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The Challenges of the Delimitation of Extended Continental Shelves by UNCLOS Part XV Tribunals: the ‘Significant Uncertainty’ Criterion

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Abstract

This article explores the relationship between the Commission on the Limits of the Continental Shelf (CLCS) and dispute settlement tribunals under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS). While the CLCS is tasked with examining scientific claims for continental shelf extensions beyond 200 nautical miles, only Part XV tribunals can settle disputes between States over maritime boundaries.

In several cases, tribunals have been asked to rule on boundary delimitation before the CLCS has issued its recommendations. This raises an important legal challenge. To address this, tribunals like ITLOS and the ICJ have applied the ‘significant uncertainty’ test — they will proceed only if there’s no major doubt about the existence of a continental margin.

Jurisprudence has evolved from early refusals to assert jurisdiction to more recent decisions where tribunals have delimited extended shelves. These decisions show a growing acceptance that delimitation can occur if scientific evidence is strong enough. Still, concerns remain: acting without CLCS recommendations may weaken its authority or create conflicts. Therefore, tribunals generally treat their assessments as provisional, pending the CLCS’s final evaluation.

Keywords

maritime delimitation; continental shelf beyond 200 mn; Commission on the Limits of the Continental Shelf; dispute settlement; competence of Part XV tribunals

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1. Introduction

The Commission on the Limits of the Continental Shelf (CLCS), a body created by the United Nations Convention on the Law of the Sea (UNCLOS),¹ is responsible for examining submissions by coastal States for the extension of their continental shelf beyond 200 nautical miles (nm). It is composed of 21 experts in geology, geophysics or hydrography, who are elected by the States Parties to the Convention with due regard to ensure equitable geographical representation.² The Commission's decisions concerning the establishment of the outer limits of the continental shelf are described in the Convention as 'recommendations', but are conferred with a 'definitive' and 'binding' character once accepted by the coastal State.³ If a State disagrees with the commission's recommendations, Article 8 of Annex II allows it to submit a revised or new application within a reasonable period of time.⁴ To date, 93 submissions have been made to the CLCS, of which only 35 have been the subject of recommendations; there have been a total of 11 revised submissions procedures.⁵

In the case of disputes between States on the delimitation of their maritime spaces, the CLCS is not a tribunal and cannot settle between the parties. The issue of dispute settlement, including delimitation disputes, is addressed in UNCLOS Part XV. Under Article 286, "any dispute concerning the interpretation or application of this Convention shall [...] be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section", namely the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII in special matters (fisheries, protection and preservation of the marine environment, marine scientific research, or navigation, including pollution from vessels and by dumping).⁶ States are free to choose, by issuing a declaration, one of these options for dispute settlement. If a State that is a party to a dispute has not issued a declaration or if the parties to the dispute

1 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS), annex II, art 1.

2 *ibid* annex II, art 2; Joanna Mossop, *The continental shelf beyond 200 nautical miles: rights and responsibilities* (Oxford University Press 2016); Peter J. Cook, *Continental shelf limits: the scientific and legal interface* (Oxford University Press 2000); Signe Veierud Busch, *Establishing continental shelf limits beyond 200 nautical miles by the coastal state: a right of involvement for other states?* (Brill 2016); Bjarni Már Magnússon, *The continental shelf beyond 200 nautical miles: delineation, delimitation and dispute settlement* (Brill 2015); United Nations, Division for Ocean Affairs and the Law of the Sea, *The law of the sea: training manual for delineation of the outer limits of the continental shelf beyond 200 nautical miles and for preparation of submissions to the Commission on the Limits of the Continental Shelf* (United Nations 2006); Xuexia Liao, *The continental shelf delimitation beyond 200 nautical miles: towards a common approach to maritime boundary-making* (Cambridge University Press 2022); Tomas Heidar, John Norton Moore and Myron H. Nordquist (ed.), *Legal and Scientific Aspects of Continental Shelf Limits* (Brill 2004); Suzette V. Suarez, *The outer limits of the continental shelf: legal aspects of their establishment*, Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht (Springer 2008); Sandrine W. De Herdt, 'A referral process to the Commission on the Limits of the Continental Shelf in the delimitation of the continental shelf beyond 200 M process: An appraisal' (2020), 53 *The International Journal of Marine and Coastal Law* 4, 682-703.

3 UNCLOS, article 76.8.

4 See Hilde Woker, 'Disagreements between the Commission on the Limits of the Continental Shelf (CLCS) and Submitting Coastal States' (2024) 39 *The International Journal of Marine and Coastal Law* 2, 252-278.

5 On the functioning of the Commission, see Øystein Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy* (Brill 2014); Elie Jarmache, 'A propos de la Commission des limites du plateau continental' (2006), *Annuaire du droit de la mer*, 51-67; Matthieu Aldjima Namountougou, 'La Commission des limites du plateau continental: Problèmes de statut juridique et attributions' (2008) 41 *Revue Belge de Droit International* 1, 292-330.

6 UNCLOS (n 1) annex VIII, art 1.



do not accept the same procedure for its settlement, it will be submitted to arbitration in accordance with Annex VII.⁷ These tribunals, hereafter referred to by the expression (Part XV tribunals) have jurisdiction over any dispute concerning the interpretation or application of UNCLOS, including the establishment of a maritime boundary between States that are party to the Convention.⁸

Thus, in theory, the division of jurisdictional competence is clear: the CLCS decides on the validity of the claims and on the outer limit of an extended continental shelf, whereas Part XV tribunals settle disputes between States on the delimitation of their respective maritime spaces, including their (extended) continental shelves. However, in practice, the claims for extended continental shelves can create, revive, aggravate or extend maritime delimitation disputes: for example, in the *Canada–France Maritime Boundary* case around Saint Pierre and Miquelon.⁹

Or, in contrast, cases may be brought before a tribunal in an attempt to prevent future disputes from occurring, by settling the maritime boundary once and for all, even if the CLCS has not yet ruled on the claim. The recent cases relating to the Bay of Bengal, the maritime disputes between Somalia and Kenya, and between the Maldives and Mauritius illustrate this situation. In these three cases, a Part XV tribunal was sought before the CLCS had the opportunity to statute on whether the claims to an extended continental shelf were well founded.

This article will focus on such cases, which challenge the separation competence designed by UNCLOS between the CLCS (delineation of the outer limit of the continental shelf) and Part XV tribunals (dispute settlement). Can or should a Part XV tribunal rule on the delimitation of an extended continental shelf before the Commission has made its recommendations? This debate about the competence of the Commission versus the dispute settlement mechanism first appeared in the arbitral between France and Canada concerning Saint Pierre and Miquelon. At the time (the case was decided in 1992), the arbitral tribunal considered that it did not have the jurisdiction to proceed with a delimitation of the extended continental shelf.¹⁰ In a later case between Barbados and Trinidad and Tobago (in 2006),¹¹ the arbitral tribunal also refused to proceed with such a delimitation; as did the

7 UNCLOS (n 1) art 287.

8 UNCLOS (n 1) art 288.

9 On these issues, see Huu Duy Minh Tran, 'The approach of the Commission on the Limits of the Continental Shelf to submissions involving unresolved disputes: Should it be modified?' (2023) 13 *Asian Journal of International Law*, 124-145; Sandrine W. De Herdt, 'The Relationship Between the Delimitation of the Continental Shelf Beyond 200 nm and the Delineation of Its Outer Limits' (2020) 51 *Ocean Development & International Law*, 263-282; Stuart Kaye, 'The Impact of Advisory Opinions from the International Tribunal of the Law of the Sea on the Work of the Commission on the Limits of the Continental Shelf: An Essay in Honor of Ted L. McDorman' (2024) 55 *Ocean Development & International Law*, 545-554.

10 Arbitral Award, *Delimitation of maritime Areas between Canada and France (Saint-Pierre-et-Miquelon)* (10 June 1982) RIAA, vol. XXXI, 79, in line with the jurisprudence of ICJ, *Monetary Gold taken in Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*. For a commentary, see Merritt R. Blakeslee, 'The Distant Island Problem: The Arbitration on the Delimitation of the Maritime Zones Around the French Collectivité Territoriale of Saint-Pierre-and-Miquelon' (1991) 21 *Ga. J. Int'l & Compar. L.*, 359-385; Elisabeth Zoller, 'La sentence franco-canadienne concernant St Pierre et Miquelon' (1992) 38 *AFDI*, 480-500.

11 While the arbitral tribunal held that its jurisdiction included the delimitation of the maritime boundary of the continental shelf beyond 200 nautical miles (217), it did not exercise this jurisdiction in this case, noting that 'the single maritime boundary which the Tribunal has fixed is such that, between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nautical miles' (368), PCA, *Barbados v. Trinidad and Tobago* (11 April 2006) Award, case 2004-02. For a commentary, see Julien Cazala, 'Retour sur les méthodes de délimitation juridictionnelle d'espaces maritimes mises en œuvre dans quelques affaires récentes' (2008) 54 *AFDI*, 411-427.



International Court of Justice in the case of the maritime dispute between Nicaragua and Honduras in the Caribbean Sea (in 2007).¹²

However, in the 2012 Bay of Bengal case, ITLOS opened the door to making such a delimitation, albeit in very specific circumstances.¹³ Almost a decade later, the ICJ went further, agreeing to delimit the hypothetical extended continental shelves of Somalia and Kenya in 2021,¹⁴ although not without criticism.¹⁵ To decide whether it could make such a delimitation, ITLOS relied on the fact that there was no 'significant uncertainty' as to the existence of a continental margin in the area in question. It would use this criterion again in its judgment of 28 April 2023 in the dispute relating to the maritime boundary between Mauritius and the Maldives in the Indian Ocean, but this time refusing to accept Mauritius's request for the delimitation of the extended continental shelf because of 'significant uncertainty'¹⁶ as to whether the portion claimed by Mauritius constitutes 'the basis of the natural prolongation of Mauritius to the critical point of the foot of the slope'.¹⁷

These cases indicate how 'significant uncertainty' has been used with the purpose of assessing if a Part XV tribunal is able to rule on the delimitation of an extended continental shelf before the Commission has made an assessment of the parties' claims (1). This raises challenges concerning the allocation of competence between tribunals and the CLCS (2).

2. The purpose of the "significant uncertainty" criterion

The jurisdictional competence of Part XV tribunals to delimit continental shelves beyond 200 nautical miles was established gradually over time, relying on the wording of UNCLOS. Later, the criterion of 'certainty' of a claim would be used by these tribunals to make final settlements in certain disputes.

12 The court had held that 'the line can in no case be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim to rights over the continental shelf beyond 200 miles [must] be in accordance with Article 76 of UNCLOS and considered by the Commission on the Limits of the Continental Shelf established under that treaty', ICJ, *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua/Honduras)* (Judgment of the 8 October 2007) 319. For a commentary, see Yoshifumi Tanaka, 'Reflections on Maritime Delimitation in the Nicaragua/Honduras Case' (2008) 68, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 903-937.

13 ITLOS, *Dispute relating to the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of the 14 March 2012) n 16, 363. For a commentary, see Abdullah Al Faruque, 'Judgment in Maritime Boundary Dispute between Bangladesh and Myanmar: Significance and Implications under International Law' (2012) 18 *Asian Yearbook of International Law*, 65-87; Marcin Kaldunski, 'A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal' (2015) 28 *Leiden Journal of International Law* 4, 799-848.

14 ICJ, *Maritime delimitation in the Indian Ocean (Somalia/Kenya)* (Judgment of the 12 October 2021, Merits) 197.

15 See, for example, the separate opinions of Judges Donoghue and Robinson.

16 ITLOS, *Delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean (Mauritius/Maldives)* (Judgment of the 28 April 2023) n 28, 449.

17 *ibid.*



2.1 Gradual recognition of the jurisdiction of Part XV tribunals to delimit the continental shelf

In the first cases to raise the issue of the delimitation of a continental shelf beyond 200 nm, tribunals did not consider they had jurisdictional competence. The major case was the 1992 Canada–France Maritime Boundary case concerning Saint Pierre and Miquelon.¹⁸ The arbitral tribunal considered it could not proceed on the delimitation of the continental shelves of the parties beyond 200 nm on the basis that such a decision would affect the rights of a third party not present in the proceedings: ‘The Tribunal is not competent to delimit the rights of a party who is not present before it.’¹⁹ Here, the third party was the international community, represented by the institutions responsible for administering and protecting the Area, which had been declared a common heritage of mankind.²⁰ This position was in line with the jurisprudence of the 1954 ICJ case that held that it had no jurisdiction to rule on the return of gold seized by the Nazis.²¹

In the 2012 dispute concerning the maritime boundary of Bangladesh and Myanmar in the Bay of Bengal, this issue of the Area and the rights of third parties was raised again before ITLOS in reference to the right of States such as India.²² Bangladesh argued that the potential overlap with the claims or rights of third parties did not deprive the Tribunal of its jurisdiction to delimit the maritime boundary since third parties would not be bound by the Tribunal’s judgment and their rights would be unaffected by it as provided in Article 33§2 of the Statute.²³

In an earlier maritime dispute between Nicaragua and Honduras in the Caribbean Sea in 2007, the ICJ refused to extend the delimitation line beyond 200 nm,²⁴ referring to the CLCS as being the competent organ on the matter.²⁵ Yet in the same period (in 2006), an arbitral tribunal took a diametrically opposed position in a dispute between Barbados and Trinidad and Tobago, considering that it held the jurisdiction to delimit the maritime boundary of the continental shelf beyond 200 nm.²⁶

18 Arbitral Award, *Delimitation of maritime Areas between Canada and France* (n 10) 82.

19 *ibid* 79. Unofficial translation from the French ‘Le Tribunal n’est pas compétent pour procéder à une délimitation touchant aux droits d’une partie qui n’est pas présente devant lui’.

20 Arbitral Award, *Delimitation of maritime Areas between Canada and France* (n 10) 78: ‘Any decision by which the Tribunal recognizes the Parties’ rights over the Continental Shelf beyond 200 nautical miles or rejects such rights would constitute a decision involving delimitation not ‘between the parties’ but between each of them and the international community, represented by the organs responsible for the administration and protection of the international seabed area which has been declared the common heritage of mankind’.

21 ICJ, *Monetary Gold taken in Rome in 1943* (n 10).

22 ITLOS, *Bay of Bengal* (n 13) 344: ‘At the same time Myanmar submits that ‘[e]ven if the Tribunal were to decide that there could be a single maritime boundary beyond 200 [nm] (quod non), the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area’.

23 ITLOS, *Bay of Bengal* (n 13) 352 and ITLOS Statute, article 33.2: ‘The decision shall have no binding force except between the parties in respect of that particular dispute’.

24 The court had held that ‘in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder’. ICJ, *Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea* (n 12) 319.

25 *ibid*.

26 PCA, *Barbados v. Trinidad and Tobago* (n 11) 217.



However, in the end the Tribunal refused to proceed to this delimitation for the simple factual reason that 'there is no single maritime boundary beyond 200 nautical miles'.²⁷

The 2006 *Barbados v. Trinidad and Tobago* case thus set a precedent of establishing a tribunal's jurisdiction, although its refusal to proceed meant it stayed under the radar in international case law. The 2012 *Bay of Bengal* case would prove to be the turning point. Following Bangladesh's argument,²⁸ ITLOS established its jurisdiction to delimit the continental shelf beyond 200 nm,²⁹ relying on the unicity of the legal regime of the continental shelf. The formulation of UNCLOS Articles 76, 77 and 83 makes no distinction between the continental shelf within or beyond 200 nm: the coastal State exercises the exclusive sovereign rights over the entirety of the continental shelf. Nor do the rules governing delimitation make any such distinction, hence: 'there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf'.³⁰

This position was confirmed by the arbitral tribunal in the 2014 *Bay of Bengal* case,³¹ and by the ITLOS special chamber in the 2017 *Ghana v. Côte d'Ivoire* case³² and the 2023 *Mauritius v. Maldives* case, which considered that the jurisdiction 'necessarily covers the continental shelf in its entirety, whether that be within or beyond 200 nm'.³³ In 2021, the ICJ also accepted to proceed to the delimitation of the continental shelves of Somalia and Kenya beyond 200 nm; however, the judgment did not go back over

²⁷ *ibid* 368.

²⁸ ITLOS, *Bay of Bengal* (n 13) 350: 'Bangladesh is of the view that the Tribunal is expressly empowered by the Convention to adjudicate disputes between States arising under articles 76 and 83, in regard to the delimitation of the continental shelf. As the Convention draws no distinction in this regard between jurisdiction over the inner part of the continental shelf, i.e., that part within 200 nm, and the part beyond that distance, according to Bangladesh, delimitation of the entire continental shelf is covered by article 83, and the Tribunal plainly has jurisdiction to carry out delimitation beyond 200 nm'.

²⁹ *ibid* 363.

³⁰ PCA, *Barbados v. Trinidad and Tobago* (n 11) 213.

³¹ PCA, *Bay of Bengal* (n 13) 77: 'The Tribunal emphasizes that article 76 of the Convention embodies the concept of a single continental shelf. This is confirmed by article 77, paragraphs 1 and 2 of the Convention, according to which a coastal State exercises exclusive sovereign rights over the continental shelf in its entirety. No distinction is made in these provisions between the continental shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise makes no such distinction'.

³² ITLOS, *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment of the 23 September 2017) case n 23, 491; Millicent McCreath and Zoe Scanlon, 'For a commentary, see The Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire: Implications for the Law of the Sea' (2019) 50 *Ocean Development & International Law*, 1-22; Andrés Sarmiento Lamus and Rodrigo González Quintero, 'International Tribunal for the Law of the Sea. Request for Provisional Measures in the Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)' (2016) 31 *International journal of marine and coastal law*, 160-167; Yoshifumi Tanaka 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46 *OceanDev&IntlL*, 315-330; Andrés Sarmiento Lamus and Rodrigo González Quintero 'Request for Provisional Measures in the Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)' (2016) 31 *The International Journal of Marine and Coastal Law*, 160-167; Maria Gavouneli, 'Delimiting Delimitation: Lessons Learned from the ITLOS Chamber Judgment on the Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054575> accessed 6 May 2025; Nicholas A. Ioannides, 'A Commentary on the Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)' (2017) *Maritime Safety and Security Law Journal*, 48-61.

³³ ITLOS, *Mauritius/Maldives* (n 16) 338.



the issue of jurisdiction.³⁴

These cases show the progressive construction of a consensus between ITLOS, arbitral tribunals and the ICJ to assert their jurisdiction to delimit extended continental shelves, if so asked by the parties to the dispute. The first step was for the tribunals to establish their jurisdiction; only after this was determined could they consider whether it was appropriate to exercise said jurisdiction.³⁵

2.2 Jurisdiction based on the wording of UNCLOS

In UNCLOS, the main role of the CLCS is defined as follows:

To consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea.³⁶

Therefore, in theory, the lines of authority are clear: the delineation process is conducted by the Commission, and (if there is a dispute) the delimitation process by Part XV tribunals. While the latter enables the delimitation of the maritime space between States, the former is limited to setting the outer limit of a State's shelf (delineation). In other words, delineation is the exclusive competence of the Commission. However, both processes (delineation and delimitation of continental shelves beyond 200 nm) share the same prerequisite: is the coastal State entitled to an extension under the criteria set forth in Article 76 of UNCLOS?

To establish this, it is necessary to interpret and apply this article, especially paragraphs 4 to 6:

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

- (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
- (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the

³⁴ ICJ, *Maritime delimitation in the Indian Ocean (Somalia/Kenya)* (n 14) 178. For a commentary, see D. Müller, 'Délimitation maritime dans l'océan Indien (Somalie/Kenya). L'arrêt sur le fond rendu le 12 octobre 2021' (2021) 67 *Annuaire français de droit international*, 305-329; Jean-Grégoire Mahinga, 'La délimitation de la frontière maritime entre la Somalie et le Kenya devant la Cour internationale de Justice (Arrêt du 12 octobre 2021)' (2022) 149, *Journal du droit international*, 860-888.

³⁵ ITLOS, *Bay of Bengal* (n 13) 363: 'For the foregoing reasons, the Tribunal finds that it has jurisdiction to delimit the continental shelf in its entirety. The Tribunal will now consider whether, in the circumstances of this case, it is appropriate to exercise that jurisdiction.'

³⁶ UNCLOS annex II, art 3.1a.



foot of the continental slope.

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

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural.

UNCLOS creates a specific institution (the CLCS) and a specific procedure to be followed by coastal States that wish to extend their continental shelf beyond 200 nm. The procedure is binding; States that are parties to the Convention do not have the liberty to delineate the outer limits of their continental shelf beyond 200 nm without submitting their claim to the Commission for an assessment. When a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nm, it must submit the details of such limits to the Commission along with supporting scientific and technical data within 10 years of the entry into force of the Convention for that State.³⁷

However, this does not mean that the convention grants the Commission the exclusive jurisdiction to interpret Article 76. In particular, Part XV on the settlement of disputes does not limit the competence of the judicial or arbitral bodies. Indeed, Article 288§1 states that a Part XV tribunal 'shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part', including the disputes over the interpretation of Article 76. Moreover, UNCLOS Art. 9 of Annex II states that the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.

Thus, both Part XV tribunals and the Commission are competent to interpret Article 76, and a connection between the two is crucial. As pointed out by L. N. Nguyen, ITLOS makes a distinction between the notions of *entitlement* to the continental shelf beyond 200 nm and the outer limits of the continental shelf.³⁸ Whereas a coastal State has to follow the procedures set forth in Article 76(8) in order to extend its continental shelf beyond 200 nm, entitlement to the continental shelf does not depend on any procedural requirements.³⁹

³⁷ UNCLOS (n 1) annex II, art 4.

³⁸ Lan Ngoc Nguyen, 'UNCLOS Tribunals and the Development of the Outer Continental Shelf Regime' (2018) 67 *International and Comparative Law Quarterly*, 433; see also Myron H Nordquist, *The regulation of continental shelf development: rethinking international standards* (Martinus Nijhoff Publishers 2013).

³⁹ *ibid.*



2.3 The notion of “certainty” to determine if a tribunal should exercise its competence

If we can agree on the potential jurisdiction of Part XV tribunals to consider the delimitation of the extended continental shelf before the recommendations by the Commission, the next question is if a tribunal *should* proceed. In the *Bay of Bengal* case, ITLOS devoted only four paragraphs to determine that it had jurisdiction, and thirty to discuss whether it should exercise this jurisdiction and proceed to delimit the continental shelf beyond 200 nm.⁴⁰

Looking at the relevant cases, the jurisprudence makes references to two main elements considered decisive by the courts: the level of certainty of the existence of a continental margin in the disputed area, and the fact that this existence is not contested between the parties.

ITLOS relied mainly on the first criteria in the *Bay of Bengal* case, the *Mauritius v. Maldives* case, and the *Ghana v. Côte d'Ivoire* case. In the *Bay of Bengal* case, ITLOS referred to the fact that the parties agreed on the fact that the continental shelves would extend beyond 200 nm,⁴¹ but disagreed on what constitutes a continental margin.⁴² Indeed, Bangladesh did not deny that there is a continental margin off Myanmar's coast, but argued that this margin has no natural prolongation beyond 50 nm off that coast.⁴³ In the *Mauritius v. Maldives* case, the parties strongly disagreed on Mauritius's entitlement to a continental shelf beyond 200 nm in the northern Chagos Archipelago region.⁴⁴ In both cases, ITLOS considered the notion of the level of certainty: 'The Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question'.⁴⁵ In other words, since 'not every coast generates entitlements to a continental shelf extending beyond 200 nm',⁴⁶ ITLOS decided to exercise its competence to proceed to a delimitation only when it is convinced that 'such a continental shelf exists',⁴⁷ and to refrain from doing so when there is 'significant uncertainty'.

In the *Bay of Bengal* case, ITLOS noted that the area presents a unique situation acknowledged during the third UNCLOS conference negotiations:⁴⁸ practically the entire sea floor of the bay is covered by a thick layer of sediment (14–22-km deep) that originated in the Himalayas and the Tibetan Plateau.⁴⁹ Therefore, the Tribunal was confident that both Bangladesh and Myanmar had entitle-

40 Oystein Jensen, 'Maritime Boundary Delimitation beyond 200 Nautical Miles: The International Judiciary and the Commission on the Limits of the Continental Shelf' (2015) 84 Nordic Journal of International Law 4, 586.

41 ITLOS, *Bay of Bengal* (n 13) 400.

42 *ibid* 441–442.

43 *ibid*.

44 ITLOS, *Mauritius/Maldives* (n 16) 384. The entitlement of the Maldives to the continental shelf beyond 200 nm was, however, uncontested between the parties.

45 ITLOS, *Bay of Bengal* (n 13) 443.

46 ITLOS, *Bay of Bengal* (n 13) 439.

47 ITLOS, *Ghana/Côte d'Ivoire* (n 32) 491.

48 The *Bay of Bengal* is cited in the Final Act of the Third United Nations Conference on the Law of the Sea, Annex II, Statement of Understanding Concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin.

49 ITLOS, *Bay of Bengal* (n 13) 444. The tribunal refers to Joseph R. Curray, 'The Bengal Depositional System: The Bengal Basin and the Bay of Bengal', 23 June 2010; Joseph R. Curray, 'Comments on the Myanmar Counter-Memorial, 1 December 2010', of 8 March 2011; and Hermann Kudrass, 'Elements of Geological Continuity and Discontinuity in the Bay of Bengal: From the Coast to the Deep Sea', 8 March 2011.



ments to a continental shelf extending beyond 200 nm,⁵⁰ reducing the uncertainty to a minimum. In the same way, in the *Ghana v. Côte d'Ivoire* case, the ITLOS special chamber also relied on certainty criteria, explaining that it 'has no doubt that a continental shelf beyond 200 nm exists for Côte d'Ivoire since its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist'.⁵¹

In contrast, in the *Mauritius v. Maldives* case, Mauritius asked the special chamber to proceed to the delimitation of the parties' continental shelves beyond 200 nm in the northern Chagos Archipelago region and ITLOS refused to do so, based on the 'significant uncertainty' criterion. In this case, the entitlement of Mauritius to a continental shelf beyond 200 nm was disputed by the Maldives. To be entitled to an extension, a coastal State must demonstrate a natural prolongation of its submerged land territory to the outer edge of its continental margin beyond 200 nm.⁵² Mauritius put forward three different proposals to prove this natural prolongation, however, the first was dismissed by the Tribunal: 'As the first route presented by Mauritius passes within the continental shelf of the Maldives within 200 nm that is uncontested by Mauritius, it cannot form a basis for Mauritius's natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 nm'.⁵³

The second and third routes were not documented enough to prove without "significant uncertainty" that they could form a basis for a natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 nm.⁵⁴ Therefore, '[g]iven the significant uncertainty, the Special Chamber is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region'.⁵⁵

The ICJ has never used nor referred to ITLOS's 'significant uncertainty' criterion, so it cannot be argued that it has become a generally accepted notion to determine when a Part XV tribunal can settle the delimitation of continental shelves beyond 200 nm. However, in a more indirect way, the ICJ has also required a minimum level of proof to support a claim in order to proceed to a requested delimitation. In the 2012 ICJ case concerning a maritime dispute between Nicaragua and Colombia, the Court refused to delimit the continental shelf beyond 200 nm because Nicaragua 'ha[d] 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'.⁵⁶ Without using the same vocabulary,⁵⁷ in practice the Court required a minimum level of evidence of the existence of this entitlement to accept proceeding to a delimitation.

50 ITLOS, *Bay of Bengal* (n 13) 449.

51 ITLOS, *Ghana/Côte d'Ivoire* (n 32) 491.

52 ITLOS, *Mauritius/Maldives* (n 16) 444.

53 *ibid.*

54 *ibid.* 449.

55 *ibid.* 450.

56 ICJ, *Territorial and maritime dispute (Nicaragua v. Colombia)* (Judgment of the 19 November 2012), ICJ Reports 2012 (II), p. 669, 129. For a commentary or a contextualisation, see Holly Leung, 'The Extended Continental Shelf in Nicaragua v Colombia: Identifying a Customary Rule Based on CLCS Submissions?' (2024) 55, *Ocean Development & International Law* 1-2, 206-233; Ekaterina Antsygina and Bernardo Perez-Salazar, 'Sovereign rights on the extended continental shelf: The case of the Nicaraguan rise in the Western Caribbean' (2020) *The International Journal of Marine and Coastal Law*, 772-800.

57 The ICJ could have referred to the *Bay of Bengal* case and the 'significant uncertainty' criterion since the judgment in the *Bay of Bengal* case was issued in March 2012 and that of *Nicaragua v. Colombia* in November 2012.



In contrast, in the 2017 case *Somalia v. Kenya*, the ICJ saw no objection to extending the maritime boundary beyond 200 nm 'until it reaches the outer limits of the continental shelves of the Parties, which are to be delimited by Somalia and Kenya on the basis of the recommendations made by the Commission',⁵⁸ without the parties having to scientifically prove to the Court without "significant uncertainty" the existence of sufficient grounds for the extension of each State's shelf. Here, the Court expressly relied on the second criteria: the lack of contestation of the other party's entitlement to a continental shelf beyond 200 nm and the fact that both parties asked the Court to delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf.⁵⁹ The ICJ did not assess the scientific arguments used by the parties to justify their claims.

These two cases could be seen as inconsistent in the jurisprudence of the ICJ, or at least as showing hesitation around a new issue that had not yet stabilized. However, the divergence in the two decisions could also be explained by the fact that in *Somalia v. Kenya* both parties had filed a submission to the CLCS, whereas in *Nicaragua v. Colombia*, prior to the judgment of the Court, Nicaragua had submitted "preliminary information" to the CLCS, but had not filed a submission. Had Nicaragua filed a submission to CLCS, it would have documented its claim. This leads to the persuasive hypothesis that by filing a submission to the CLCS prior to the Court decision, a State fulfils its obligation to establish the reality of its claim. Once the submission is filed, the ICJ does not require additional scientific data. In fact, in neither case did the court go into depth in the scientific data supporting the claims. This marks a difference between the ICJ and ITLOS, with the latter demanding a higher standard of proof.

Even going back to the 1992 Saint Pierre and Miquelon case between France and Canada, the arbitral tribunal put forward the need to proceed with caution when there is uncertainty: 'a tribunal cannot reach a decision on the pure assumption that such rights will in fact exist'.⁶⁰

2.4 The ultimate objective of the 'certainty' criterion: achieve the full settlement of the dispute

By accepting to decide on delimitation in cases in which no 'significant uncertainty' exists, Part XV tribunals could settle a dispute once and for all. The tribunals' jurisdiction on this would also come into play in the case of the existence of a dispute between States, as the CLCS is prevented from examining a submission without the express consent of all parties to the dispute: '[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'.⁶¹

In the *Mauritius v. Maldives* and *Bay of Bengal* cases, for example, the CLCS was not able to proceed to the examination of the submissions due to the existence of a maritime delimitation dispute between States. As pointed out by ITLOS, this would mean that if the Tribunal declined to delimit the continental shelf beyond 200 nm, the question concerning the outer limit of the continental shelf of each party would remain unresolved.⁶² In the *Bay of Bengal* case, ITLOS explained that this would

⁵⁸ ICJ, *Somalia/Kenya* (n 14) 196.

⁵⁹ *ibid* 194.

⁶⁰ Arbitral Award, *Delimitation of maritime spaces between Canada and the French Republic* (n 10) 81.

⁶¹ CLCS, Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 April 2008, CLCS/40/Rev.1, annex 1, 5a.

⁶² ITLOS, *Bay of Bengal* (n 13) 390.

be problematic:

It would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.⁶³

In the *Mauritius v. Maldives* case, while the ITLOS special chamber refused to proceed to the delimitation of the continental shelf beyond 200 nm, it noted that it was aware that the CLCS was currently not able to make recommendations to the parties and that this constituted an 'impasse' that may prevent the parties from receiving recommendations from the Commission and establish definitive and binding outer limits of the continental shelf.⁶⁴ This led ITLOS to suggest that the parties give their consent to the CLCS to allow it to consider each other's submissions,⁶⁵ as the CLCS rules of procedure indicate that the Commission may consider one or more submissions concerning a disputed area 'with prior consent given by all States that are parties to such a dispute'.⁶⁶ Such consent was ultimately granted in the *Somalia v. Kenya* case, in which each party initially filed an objection to consideration by the Commission of the other's submission, but subsequently withdrew these objections.⁶⁷

3. The challenges raised by the use of the "significant uncertainty" criterion

To assess the level of certainty of a claim to a continental shelf beyond 200 nm, the parties are required to provide scientific evidence – or an executive summary – on which their claims are based. Then the competent Part XV tribunal must assess this evidence, *prima facie*. Two main problems potentially arise from this: the risk of weakening the Commission, and the challenge for judges or arbitrators to deal with very technical data.

3.1 The risk of weakening the CLCS

ITLOS argues that the use of the 'significant uncertainty' criterion prevents diverging interpretations of Art. 76 by Part XV tribunals and the Commission and ensures that the rights exist before

63 *ibid.*, 392. See also *Bay of Bengal maritime boundary arbitral (Bangladesh/ India)* (Award of the 7 July 2014) no. 2010-16, 82: '[I]n the view of the Tribunal, the consequence of these decisions by the CLCS is such that, if the Tribunal were to decline to delimit the continental shelf beyond 200 nm, the outer limits of the continental shelf of each of the Parties would remain unresolved, unless the Parties were able to reach an agreement. In light of the many previous rounds of unsuccessful negotiations between them, the Tribunal does not see that such an agreement is likely. Accordingly, far from enabling action by the CLCS, inaction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not consider that such an outcome would be consistent with the object and purpose of the Convention.'

64 ITLOS, *Mauritius/ Maldives* (n 16) 455.

65 *ibid* 456.

66 CLCS, Rules of Procedure (n 61) 5a.

67 ICJ, *Somalia/Kenya* (n 14) 34 and 188.



delimiting boundaries. This criterion requires that the States parties to the dispute bring sufficient evidence before the Tribunal to support the existence of their claim to a continental shelf beyond 200 nm. However, as in the *Bay of Bengal* case, even if there is no 'significant uncertainty', the possibility of the CLCS later adopting a divergent position on the claim cannot be ruled out.⁶⁸ As a result, some States (such as Myanmar), as well as some scholars, have argued that ITLOS and other UNCLOS tribunals have to wait for the Commission to issue its recommendations before delimitation, relying on two main arguments:^{69,70} that delimiting the continental shelf 'presupposes the existence of a shelf to delimit';⁷¹ and that protecting the competence of the CLCS safeguards the entire structure of the Convention.

As for the first argument, as pointed out by O. Jensen, the Convention does not specify which procedure has to be done first: delineation or delimitation.⁷² Whereas UNCLOS Annex II requires a coastal State to make a submission to the Commission 'as soon as possible but in any case within 10 years' of the entry into force of the convention for the State,⁷³ the Convention does not give any specific time frame for the delimitation of a continental shelf.⁷⁴ These provisions cannot be interpreted as imposing delineation before States can delimit the continental shelf.

In the *Bay of Bengal* case, Myanmar argued that as long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the Commission, 'the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are'.⁷⁵ It considered that the recommendations of the CLCS are a "necessary precondition"⁷⁶ to any determination by a Part XV tribunal of a maritime border beyond 200 nm.

In its argument, Myanmar relied on the 2007 ICJ judgment in the case concerning the maritime dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*). In this judgment, the ICJ explained that 'in no case' may the delimitation line be interpreted as extending more than 200 nm from the baseline because 'any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder'.⁷⁷

This very short paragraph (the judgment includes no other mention of the Commission or the extension of a continental shelf beyond 200 nm) was interpreted by Myanmar as proof that the ICJ declined to delimit the continental shelf beyond 200 nm because the CLCS had not yet made rec-

68 ITLOS, *Mauritius/Maldives* (n 16) 433.

69 Scholars who have supported this position include: Bjørn Kunoy, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf' (2010), *International Journal of Marine and Coastal Law*, 237; Lan Ngoc Nguyen (n 38) 441.

70 ITLOS, *Bay of Bengal* case (n 13) 345.

71 Oystein Jensen (n 40).

72 *ibid.*

73 UNCLOS (n 1) annex II, art 4.

74 Art 83.2 simply states that if they fail to reach agreement within a 'reasonable period of time', the states concerned shall have recourse to the procedures set out in pt XV.

75 ITLOS, *Bay of Bengal* (n 13) 345.

76 *ibid.*

77 ICJ, *Nicaragua/ Honduras* (n 12) 319.



ommendations.⁷⁸ While this interpretation may be broad, this short paragraph undoubtably shows that for the Court at that time, the delimitation of a continental shelf beyond 200 nm was out of the question. Myanmar thus suggested to defer the judgment on this point until the recommendations of the Commission were issued and the parties had taken a position on them.⁷⁹

Today, this argument is no longer seriously considered, either by the ICJ or by ITLOS or any arbitral tribunal. These bodies now consider that the lack of delineation of the outer limit of the continental shelf is not in and of itself an impediment to its delimitation between two states with adjacent coasts.⁸⁰ Nevertheless, it should be pointed out that in *Somalia v. Kenya*, the ICJ noted that both parties had filed submissions to the Commission,⁸¹ and that they therefore fulfilled their obligations under Article 76§8 of the Convention.⁸² One can thus wonder what the Court would have decided if one or both States had failed to file a submission to the CLCS.

The question was raised explicitly before ITLOS in the *Bay of Bengal* case and in the *Mauritius v. Maldives* case, because neither Bangladesh and Myanmar in the former, nor Mauritius in the latter, had filed submissions with the CLCS before the proceedings (they did so during the proceedings). This led the Maldives to argue that Mauritius's claim was inadmissible. The special chamber responded that the filing of a submission with the CLCS prior to the proceedings was not a procedural requirement.⁸³ Nonetheless, in practice, such a submission contains the scientific data supporting the State's claim to a continental shelf beyond 200 nm. The 2012 maritime dispute between Nicaragua and Colombia shows that without the support of the data contained in the submission, it is difficult – if not impossible – to convince a tribunal of the certainty of the claim.⁸⁴

So while in theory, neither the prior recommendations by the Commission nor the filing of a submission are procedural requirements for a Part XV tribunal to delimit a continental shelf, in practice, tribunals require the State to establish that it has a continental margin that extends beyond 200 nm. If the State has not compiled and provided the data as evidence of this, its entitlement to a continental shelf beyond 200 nm would not be supported.

The other argument put forward that tribunals should wait for the Commission to issue its recommendations before delimitation is based on the idea that this safeguards the convention itself. In the *Bay of Bengal* case, Myanmar argued that: 'to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance'.⁸⁵

78 *ibid.*

79 ITLOS, *Bay of Bengal*, 349 (n 13). See also Oystein Jensen, 'Maritime Boundary Delimitation beyond 200 Nautical Miles' (n 40).

80 ICJ, *Somalia/Kenya* (n 14) 189 and ITLOS, *Bay of Bengal* (n 13) 379; ICJ, *Nicaragua/Colombia* (n 56) 128 argument of Nicaragua.

81 Kenya made its submission to the CLCS on 6 May 2009, while Somalia made its submission on 21 July 2014 and provided an amended Executive Summary on 16 July 2015. While they previously objected to the consideration by the Commission of each other's submissions, these objections were subsequently withdrawn.

82 ICJ, *Somalia/Kenya* (n 14) 179.

83 ITLOS, *Mauritius/Maldives* (n 16) 377.

84 ICJ, *Nicaragua/Colombia* (n 56) 129.

85 *ibid.*



By delimiting continental shelves beyond 200 nm, does the Tribunal step on the Commission's toes? In the *Bay of Bengal* case, ITLOS argued it did not, and that the exercise of its jurisdiction cannot be seen as an 'encroachment on the functions of the Commission'.⁸⁶ To the Tribunal, the two processes are independent from one another, thus the settlement of disputes between States regarding such delimitation cannot be seen as precluding the examination by the Commission of the submissions made to it.⁸⁷ The ICJ adopted a similar position in the *Somalia v. Kenya* case. These Part XV tribunals found they could determine a 'provisional' continental shelf boundary, which may then be adjusted according to the recommendations adopted by the Commission.

In theory, there should be no conflict or inconsistency between the decisions taken by Part XV tribunals on the one hand and the Commission on the other: the delimitation line decided by a Part XV tribunal will end, in any case, at the outer limit of the continental shelf. Therefore, if the Commission issues recommendations denying the State a claim beyond 200 nm, the delimitation line will end at 200 nm: end of story. However, this argument can only stand if the Part XV tribunal delimits 'potential' continental shelves beyond 200 nm, without taking a position on the claim to such a continental shelf. If a tribunal had previously considered that there was no significant uncertainty that a claim was well founded, and if the Commission later refused to recognize this claim, legal issues could arise. For example, in the *Bay of Bengal* case, ITLOS expressly concluded that both Bangladesh and Myanmar had entitlement to a continental shelf beyond 200 nm before the Commission issued its recommendations.⁸⁸ The consequences of such a divergence were raised in *Mauritius v. Maldives*: according to Mauritius, in the 'unlikely event the CLCS were to differ in its recommendations',⁸⁹ the parties may, under Article 8 of Annex II to the Convention, make revised or new submissions to the Commission to include the judgment and the parties' obligations under Article 296 of the Convention to comply with it.⁹⁰ In Mauritius's view, since ITLOS's judgments are binding, this would 'preclude the Parties from accepting recommendations from the CLCS that conflicted with it'.⁹¹ The present authors do not subscribe to this reading of ITLOS's judgments since they would merely be a first assessment without prejudice of to the Commission's formal decision based on a full assessment of the situation. However, such a conflict could certainly weaken the authority of the Commission and the acceptability of the recommendations it issues.

3.2 The challenge of assessing complex scientific data

Determining 'significant uncertainty' requires a certain level of assessment of scientific data by Part XV tribunals, which is, in principle, the responsibility of the CLCS. While the latter is better equipped to assess complex scientific evidence, the lack of specialized expertise in comparison to the Commission has not been interpreted as a barrier to the settlement of disputes by the ICJ, ITLOS or arbitral tribunals.⁹²

⁸⁶ ITLOS, *Bay of Bengal* (n 13) 393.

⁸⁷ *ibid.*

⁸⁸ *ibid* 449: 'The Tribunal accordingly concludes that both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 nm'.

⁸⁹ ITLOS, *Mauritius/Maldives* (n 16) 401.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² See, for instance, the position of Mauritius in ITLOS, *Mauritius/Maldives* (n 16) 402.



In the *Somalia v. Kenya* case, the ICJ simply referred to scientific data, noting that the entitlement of a State to a continental shelf beyond 200 nm depends on geological and geomorphological criteria;⁹³ that both Somalia and Kenya supported their claims with scientific evidence in their submissions to the CLCS; and that their claims overlap.⁹⁴ In the *Bay of Bengal* case, ITLOS gave more importance to the scientific data in proceeding to a basic assessment. It noted that there is uncontested scientific evidence regarding the unique nature of the Bay of Bengal,⁹⁵ declaring it was 'satisfied' that there is a 'continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm'.⁹⁶ It concluded that both Bangladesh and Myanmar have entitlements to a continental shelf beyond 200 nm.⁹⁷

The *Mauritius v. Maldives* case is by far the most interesting concerning the use by ITLOS of scientific data. The Tribunal devoted eight pages to whether the parties have a claim to a continental shelf beyond 200 nm in the area. In doing so, it made an assessment of the scientific data presented by Mauritius and concluded that it was not convincing.⁹⁸ To proceed to this assessment, ITLOS even applied the Commission's guidelines. ITLOS also questioned whether it should appoint an expert in the *Mauritius v. Maldives* case, in application of Article 82 of the rules of the Tribunal, but eventually ruled against it.⁹⁹

4. Conclusion: a prima facie assessment

In conclusion, ITLOS (and, in to a lesser extent, the ICJ) conducted *prima facie* assessments of the party's claims, not precluding the final assessment, to be made by the Commission. The process is to be compared with the evaluation of its competence made by an international tribunal when it has to decide whether to adopt provisional measures. This evaluation requires a low level of appreciation of the tribunal's own competence. There is a long established jurisprudence which clearly emphasizes that the question is not whether there is conclusive proof of jurisdiction but rather whether, on the evidence available, 'jurisdiction is not so *obviously excluded* as to make it extremely unlikely that the merits of the dispute will actually be considered'.¹⁰⁰ In fact, in the *Bluefin Tuna*¹⁰¹ case, ITLOS found that *prima facie* the Annex VII arbitral tribunal would have jurisdiction to deal with the merits of the cases brought by the applicants, however, the arbitral tribunal concluded that it did not have jurisdiction.¹⁰² This difference cannot be interpreted as a conflict, nor either as confirming or overruling the finding of ITLOS at the provisional measures stage.¹⁰³

93 ICJ, *Somalia/Kenya* (n 14) 193.

94 *ibid* 194.

95 ITLOS, *Bay of Bengal* (n 13) 446.

96 *ibid*.

97 *ibid* 449.

98 ITLOS, *Mauritius/Maldives* (n 16) 138-145.

99 ITLOS, *Mauritius/Maldives* (n 16) 454.

100 Thomas A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Heidelberg Journal of International Law, 50.

101 ITLOS, *Southern Bluefin Tuna* (New Zealand/Japan; Australia/Japan) (Order of the 27 August 1999, Provisional Measures) 62.

102 ITLOS, *Southern Bluefin Tuna* (Award on Jurisdiction and Admissibility of the 4 August 2000).

103 Mensah (n 100).



In the same way, the *prima facie* assessment arising from the use of the 'significant uncertainty' criterion implies no more than that the applicant has made an arguable case. As in the provisional measures procedures, '[i]t is a low threshold, nothing more than a hypothesis, and is fundamentally different from a definitive holding that it has or does not have jurisdiction over the merits.'¹⁰⁴ Therefore, the first assessment made by the Tribunal of the absence of 'significant uncertainty' is without prejudice of to the Commission's formal decision reached after full argument.

¹⁰⁴ Shabtai Rosenne, 'Provisional Measures and prima Facie Revisited' (2002) Festschrift in Honour of judge Oda, 515.