab Jamahiriya/Malta) [1985] ICJ Rep 13, at p. 33, para. 34.
29 Ibid., at p. 97 (Separate opinion of Judge Mbaye).
adopted two radically alternative definitions. He considered that the concept of continental shelf as the natural prolongation in the physical sense had changed and that the role of natural prolongation in defining the continental shelf had diminished. The difference of “complementary” and “alternative” lies in what sense the concept of natural prolongation was used: a physical entity or a legal definition of the continental shelf. The Court apparently was faithful to the traditional definition of the continental shelf, which was carved out by the Court in the North Sea cases and prevailing before the LOSC. This complementary relationship between natural prolongation and distance was also acknowledged by the Arbitral Tribunal in the Barbados v. Trinidad and Tobago case.

Together with the statement in the Tunisia/Libya case, some scholars consider that the observations cited above suggested some “hierarchy” within Article 76, paragraph 1, which means that “the distance-based claim would always yield to the claim based on natural prolongation if there was a potential overlap”. However, this interpretation of the Court’s statements might have overlooked the fact that neither statement in the Tunisia/Libya case nor the Libya/Malta case discussed a situation in which the two criteria met in the context of the continental shelf delimitation. Instead, they are general observations about Article 76 as a rule of entitlement. The terms “main”, “in

30 Ibid., at p. 157, para. 61 (Dissenting opinion of Judge Oda).
31 Tunisia/Libya case (n 25) at p. 222, para.107 (Dissenting opinion of Judge Oda).
32 In fact, before the Libya/Malta case, the 200-nm distance criterion was rejected as representing customary law and judgments and customary international law viewed the continental shelf as a geological concept. See M D Evans, Relevant Circumstances and Maritime Delimitation (Clarendon Press, Oxford, 1989) at p. 53. It was considered that the term “natural” is of primary importance, whereas the other “legally artificial one, extending beyond the prolongation of the land mass but stopping at the 200-mile limit” is only of secondary importance. This observation is premised on the institution of continental shelf as a submarine regime. See J-F Pulvenis, ‘The Continental Shelf Definition and Rules Applicable to Resources’ in R-J Dupuy and D Vignes (eds), A Handbook on the New Law of the Sea (Martinus Nijhoff Publishers, Dordrecht, 1991) 315–381, at pp. 341–342.
33 The Arbitral Tribunal stated that: “In fact, the concept of distance as the basis of entitlement became increasingly intertwined with that of natural prolongation. Such a close interconnection was paramount in the definition of the continental shelf under UNCLOS Article 76, where the two concepts were assigned complementary roles”. Barbados v. Trinidad and Tobago case (n 16) at para. 225.
34 Evans (n 32) at p. 54; see also B B Jia, ‘The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?’ (2013) 12 (1) Chinese Journal of International Law (CJIL) 79–103.
certain circumstances”, and “in part” should be read taking into account the historical background of that time, during which the LOSC was not in force and the distance rule had just gained currency. Therefore, interpreting these statements to support the priority between the criteria would be confusing, if not misleading.

What appears to be more relevant is the Court’s observation on the relevance of geomorphological and geological factors in the delimitation in the Libya/Malta case. This observation started with the irrelevance of geological or geophysical factors within 200 nm because within that distance they did not have a role “either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims”. Following that, the Court stated:

[S]ince 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.

Read in the context of the present case, the Court was merely stating the obvious. As the distance between Libya and Malta is less than 200 nm, no geophysical feature could lie more than 200 miles from each coast, and the

37 Libya/Malta case (n 28) at p. 35, para. 39.
38 Ibid.
39 Ibid., at p. 20, para. 16.
“rift zone” claimed by Libya was thus too close to the coasts to be relevant. Nonetheless, would this observation entail a more general implication?

At first sight, the Court seems to suggest that distance is not to be encroached upon by the natural prolongation of another coastal State, as it explicitly ruled out the relevance of any geomorphological or geological factors within 200 nm in the delimitation. This opinion is shared by some scholars, and it was also argued by Colombia in the *Nicaragua v. Colombia I* case.

Besides, it might imply more generally that where the distance between two opposite coasts is less than 400 nm, entitlement based on geomorphological/geological factors cannot overlap with that of distance, because “no geophysical feature can lie more than 200 miles from each coast”. Two points emerge from this observation. First, no geophysical feature might intrude into another State’s 200-nm limit, because such a feature has to lie beyond 200 nm of both coastal States; second, following the first, within 400 nm of two opposite coasts, only the distance criterion is applicable for both States. The latter statement might lead to the conclusion that only entitlements based on the same criterion could overlap.

However, it is doubtful whether the general application of that statement was intended by the Court. For one thing, what the Court dealt with was a delimitation in which both parties could only claim a continental shelf as far as 200 nm based on the distance criterion. Even Judge Oda, who appended a dissenting opinion in which he considered that the Court failed to grasp the importance of the distance criterion, doubted whether the Court had gone as far as to imply that “whenever dealing with claims in regard to combined distances between coasts of less than 400 miles, ‘there is no longer any reason to ascribe any role to geological or geophysical factors’” (emphasis in the original). On
the contrary, Judge Oda pointed out that the approach adopted by the Court might be open to challenge “had the sea-bed in the present case featured, not a rift zone, but the outer edge of a continental margin”, and the Court would have to “weigh the merits of two convincing claims invoking the sense of Article 76, the one based on geomorphology, the other relying on distance.”43

The concurrent invocation of two criteria by two parties envisioned by Judge Oda occurred in the Nicaragua v. Colombia I case. Nicaragua insisted on its claim to the continental shelf beyond 200 nm and adopted two different approaches to addressing the delimitation of the continental shelf during the course of the proceedings. Nicaragua first contended that the delimitation should be an equal division of the overlapping continental margins of Nicaragua and Colombia,44 and next it shifted to a position that the delimitation should be a “median line between the outer limit of Nicaragua’s continental margin and the outer limit of Colombia’s 200-nautical-mile continental shelf”.45 The former position is premised on the idea of overlapping entitlements of the same kind, but it might be difficult to maintain, as Colombia is entitled to a 200-nm continental shelf under customary international law.46

The second position was not considered by the ICJ. The Court, determining that Nicaragua had not established that it has a continental shelf beyond 200 nm that extends far enough to overlap with Colombia’s 200-nm entitlement to the continental shelf, took the position that it need not “address any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party”.47

Therefore, the ICJ avoids addressing the merits of the two claims and the issue remains unresolved. However, as the Court decided that the questions of the delimitation of the continental shelf beyond 200 nm are admissible in

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43 Ibid.
46 In the Nicaragua v. Colombia I case, both parties considered that Article 76, paragraph 1 reflected customary international law, and so the Court declared. Nicaragua v. Colombia I case (n 9) at p. 666, paras. 116–118.
Nicaragua v. Colombia II case, it seems inevitable that the ICJ has to consider the relationship between natural prolongation and distance if Colombia maintains its previous arguments.

Although the observations in the Libya/Malta case seem to be inconclusive, the Arbitral Tribunal in the Guinea/Guinea Bissau case is more determinant in stating the equality between natural prolongation and distance. The Arbitral Tribunal acknowledged that both natural prolongation and distance are rules of entitlement included in Article 76, and the distance rule, “without derogating from the rule of natural prolongation, reduces its scope by substituting it in certain circumstances”. The Arbitral Tribunal continued that:

There are therefore two rules between which there is neither priority nor precedence. In any event, however, the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves.

Therefore, instead of a hierarchical relationship, the Arbitral Tribunal considered that natural prolongation and distance are equal in nature and they apply to different situations. Nonetheless, according to the Arbitral Tribunal, natural prolongation could only apply where there is a separation of continental shelves, which appears to suggest a different idea of delimitation other than the one based on overlapping entitlements. Again, the Arbitral Award of Guinea/Guinea Bissau case was made before the LOSC entered into force and the situation of that case did not concern the existence of the outer edge of the continental margin.

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48 See operative clause (2)(b), Nicaragua v. Colombia II case, Preliminary objections (n 2) at para. 126.

49 The Tribunal is composed of three Judges who are also members of the ICJ, namely Judge Lachs, Judge Mbaye, and Judge Bedjaoui. All three judges also participated in the Libya/Malta case. See Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985.

50 Ibid., at para. 115.

51 Ibid., at para. 116.

52 The idea that natural prolongation could only apply where there is separation of continental shelves relates to the notion of natural prolongation as a physical concept, and if it is the separation of two continental shelves rather than a common continental shelf, it is in essence a matter of ascertaining the outer limits of two continental shelves rather than delimiting an area of overlapping continental shelves. This is different from the delimitation that arises out of the situation where two coastal States abut on the same, common continental shelf. See Evans (n 32) at pp. 47–48, and 103.
Furthermore, it is open to interpretation whether the observations in the *Libya/Malta* case could be applied *mutatis mutandis* to the case where the outer edge of the continental margin of one State is concerned. On the one hand, the situation in the *Libya/Malta* case is very different in that neither State could claim a continental shelf beyond 200 nm in terms of law and fact. On the other hand, the interpretation that links the distance between opposite States with the entitlement to the continental shelf introduces external factors for a claim to the continental shelf beyond 200 nm other than those required by Article 76.

In essence, Article 76 is a rule of entitlement. It is not conditioned on the coastal relationship of States. Nothing in Article 76 restricts coastal States from making a claim to the continental shelf beyond 200 nm due to the presence of a neighbouring State, unless the distance between the two is less than 200 nm, which makes it physically impossible. One cannot introduce the coastal relationship of neighbouring States as one element validating or negating a claim to the continental shelf beyond 200 nm, for that is foreign to Article 76.

Therefore, it requires caution to interpret judicial cases that are not necessarily similar in their facts. It is unwise to strip these observations out of their contexts and apply them in a situation that was not considered by the Court. Nevertheless, several points could be summarized from the review of judicial cases. First, except for the *Barbados v. Trinidad and Tobago* case, the observations concerning the relationship between natural prolongation and distance were made before the entry into force of the LOSC, and long before the LOSC is put into application, counting from the first submission to the CLCS. Consequently, one should not lose perspective when reading those statements, which were significantly marked or even limited by the historical background. Second, in all these statements, the importance of natural prolongation is maintained, and efforts were made to harmonize the two criteria in Article 76. But it should be noted that the outer edge of the continental margin, which is essential in the context of the continental shelf beyond 200 nm, was not paid much attention. Indeed, in none of the cases a continental margin extended beyond 200 nm. Consequently, a *mutatis mutandis* application of these observations to address the relationship between natural prolongation and distance, if necessary, should be carried out in the light of the evolving practice of Article 76, as is analysed below.

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State Practice in the Application of Article 76

Although Article 76 seems to be silent on the interrelationship between distance and natural prolongation, and judicial cases are not instructive in this respect, State practice in the application of Article 76 sheds some light on the issue under analysis. Article 76, paragraph 8 requires States-parties to submit information to the CLCS when establishing the outer limits of the continental shelf beyond 200 nm. There is a discernible tendency of coastal States to refrain from encroaching upon neighbouring States’ 200-nm continental shelf or EEZ in these submissions.

Among the 77 submissions made to the CLCS,54 27 individual submissions made by 22 States55 clearly demonstrate self-constraint in avoiding encroaching upon other States’ 200-nm continental shelf. Three methods are adopted by States to this end. First, the submitting State deliberately avoids touching upon the 200-nm limit of another State. Mexico in its submission states that “[t]he endpoints of this outer limit remain deliberately short of the outer limit of the exclusive economic zones of other States in the region”.56 Second, a more popular method is to locate the endpoints of the claimed outer limits on the 200-nm limit of another State. A majority of the 27 submissions falls within this category. For example, in Canada’s submission in respect of the Atlantic Ocean, its outer limits in the Labrador Sea region are defined by combination of the fixed points in accordance with the formulae and constraints of Article 76 of the LOSC and “a point on the intersection of the line delineating the outer edge of the continental margin and the 200 M limit of the Kingdom of Denmark”.57 Such a practice could be found in the other 18 submissions, including those of Somalia, Tonga, Spain and Pakistan, to name a few.58 A third

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54 The revised submissions made by Russia, Brazil, Barbados and Argentina are not counted. All the submissions are the latest accessed on 2 June 2017 on the CLCS website: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.
55 Denmark submitted 4 partial submissions and Tonga submitted 2 partial submissions, making the total submissions 27. The approach adopted by Denmark and Tonga is consistent in their partial submissions.
58 Other submissions falling within this category include those of New Zealand, France (New Caledonia), Japan, United Kingdom (Hatton Rockall Area), the Cook Islands, Ghana, Iceland (in the Ægir Basin area and in the western and southern parts of the Reykjanes...
method is to use the 200-nm lines of other States to limit the claimed area of 
the continental shelf beyond 200 nm. For instance, in the partial submission 
made by Denmark in the area north of the Faroe Islands, “to the west, north-
west, and south-east, the outer limits of the continental shelf are delineated by 
the 200 nautical mile limits of Iceland, Jan Mayen and the mainland of Norway, 
respectively.” 59 In Norway’s submission in respect of the Atlantic Ocean and 
the Arctic, one part of the outer continental shelf area claimed by Norway is 
limited by the 200-nm lines of Denmark, and its claimed continental shelf be-
yond 200 nm in the Loop Hole is limited by the 200-nm line of Russia. 60 A full 
account of individual submissions in which States refrain from encroaching 
upon neighbouring States’ 200-nm limits could be found in Table 1. 61

Despite individual submissions, joint submissions made by a group of States 
also show lack of interference with other States’ 200-nm limits. The areas in-
cluded in the joint submissions are usually confined to areas beyond the 200-
nm limit of each State involved. The joint submission made by France, Ireland, 
Spain and the UK is a case in point. 62 In addition, joint submissions demon-
strate the same reluctance to intrude into other States’ 200-nm limit, just as 
in the individual submissions. For instance, the outer limits in the joint sub-
mission made by the Federated States of Micronesia, Papua New Guinea and 

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2 June 2017.


61 Three submissions are identified as irrelevant for the purposes of the present article. 
They are submissions made by Cuba, France (in respect of Saint-Pierre-et-Miquelon) and 
UK (in respect of the Falkland Islands, and of South Georgia and the South Sandwich 
Islands). The endpoints of the outer limits of the continental shelf claimed by Cuba are 
put on the intersection of the 200-nm limits of Cuba and the US, and intersection of that 
of Cuba and Mexico, respectively. This submission is excluded because it signifies more 
of an awareness of outstanding delimitation issues than of entitlement. The submission 
made by France in respect of Saint-Pierre-et-Miquelon contains areas that overlap with 
the Canada’s continental shelf within and beyond 200 nm is more concerned about the 
issue of access to the continental shelf beyond 200 nm. The submission made by the UK 
is excluded because it covers the same area claimed by Argentina in its submission, due 
to territorial disputes between the two States.

62 See ‘Joint submission by France, Ireland, Spain, and the United Kingdom’, available at 
### Table 1  
Is there a hierarchical relationship between natural prolongation and distance in the continental shelf delimitation?

State practice of refraining from encroaching on neighbouring States’ 200-nautical-mile limit

<table>
<thead>
<tr>
<th>Submitting state</th>
<th>Date</th>
<th>Area in the submissions</th>
<th>200-nautical-mile limit of neighbouring States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 New Zealand</td>
<td>19.06.2006</td>
<td>South Pacific</td>
<td>Australia, Fiji and Tonga</td>
</tr>
<tr>
<td>2 Norway</td>
<td>27.11.2006</td>
<td>North East Atlantic and Arctic</td>
<td>Russia, Denmark</td>
</tr>
<tr>
<td>3 France (New Caledonia)</td>
<td>22.05.2007</td>
<td>Southeastern part of New Caledonia</td>
<td>Australia</td>
</tr>
<tr>
<td>4 Japan</td>
<td>12.11.2008</td>
<td>Area off Minami-Io-To Island and area off Oki-No-Tori Island</td>
<td>US and Palau</td>
</tr>
<tr>
<td>5 United Kingdom</td>
<td>31.03.2009</td>
<td>Hatton Rockall Area</td>
<td>Iceland</td>
</tr>
<tr>
<td>7 Ghana</td>
<td>28.04.2009</td>
<td>Gulf of Guinea</td>
<td>Nigeria</td>
</tr>
<tr>
<td>8 Iceland</td>
<td>29.04.2009</td>
<td>Ægir Basin; area and in the western and southern parts of Reykjanes Ridge</td>
<td>Norway (Jan Mayen) and Denmark (Faroe Islands and Greenland)</td>
</tr>
<tr>
<td>9 Denmark</td>
<td>29.04.2009</td>
<td>North of the Faroe Islands</td>
<td>Norway (mainland and Jan Mayen)</td>
</tr>
<tr>
<td>10 Pakistan</td>
<td>30.04.2009</td>
<td>Arabian Sea</td>
<td>Oman</td>
</tr>
<tr>
<td>11 Palau</td>
<td>08.05.2009</td>
<td>Western Central Pacific</td>
<td>Japan, the Philippines, Micronesia and Indonesia</td>
</tr>
<tr>
<td>12 Sri Lanka</td>
<td>08.05.2009</td>
<td>Southern part of the Bay of Bengal</td>
<td>India (Andaman Islands)</td>
</tr>
<tr>
<td>13 Portugal</td>
<td>11.05.2009</td>
<td>Mainland and Madeira archipelago; Azores</td>
<td>Morocco</td>
</tr>
</tbody>
</table>
### Table 1

*Is there a hierarchical relationship (cont.)*

State practice of refraining from encroaching on neighbouring States’ 200-nautical-mile limit

<table>
<thead>
<tr>
<th>Submitting state</th>
<th>Date</th>
<th>Area in the submissions</th>
<th>200-nautical-mile limit of neighbouring States</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 Tonga</td>
<td>11.05.2009</td>
<td>South Pacific (the Tonga/Kermadec Ridge region)</td>
<td>New Zealand</td>
</tr>
<tr>
<td>15 Spain</td>
<td>11.05.2009</td>
<td>Area of Galicia</td>
<td>France</td>
</tr>
<tr>
<td>16 Mozambique</td>
<td>07.07.2010</td>
<td>Indian Ocean</td>
<td>South Africa and France (Europa Island)</td>
</tr>
<tr>
<td>17 Maldives</td>
<td>26.07.2010</td>
<td>Indian Ocean</td>
<td>Sri Lanka and India</td>
</tr>
<tr>
<td>18 Denmark</td>
<td>02.12.2010</td>
<td>South of Faroe Islands and Rockall region</td>
<td>Iceland and Ireland</td>
</tr>
<tr>
<td>19 Mexico</td>
<td>19.12.2011</td>
<td>The eastern polygon in the Gulf of Mexico</td>
<td>US and Cuba</td>
</tr>
<tr>
<td>20 Tanzania</td>
<td>18.01.2012</td>
<td>Indian Ocean</td>
<td>Seychelles</td>
</tr>
<tr>
<td>21 Denmark</td>
<td>14.06.2012</td>
<td>Area off southern Greenland</td>
<td>Canada</td>
</tr>
<tr>
<td>22 Federated States of Micronesia</td>
<td>30.08.2013</td>
<td>Western Pacific Ocean</td>
<td>Indonesia and Papua New Guinea</td>
</tr>
<tr>
<td>23 Denmark</td>
<td>26.11.2013</td>
<td>Northeast area of Greenland</td>
<td>Norway</td>
</tr>
<tr>
<td>24 Canada</td>
<td>06.12.2013</td>
<td>Atlantic Ocean</td>
<td>Denmark (Greenland)</td>
</tr>
<tr>
<td>25 Tonga</td>
<td>23.04.2014</td>
<td>South Pacific (in the western part of the Lau-Colville Ridge)</td>
<td>New Zealand</td>
</tr>
<tr>
<td>26 Somalia</td>
<td>21.07.2014</td>
<td>Indian Ocean</td>
<td>Yemen</td>
</tr>
<tr>
<td>27 Denmark</td>
<td>15.12.2014</td>
<td>Northern continental shelf of Greenland</td>
<td>Russia, Canada and Norway</td>
</tr>
</tbody>
</table>
Solomon Islands adopt end points on the intersection of the claimed outer limits and the 200-nm limits of Nauru and Tuvalu. The practice is quite consistent among all the joint submissions made to the CLCS so far.

Nevertheless, three submissions depart from this practice, i.e., the submissions by China, Korea and Nicaragua, as mentioned earlier.

Despite the three individual submissions, the tendency to avoid intruding into neighbouring States’ 200-nm continental shelf is evidently strong. Although only 27 individual submissions out of 77 take the position not to encroach upon other States’ 200-nm limit, it has to be noted that almost none of the remaining 40 submissions (7 joint submissions and 3 irrelevant ones are excluded from the remaining 50 submissions), despite the three exceptions, has the possibility to encroach upon neighbouring States’ 200-nm limit due to two circumstances. First and foremost, the adjacent or lateral coastal relationship between the submitting State and its neighbouring State makes it impossible for the claimed outer limits to encroach upon its neighbour’s 200-nm limit. 24 submissions fall within this category. Second, the location of the area claimed in the submissions is far away from any State’s 200-nm shelf. All together 11 submissions are in this category. Accordingly, it is evident that

68 See (n 61).
69 These submissions are made by Brazil, Ireland, Barbados, Indonesia (North West of Sumatra Island), Suriname, Myanmar, Yemen, Uruguay, Argentina, South Africa, Kenya, Vietnam, Nigeria, Côte d’Ivoire, India, Trinidad and Tobago, Namibia, Bangladesh, Guyana, Gabon, Kiribati, Angola, Bahamas, and Spain (in respect of the area west of the Canary Islands).
70 These submissions are made by Russia, Australia, the UK (Ascension Island), France (Antilles and Kerguelen Islands), the Philippines (in the Benham Rise region), Fiji, Norway (in respect of Bouvetoya and Dronning Maud Land), Mauritius, Seychelles, France (in respect of La Réunion Island and Saint-Paul and Amsterdam Islands) and Madagascar.
the majority of States has the choice to make and takes the position not to encroach upon their neighbours’ 200-nm limit.

It is therefore worth assessing the legal implications of the State practice in refraining from encroaching upon neighbouring States’ 200-nm shelf. One may consider that the State practice falls within the meaning of “subsequent practice” under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) and therefore facilitates the interpretation of Article 76. According to Article 31(3)(b) of the VCLT, together with the context, it should take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. As part of the general rule of interpretation, once established, subsequent practice is an authentic means of interpretation,71 and it could contribute to “a clarification of the meaning of a treaty in the sense of a specification (narrowing down) of different possible meanings of a particular term or provision”.72 To be taken into account for purposes of treaty interpretation, it should not only be the subsequent practice in the application of the treaty, but such practice should establish the agreement of the parties regarding its interpretation.73

Although the above-mentioned State practice is clearly practice of the States-parties in the application of Article 76 of the LOSC, it seems unable to satisfy the requirement of establishing the agreement of the parties regarding the interpretation of Article 76. To start with, not all States-parties agree with the approach not to encroach on the 200-nm continental shelf of other States, as manifested by the submissions made by China, Korea, Nicaragua and France (St Pierre et Miquelon). Although Article 31(3)(b) does not intend to require that every party must individually have engaged in the practice, it nevertheless implies the “parties as a whole”.74 The inactive parties should also have accepted the practice set by other parties.75 In this regard, other States-parties, which do not participate in the practice of establishment of the outer limits of the continental shelf, are equally indifferent to the two approaches. There

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74 ‘Draft Articles on the Law of Treaties with commentaries 1966’ (n 71) at p. 222.
is lack of action with regard to the executive summaries of submissions made public on the CLCS website, except for neighbouring States whose interests are at stake. This is in clear contrast with States’ reaction to submissions which concern Antarctica. Therefore, no agreement has been reached on the interpretation of Article 76 with regard to the interrelationship between the natural prolongation criterion and the distance criterion.

As a matter of fact, there is a difference between the submissions made by the majority of States and the ones made by China, Korea and Nicaragua. In the practice of the majority, the same area of the continental shelf beyond 200 nm is also subject to overlapping claims by their neighbouring States. In contrast, in the submissions made by China, Korea and Nicaragua, only these States claim rights over the area of the continental shelf beyond 200 nm. In other words, there would be no point to intrude into neighbouring States’ 200-nm limit if the relevant States share a common continental margin and the area is subject to multiple claims of national jurisdiction. In this situation all the relevant States are on an equal footing in both geographical and geomorphological senses.

Although the body of State practice does not constitute “subsequent practice” under Article 31(3)(b) of the VCLT for purposes of treaty interpretation, it might nevertheless contribute to the interpretation through the channel of Article 32 on supplementary means of treaty interpretation. The phrasing of Article 32 indicates that it does not make an exclusive list of all supplementary means of interpretation. Subsequent practice of States-parties, though not having established agreement among the parties, might be considered as supplementary means of

76  For example, Australia’s submission met communications from the US, Russia, Japan, the Netherlands, Germany and India, because part of the claimed area touches upon Antarctica. See the communications made to the Australian submission, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm, accessed 2 June 2017.

77  Article 32 of the VCLT reads: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable”.

interpretation in Article 32 of the VCLT is not part of the authentic means of interpretation as embedded in Article 31, the line dividing the two is not a rigid one, because there is a general link between the two and the unity of the process of interpretation is maintained.79 Therefore, if State practice is resorted to as supplementary means, it will no doubt be taken into account together with the general rule of interpretation.

Despite the potential effect on treaty interpretation, it is also of interest to analyse whether State practice could give rise to the formulation of emerging customary law on the treatment of neighbouring States’ 200-nm limit.

Before analysing this possibility, it first has to distinguish this issue from that where a treaty rule passes into the corpus of customary international law. The latter was considered in the North Sea cases, in which Denmark and the Netherlands argued that Article 6 of the 1958 Convention on the Continental Shelf had become customary rule “partly because of its own impact, partly on the basis of subsequent State practice”80. Although this argument was not accepted by the ICJ, the Court acknowledged that “this process is perfectly possible”, and “it constitutes indeed one of the recognized methods by which new rules of customary international law may be found”.81 The Court also stated a series of conditions to be satisfied for the formulation of customary rules originating from treaty rules.82

The State practice of self-constraint in the treatment of neighbouring States’ 200-nm limit, however, is not the application of an existing treaty rule. On the one hand, the relevant State practice is the result of application of Article 76, paragraphs 2 to 8, whereas the treatment of neighbouring States’ 200-nm shelf rather reflects coastal States’ understanding of Article 76, paragraph 1. On the other hand, no treaty rule imposes such an obligation on coastal States to refrain from intruding into the 200-nm limit of other States.

It is common knowledge that “the existence of a rule of customary international law requires that there be ‘a settled practice’ together with opinio juris”.83 Current State practice in refraining from intruding into neighbouring States’ 200-nm shelf is considerably uniform and consistent, albeit with several notable exceptions. As mentioned earlier, the extent of State practice would seem more impressive if one considers that almost all States adopt the

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79 See ‘Draft Articles on the Law of Treaties with commentaries 1966’ (n 71) at p. 220.
80 North Sea Continental Shelf cases [1969] ICJ Rep 3, at p. 41, para. 70.
81 Ibid., at p. 41, para. 71.
82 See ibid., at pp. 41–45, paras. 72–79.
self-constraint approach when a neighbouring State’s 200-nm shelf is nearby. Besides, from Table 1 it is obvious that such a practice is representative in terms of geographical distribution and different socio-economic systems, and that the States taking this position are those “whose interests were specially affected”.\textsuperscript{84} In addition, the decision not to encroach upon the 200-nm limit of neighbouring States is not only discernible between States-parties, but also is taken by parties in relation to non-parties. For example, Japan, the Cook Islands and Mexico deliberately refrain from encroaching upon the 200-nm limit of the US.\textsuperscript{85} At this moment one has to consider the effect of the submissions that depart from this body of practice on the formulation of a customary rule. On the one hand, it is not necessary for State practice contributing to the customary rule to be universal,\textsuperscript{86} and the persistent objector rule is applicable as long as the conditions are met.\textsuperscript{87} On the other hand, the existence of conflicting State practice might prevent the ascertainment of customary international law based on the induction from State practice.\textsuperscript{88}

The \textit{opinio juris}, however, is difficult to establish. For one thing, it is unclear whether coastal States refrain from intruding into neighbouring States’ 200-nm shelf because of the belief that “this practice is rendered obligatory by the existence of a rule of law requiring it”.\textsuperscript{89} On the contrary, it could be due to non-legal reasons. States might exercise such constraint to avoid objections from neighbouring States, which might result in blocking the delineation process.\textsuperscript{90} Alternatively, States might be carrying out this practice based on

\begin{itemize}
\item \textsuperscript{84} \textit{North Sea} cases (n 80) at p. 42, para. 73.
\item \textsuperscript{85} See the submissions of Japan, the Cook Islands and Mexico (in respect of the eastern polygon in the Gulf of Mexico), available at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, accessed 2 June 2017.
\item \textsuperscript{87} \textit{Fisheries case (United Kingdom v. Norway)} [1951] 1ICJ Rep 116, at pp. 131 and 138.
\item \textsuperscript{89} \textit{North Sea} cases (n 80) at p. 44, para. 77.
\item \textsuperscript{90} See Rule 46 of and Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf. Paragraph 5 (a) of Annex I provides that: “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”. In practice, these rules seem to give coastal States a “veto power” that could block the consideration of submissions. See A Serdy,
a reciprocal basis, or more simply they are following an already discernible pattern of practice. Unless more convincing evidence, such as statements of States, regarding the binding force of the practice is available, it is unlikely that *opinio juris* could be identified.

Nonetheless, the possibility of an emerging customary rule is not excluded, because its formation could take time and has to go through the “gradual hardening of practice into law”. The gradually cumulative State practice might make coastal States reluctant to depart from this consistent body of practice. International courts and tribunals, on the other hand, though bound to apply existing law, might make efforts to harmonize *lex lata* with *lex ferenda*, to the direction which a majority of States seem to head for. Besides, sometimes the ICJ declares the existence of a customary rule not based on a comprehensive survey of State practice and *opinio juris*, but it might use techniques of deduction or analogy to assert the customary rule status of a particular rule. Therefore, it is possible that the Court takes a more liberal approach to assessing the existence of customary international law in certain circumstances.

Consequently, the legal implications of State practice in refraining from encroaching upon other States’ 200-nm limit could be considered from two perspectives, one of treaty interpretation and the other of emerging customary international law. It is submitted that the significance of this body of practice should not be underestimated for its considerable relevance from both perspectives.

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92 Villiger (n 86) at pp. 29–30.
94 See P Tomka, ‘Custom and the International Court of Justice’ (2013) 12(2) *The Law and Practice of International Courts and Tribunals* 195–216, at p. 214. The declaration of the status of Article 121, paragraph 3 as customary international law is an example of the deduction methodology, because the Court considered that “the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law”. *Nicaragua v. Colombia I* case (n 9) at p. 674, para. 139.
The Relationship between the Regimes of Continental Shelf and the Exclusive Economic Zone

So far, the discussion on the question whether natural prolongation and distance has a hierarchical relationship concentrates on the understanding of Article 76. This question could also be considered from other perspectives, for instance, the relationship between continental shelf and the EEZ. It is relevant because the regime of the EEZ confers on coastal States, *inter alia*, “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living ... of the seabed and its subsoil”. This paragraph connects the regime of the continental shelf and that of the EEZ in respect of the seabed and its subsoil. The problem thus arises as to whether the rights of the EEZ preclude the possibility of overlapping entitlements based on two criteria, for it forces the separation of a coastal State's EEZ regime in respect of rights to the seabed and subsoil and rights to the water column.

Before proceeding to consider this question, two points underlying the relationship between the continental shelf and the EEZ have to be highlighted. First, the EEZ and the continental shelf remain two separate institutions in international law. The relationship between the EEZ and the continental shelf was subject to abundant discussions in the literature. Evans identified four theoretical categories that had been advanced on their relationship, namely, absorption, assimilation, parallelism and separation. Nevertheless, the consideration of the relationship between the EEZ and the continental shelf more often than not focuses on their relationship up to 200 nm, and therefore the relevance of the continental shelf beyond 200 nm is underestimated. Although

95 Article 56(1)(a) of the LOSC.
96 See M D Evans, ‘Delimitation and the Common Maritime Boundary’ (1994) 64(1) *British Yearbook of International Law* 283–332, at pp. 286–293.
97 The consequences of the lack of consideration of the continental shelf beyond 200 nm are the difficulties in fully conceptualizing the issue of the common boundary of the EEZ and the continental shelf. See *ibid.*, at pp. 299–300.
there was doubt as to their separation at the time before the LOSC entered into force,98 it is firmly established in the current state of international law.99

Second, whereas a continental shelf and an EEZ could co-exist over the same space, they could not overlap because they are in nature two different maritime zones. Consequently, there is no question of delimiting an overlapping area of EEZ and continental shelf.100

Despite the separation, the two regimes are intimately connected in respect of the seabed and subsoil. Article 56, paragraph 3 provides that the “rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI”. Whereas some may consider that it implies that the EEZ trumps the continental shelf up to 200 nm for practical purposes,101 others interpret it as that the continental shelf regime applies to the seabed and subsoil within 200 nm of the EEZ.102

It seems that the latter view is more consistent with the autonomy of the two regimes as well as their harmonization under the LOSC. For one thing, the idea that within 200 nm the continental shelf is “trumped” by the EEZ simply goes against the concept of a single continental shelf. The text of Article 56(3) is a clear indication of the applicable law, which might result from the idea that the continental shelf and the EEZ are essentially dealing with dif-
ferent natural resources.\textsuperscript{103} Whereas the continental shelf confers on coastal States exclusive rights over the exploration and exploitation of the non-living resources and sedentary resources in the seabed and subsoil, the EEZ is more concerned with the living resources in the water column, in particular fisheries. It is therefore in line with the functional purposes of the two regimes if the continental shelf regime applies to the seabed and subsoil, even if the area is also within the reach of the EEZ.

If it is the continental shelf regime that applies to the seabed and subsoil, natural prolongation and distance could hence overlap because they are both entitlements to the continental shelf, and the EEZ of one coastal State should not have bearing on the continental shelf delimitation. This statement, at first sight, seems to be in contradiction with the observation made by the ICJ in the \textit{Libya/Malta} case, which states that:

\begin{quote}
As the 1982 Convention demonstrates, the two institutions—continental shelf and exclusive economic zone—are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State.\textsuperscript{104}
\end{quote}

A careful reading of this excerpt, however, would call into doubt the relevance of the EEZ to the delimitation of the continental shelf. In linking the EEZ and continental shelf regimes in the \textit{Libya/Malta} case, the Court aimed at applying the distance criterion as the basis of entitlement to the continental shelf. Although the Court declared that the EEZ had become part of customary international law,\textsuperscript{105} it did not consider whether Article 76, paragraph 1 had acquired the same status.\textsuperscript{106} Accordingly, it is the close relationship between the EEZ and the continental shelf that lent support for the application of the distance criterion. As the Court stated, “[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.”\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{103} See Attard, \textit{ibid.}, at pp. 137, 141.
\item \textsuperscript{104} \textit{Libya/Malta} case (n 28) at p. 33, para. 33.
\item \textsuperscript{105} \textit{Tunisia/Libya} case (n 25) at p. 48, para. 47; \textit{Libya/Malta} case (n 28) at p. 33, para. 34.
\item \textsuperscript{106} See \textit{Libya/Malta} case (n 28) at pp. 32–33, paras. 31–33.
\item \textsuperscript{107} \textit{Ibid.}, at p. 33, para. 34.
\end{itemize}
However, this reasoning might be self-contradicting. If the two regimes are “different and distinct”,108 as the Court put it, why would the distance criterion of the EEZ (a customary rule) penetrate into the continental shelf, for which the distance criterion had not been a customary rule? The statement that “there cannot be an exclusive economic zone without a corresponding continental shelf” would only make sense under the LOSC, which was not applicable between Libya and Malta at that time.109

It should be noted that the relevance of the EEZ to the continental shelf delimitation in the Libya/Malta case is limited to the applicability of the distance criterion; it does not mean that the delimitation of the continental shelf should always end up with the same boundary with that of the EEZ. Subsequent judicial practice has confirmed that, theoretically, there could have been two different delimitation lines due to the separation of the two regimes, whereas international courts and tribunals tend to produce a single boundary line either based on special agreements between the parties, or out of other considerations.110 State practice also confirmed the possibility of different lines for the two regimes, even if it takes place within 200 nm of one coastal State.111

This interpretation is also adopted by the International Tribunal for the Law of the Sea (ITLOS) and the Arbitral Tribunal in the Bay of Bengal cases in the consideration of the “grey area” problem. In both cases, the adjustment of the equidistance line resulted in a portion of the area which is beyond 200 nm of

108  Ibid.
109   Evans (n 32) at pp. 51–53.
110  Neither in the LOSC nor in customary international law is there any obligation for coastal States to seek a single delimitation line for the two maritime zones. In fact, although identical in the texts, the delimitation rules for the EEZ and the continental shelf are separately set out in Articles 74 and 83. Although international courts and tribunals are more often than not requested to conduct a single maritime delimitation, the theoretical possibilities of two separate lines for the continental shelf and the EEZ are open. See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) [1984] ICJ Rep 246, at p. 267, para. 27; see also Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) [1993] ICJ Rep 38, at pp. 57–59, paras. 42–48; see also Evans (n 96) at pp. 329–330.
Bangladesh, but within 200 nm of Myanmar and India. The ITLOS considered that “only the continental shelves overlap” in this area, thus confirming that it is the legal regime of the continental shelf that applies to the seabed and subsoil. Both decisions indicate that the rights over the seabed and subsoil should be vested in the State which possesses the continental shelf beyond 200 nm, rather than in the State whose EEZ covers the same area. Bangladesh, therefore, enjoys the continental shelf rights of the “grey area”. The ITLOS observes that:

[I]n the area beyond Bangladesh’s exclusive economic zone that is within the limits of Myanmar’s exclusive economic zone, the maritime boundary delimits the Parties’ rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar’s rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters.

It is questioned whether indeed Myanmar’s EEZ rights are not limited, if one considers that it is the EEZ rather than the continental shelf regime that applies to the seabed and subsoil. Dr. P.S. Rao, arbitrator of the Bangladesh/India case, criticized the approach of the ITLOS and the Arbitral Tribunal in his concurring and dissenting opinion. Not only did Dr. P.S. Rao consider the “EEZ as one single, common maritime zone within 200 nm which effectively incorporates the regime of the continental shelf within it”, but also that “the entitlement to the EEZ takes priority over the entitlement to the continental shelf beyond 200 nm”, because according to Dr. P.S. Rao,

[t]his complicated method to calculate the outer limits of the continental shelf suggests that the entitlement to the continental shelf beyond 200 nm depends on different factors and is not as absolute as the entitlement to the EEZ.

113 Bangladesh/Myanmar case (n 4) at p. 136, para. 474.
114 See Evans (n 22) at p. 73.
115 Bangladesh/India case, Concurring and dissenting opinion of Dr P S Rao, at para. 24.
116 Ibid., at para. 40.
117 Ibid.
He suggested an alternative delimitation boundary line between Bangladesh and India that avoided the creation of the “grey area”, thus leaving India’s 200-nm limit untouched.\footnote{Ibid.} Although it is understandable that the “grey area” might give rise to potential post-delimitation disputes and it is desirable to avoid its creation out of policy and practical considerations, it is unlikely that Dr. P.S. Rao’s arguments are convincing in legal terms. Although the establishment of the outer limits of the continental shelf is complex, it does not mean that it cannot be determined. In contrast, complex as it may be, the procedure also has some strengths that could facilitate location of the precise outer limits, which is seen as one of the accomplishments of the LOSC.\footnote{See S T Gudlaugsson, ‘Natural Prolongation and the Concept of the Continental Margin for the Purposes of Article 76’ in T H Heidar, J Norton Moore and M H Nordquist (eds), \textit{Legal and Scientific Aspects of Continental Shelf Limits} (Martinus Nijhoff Publishers, Leiden, 2004) 61–90, at pp. 64–65; T L McDorman, ‘The Continental Shelf Regime in the Law of the Sea Convention: A Reflection on the First Thirty Years’ (2012) 27(4) \textit{The International Journal of Marine and Coastal Law} 743–751, at p. 744.} It by no means undermines the inherent nature of the continental shelf rights, as provided by Article 77 of the LOSC. Besides, the superiority of the EEZ entitlement over the continental shelf finds no support either from the LOSC or customary international law, for it implies the absorption of the continental shelf by the EEZ.

The parties in the \textit{Bay of Bengal} cases are free to conclude joint development agreements with regard to both the seabed and superjacent waters in the “grey area” in order to avoid practical difficulties.\footnote{See R Mishra, ‘The ‘Grey Area’ in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution’ (2016) 47(1) \textit{Ocean Development & International Law (ODIL)} 29–39.} However, in legal terms, the rights of the seabed and subsoil are subject to the application of the law in LOSC Part VI, rather than LOSC Part V, as considered by the ITLOS and the Arbitral Tribunal. Consequently, coastal States’ EEZ rights should not interfere with a delimitation that is solely concerned with the continental shelf.

\textbf{Prospects of Dividing the Overlapping Entitlements}

As established in the jurisprudence of international courts and tribunals, the starting point of maritime delimitation is the identification of the area of overlapping entitlements.\footnote{The Black Sea case (n 11) at p. 89, para. 77; Bangladesh/Myanmar case (n 4) at para. 397.} In the scenarios under analysis, if it is recognized that there is no hierarchical relationship between natural prolongation and distance, it is then necessary to determine the area of overlapping entitlements...
and proceed to divide this area. Nevertheless, there are challenging issues regarding the choice and application of appropriate delimitation method(s).

First, it is doubtful if the three-stage approach that is normally used in the jurisprudence of maritime delimitation is still applicable in these scenarios, at least the use of provisional equidistance line. The equidistance line, or the median line, is constructed based on the coastal geography, reflected by the selected basepoints on the relevant coasts of each State. Consequently, this normal application of equidistance would not reflect the true relationship of the overlapping entitlements if they are based on different criteria. For instance, an equidistance line that is between the mainland of Nicaragua and the mainland of Colombia is located beyond the 200-nm limit of Colombia. A median line between China and Japan would only reflect their coastal relationship without addressing the claimed entitlement to the continental shelf beyond 200 nm by China.

What if the equidistance line is not constructed from the relevant coasts but from the relevant outer limits of the respective State? This method has at least two defects. First, it blurred the distinction between delineation and delimitation by making the determination of the outer limits a necessary step.

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122 The three-stage approach comprises the provisional equidistance line, the consideration of relevant circumstances and the disproportional test. It is summarized in the Black Sea case (n 11) at pp. 101–103, paras. 115–122.

123 Ibid., at p. 101, para. 117.

124 In the Nicaragua v. Colombia I case, the Nicaraguan Memorial proposed an equidistance line between the mainland of the two States, which is located beyond 200 nm of both States. See Nicaragua v. Colombia I case, Counter-Memorial of Colombia, Volume I, at pp. 312–318, available at http://www.icj-cij.org/docket/index.php?pi=3&p2=3&case=124&code=nicol&p3=1, accessed 2 June 2017.

125 This method was argued by Nicaragua in the Nicaragua v. Colombia I case, and the formula proposed by Nicaragua is “the boundary is the median line between the outer edge of Nicaragua’s continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia’s 200-mile zone”. Although Nicaragua argued for “the outer edge” rather than “the outer limits”, the two would substantially coincide in this case, because, the outer edge cannot exceed the maximum limits provided by Article 76, paragraph 5, which means that the redundant part would not be part of the entitlement. If the outer edge does not lie beyond the maximum limits, the outer limits should be established in accordance with Article 76, paragraph 7, which concerns the final shape of the outer limits. See Nicaragua v. Colombia I, Verbatim record, CR 2012/15 Corr. (n 23) at pp. 18–19.

126 See Nicaragua v. Colombia I case (n 9) at p. 757, para. 23 (Separate opinion of Judge Donoghue).
though the two processes are kept distinct in legal reasoning. It hence casts doubt on the question whether the function of the CLCS would be prejudiced. Second, this method will leave out the considerations of coastal geography, even though for the State whose entitlement is based on distance, its entitlement is generated by the coast. It is therefore questionable if this method is in line with the fundamental principle that “the land dominates the sea”, as the coasts are not relevant in the application of this method.

One may argue that the equidistance method is not appropriate in this situation of overlapping entitlements based on different criteria, for the equidistance method is more appropriate in maritime delimitation where both entitlements are based on distance. Consequently, alternative methods have to

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127 See Bangladesh/Myanmar case (n 4) at para. 376; Nicaragua v. Colombia II, Preliminary objections (n 2) at p. 37, para. 112.


129 As the ICJ stated in the Libya/Malta case, “The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect”. Libya/Malta case (n 28) at pp. 40–41, para. 49.

130 The ICJ in the Black Sea case considered that “[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts”, and it is for this reason that some coasts are determined as being relevant in comparison with others that are not. The Black Sea case (n 11) at p. 89, para. 77.

131 This point has been forcefully argued by P Weil; see Weil (n 14) at pp. 47–83. It is implied by the Court in the Libya/Malta case, in which the Court adopted a provisional equidistance line as a first step. The Court observed that: “It seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at
be devised. It seems that the guiding principle for the choice of the method underscores the importance of the entitlement. As observed in the *Libya/Malta* case, the choice of the criterion and the method, at least provisionally, “should be made in a manner consistent with the concepts underlying the attribution of legal title”. However, the same question arises as to whose entitlement is to be taken into account, as there are two different legal grounds for the entitlements in the two scenarios: one of natural prolongation, the other of distance. It is thus challenging, if not problematic, to find a delimitation method that suits both criteria of entitlement.

Yet it is still possible to argue that an equal division of the overlapping entitlements would be an appropriate principle to apply in this situation. The Chamber in the *Gulf of Maine* case observed that “the equal division of the areas of overlap of the marine and submarine zones appertaining to the respective coasts of neighbouring States” was one of the equitable criteria to be taken into account in maritime delimitation. Nevertheless, this principle, or criterion, is not absolute because its application is qualified by the condition that it applies “in cases where no special circumstances require correction thereof”. In addition, the applicability of this principle also requires a positive condition, that is, the equal or comparable coastal lengths of relevant States. This observation could be traced back to the *North Sea* cases. The Court of Arbitration in the *United Kingdom v. France* case also stated that:

> [W]here the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of

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132 *Libya/Malta* case (n 28) at pp. 46–47, para. 61.
133 This problem was raised by M D Evans, which he considered as a “near insoluble” one. See Evans (n 32) at p. 61.
134 *The Gulf of Maine* case (n 110) at pp. 312–313, para. 157.
136 The ICJ considered that although equity does not necessarily imply equality, it recognized that equal or comparable treatment should be given to States with equal conditions, as manifested by the coastal lengths. The Court stated that: “[I]n the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two”. *North Sea* cases (n 80) at pp. 49–50, para. 91.
shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable.137

Consequently, the applicability of equal division of overlapping areas depends on whether other special circumstances exist and whether the coastal lengths are comparable. However, one may wonder whether the requirement of comparable coastal lengths is indeed appropriate in the overlapping entitlements based on different criteria, as the area of overlap does not result from the projections of the relevant coasts, at least for the party that claims the continental shelf beyond 200 nm.

The above discussions reveal the tension between the coastal geography and the geomorphological/geological aspect of entitlement in the choice of delimitation method to divide the overlapping entitlements based on different criteria. Whereas the continental shelf beyond 200 nm only has a loose relationship with the coast, the continental shelf within 200 nm is in effect generated by the coast. The overlap of the two entitlements therefore poses challenges for the choice and application of delimitation methodology, which needs to reconcile the two aspects of entitlement.138

However, it should be noted that the identification of overlapping entitlements is only one step in maritime delimitation. It is submitted that the concept of relevant circumstances in maritime delimitation might have a significant influence on dividing the overlapping entitlements based on two criteria, in the sense that the impact of entitlement might be minimized by other relevant circumstances in concrete cases. In the scenario where the distance is less than 400 nm, even with the claim of a continental shelf beyond 200 nm, other circumstances such as coastal geography might have a more commanding role, as in most cases in which the distance is less than 400 nm. Therefore, hypothetically the delimitation lines could be the same or just slightly different, even with one State’s claim to the continental shelf beyond 200 nm. As to the scenario where the distance is beyond 400 nm, it is not impossible that a delimitation line corresponds to the 200-nm limit of one State, not as a result of the existence of a hierarchical relationship between distance and natural

prolongation, but as a result of a delimitation process in which all relevant circumstances are balanced in pursuit of an equitable solution.

Conclusion

It appears that the law is not conclusive as to whether there is a hierarchical relationship between natural prolongation and distance in the continental shelf delimitation. Article 76 of the LOSC does not address their relationship when they are invoked by different parties in a delimitation. Early judicial cases did not deal with the situation where a continental shelf beyond 200 nm was at stake. Therefore, it is doubtful whether the observations in these cases can be applied *mutatis mutandis* in the scenarios under analysis in this article. State practice in the application of Article 76, in contrast, demonstrates a strong tendency of self-constraint by avoiding intruding into neighbouring States’ 200-nm limit. This body of practice, if followed by more States in their future submissions, might give rise to an emerging customary rule.

Nevertheless, the positive law in the current stage does not prohibit overlapping entitlements based on natural prolongation and distance. Division of the overlapping entitlements based on the two criteria is therefore subject to the law of maritime delimitation, whose fundamental principle and ultimate goal are the achievement of an equitable solution. However, as the brief discussion on the prospects of delimitation shows, there are no fewer challenges if the scenarios of overlapping entitlements based on different criteria are established. Currently, the *Nicaragua v. Colombia II* case is pending before the ICJ, in which the conflict between the two entitlements is presented. It is therefore of great interest to await the judgment of the Court on the merits, which, it is hoped, would clarify or develop the law in this respect.

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139 See *Libya/Malta* case (n 28) at p. 47, para. 62.