

General Overview on Recent Developments of Maritime Delimitation beyond 200 nautical miles: a recognized jurisdiction of international courts and tribunals

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ABSTRACT

By its 17 March 2016 Judgment on Preliminary Objections in the case concerning Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) the International Court of Justice decided that it has jurisdiction to carry out the maritime delimitation of the continental shelf beyond 200 nautical miles requested by Nicaragua. In its Judgment the Court stated that in the case of Nicaragua – as a State party to the Convention on the Law of the Sea - the only prerequisite, prior to seeking judicial delimitation of the continental shelf beyond 200 nautical miles, is having complied with its obligation under Article 76, paragraph 8 of said Convention, which states that “[i]nformation on the limits of the continental shelf beyond 200 nautical miles [...] shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf [...]”. In the same Judgment the Court reinforced the difference between the delineation of the outer continental shelf and the delimitation of the continental shelf thus establishing that the latter can be undertaken independent of a recommendation from the Commission. It also indicated on the one hand that the delineation of the outer limits of the continental shelf is governed by Article 76 (8) and consists of a procedure involving the Commission on the Limits of the Continental Shelf, and on the other hand, the delimitation of the continental shelf is governed by Article 83 of the Convention which allows States parties of said Convention to effect delimitations within and beyond 200 nautical miles by agreement or recourse to dispute resolution procedures.

Keywords: Delimitation of the Continental Shelf beyond 200 nautical mile; International Courts and Tribunals; Commission on the Limits of the Continental Shelf; Recommendation of the CLCS; Nicaragua v. Colombia.

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1. Introduction

On 14 March 2012, the International Tribunal for the Law of the Sea (hereinafter “ITLOS”) delivered its Judgment in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)¹⁾. In this case ITLOS decided that it had the jurisdiction to carry out the maritime delimitation beyond 200 nautical miles (hereinafter “nm”) between Bangladesh and Myanmar. Similarly, in 2014, the Arbitral Tribunal²⁾ delivered its Award in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, (Bangladesh/India)*. In its Award the Tribunal recalled the reasoning of ITLOS, and stated that it did not find grounds to abstain from exercising its jurisdiction to decide on the maritime delimitation beyond 200 nm between the States concerned. It is important to underline that in the above-mentioned cases all the States concerned had, at the time of the dispute, already submitted information on the limits of their continental shelves beyond 200 nm to the Commission on the Limits of the Continental Shelf (hereinafter “CLCS”): hence they had complied with their obligation under Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”).

On 16 September 2013 the Republic of Nicaragua instituted proceedings against Colombia (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*) (hereinafter “*Nicaragua II*”). In its Application Nicaragua requested the ICJ to adjudge and declare the following:

First: The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.

Second: The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua’s coast. ³⁾

On 14 August 2014, less than four months before the filing of Nicaragua’s Memorial in *Nicaragua II*, Colombia raised five preliminary objections to the jurisdiction of the Court and the admissibility of Nicaragua’s Application in that case. Colombia

1) *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment (2012), ITLOS Rep.4 (hereinafter “Bangladesh/Myanmar”)*

2) The Arbitral Tribunal was established under Annex VII of the United Nations Convention on the Law of the Sea.

3) See Nicaragua’s Application, dated 16 September 2013, available at <http://www.icj-cij.org/docket/files/154/17532.pdf> (hereinafter “Nicaragua’s Application”).

claimed that the ICJ lacked jurisdiction because Nicaragua's Application was bared by the legal principle of *res judicata*. According to Colombia the ICJ had already rejected Nicaragua's claim beyond 200 nm in its Judgment of 2012. Additionally, Colombia argued that even if the Court considered that Nicaragua's Application was not barred by *res judicata* its Application was inadmissible because the CLCS had not issued its recommendations based on the information submitted by Nicaragua in relation to its continental shelf beyond 200 nm. For the purposes of this paper, only the latter, i.e. the fifth preliminary objection of Colombia in so far as it concerns the first request of Nicaragua, will be considered. The fifth preliminary objection reads as follows:

Fifth, even if one were to assume, quod non, that the Court had jurisdiction under the Pact of Bogotá or that it has retained jurisdiction on the basis of its prior Judgment, the present Application *would be inadmissible because the CLCS has not made the requisite recommendation.*[...]4)

This paper will give a general overview over the previous jurisprudence of the ICJ and international tribunals. It will identify recent developments concerning the jurisdiction of international courts or tribunals over maritime delimitations of the continental shelf beyond the 200 nm during the period before the CLCS has issued its recommendations in accordance to Article 76 (8) of UNCLOS.

2. Previous jurisprudence

The *Bangladesh/Myanmar case* concerned the delimitation of all the maritime zones under the national jurisdiction of the Parties, including the continental shelf beyond 200 nm. Today it is well-known that the 2012 Judgment of ITLOS was the first decision by an international tribunal wherein the continental shelf beyond 200 nm has been delimited. The Parties concerned in this case had different positions as to the jurisdiction of the Tribunal to carry out the requested maritime delimitation beyond 200 nm. Myanmar's position was that "[a]s long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the Commission on the Limits of the Continental Shelf [...], the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are".5) For its part, Bangladesh argued that the Tribunal had jurisdiction to carry out such a delimitation, because UNCLOS "draws no distinction [...] between jurisdiction over the inner part of the continental shelf, i.e. the part within 200 nm, and the part beyond that distance"6) and thus the "delimitation of the entire continental shelf is covered by article 83" of UNCLOS. In 2006, the International Law Association Committee on Legal Issues of the Outer

4) Nicaragua's Application, para. 12 (1), p.8 (emphatizes added).

5) Bangladesh/Myanmar, pp.103-104, para.345.

6) Bangladesh/Myanmar, p.105, para. 350.

Continental Shelf reached a similar conclusion. It considered that the delimitation of overlapping entitlements between neighboring States is governed by Article 83 of UNCLOS⁷⁾, and not by Article 76, which concerns matters of entitlement to and the establishment of the outer limits of the continental shelf.⁸⁾

The Judgment in the *Bangladesh/Myanmar* case clarified and reinforced fundamental understandings on the interpretation of Articles 76, 77, and 83 of UNCLOS. ITLOS pointed out that Article 76 embodies the concept of a single continental shelf, and that Article 77 draws no distinction between the continental shelf within and beyond 200 nm. In this regard the Award in the *Barbados/Trinidad & Tobago* case also held that “in any event there is in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf”⁹⁾. Similarly, the Arbitral Tribunal in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* recalled previous jurisprudence and stated 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.”¹⁰⁾

Hence, one can conclude that under UNCLOS no distinction is made between the shelf within 200 nm and the shelf beyond that limit; and no such distinction exists in regard to maritime delimitations of the continental shelf either, which, as indicated above, is governed by Article 83.¹¹⁾

ITLOS also underlined the complementarity of a number of bodies set up by the Convention to implement its provisions, such as CLCS and itself. It highlighted that the activities of “these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention”¹²⁾. For this balance to exist, the activities of one body should not be blocked by the activities of another. Thus, ITLOS made a clear distinction between the delimitation of the continental shelf under Article 83 and the delineation of the outer limits of the continental shelf under Article 76.¹³⁾ The latter is a matter for the CLCS to handle, and the former a matter for the dispute settlement bodies or the Parties concerned to handle.

Pursuant to Article 76, the CLCS is assigned the task of making recommendations

7) See also *Virginia Commentary*, note 13 Vol. II, 883.

8) Second Report of the Committee of the International Law Association on Legal Issues of the Outer Continental Shelf (Toronto 2006) (hereinafter “2006 Report”) available at <http://www.ila-hq.org/en/committees/index.cfm/cid/33>

9) Decision of 11 April 2006, RIAA, Vol. XXVII, p. 147, at pp.208-209, para. 213.

10) Award in the *Bangladesh/India* case, para. 77.

11) See *Bangladesh/Myanmar*, p.108, para. 361.

12) *Bangladesh/Myanmar*, p.110, para. 373.

13) See *Bangladesh/Myanmar*, p.11, para. 376.

“to coastal States on matters related to the establishment of the outer limits of their continental shelf”¹⁴). Such recommendations are issued “without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”.¹⁵) This is further supported by Article 9 of Annex II to UNCLOS, which states that the “actions of the Commission shall not prejudice matters relating to delimitation to boundaries between States with opposite or adjacent coasts”. In relation to this point ITLOS emphasized that there is nothing in UNCLOS or in the Rules of Procedures or the practice of the CLCS that indicates that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its own mandate¹⁶). The *Bangladesh/Myanmar* decision sheds light on the coexistence and complementarity of the activities of each body. The Tribunal selected wise words to emphasize this point. In paragraph 379 of its Judgment it stated that:

“Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.”

In addition, Bangladesh raised the point, well cited by now, concerning the impasse that would be caused if the Tribunal and the CLCS have to wait for each other to act¹⁷). Under Annex 1 paragraph 5 (a) of the Rules of Procedures of the CLCS, the Commission will not consider and qualify a submission in a case where a land or maritime dispute exists unless all States that are Parties to the dispute have given their prior consent. This was the situation in the *Bangladesh/Myanmar* case. Bangladesh informed the Commission by a note that there was a dispute between the Parties and, recalling paragraph 5 (a) of Annex I to the Rules, observed that:

“given the presence of a dispute between Bangladesh and Myanmar concerning entitlement to the parts of the continental shelf in the Bay of Bengal claimed by Myanmar in its submission, the Commission may not “consider and qualify” the submission made by Myanmar without the “prior consent given by all States that are parties to such a dispute”.¹⁸)

The Commission, pursuant the Rules of Procedure,¹⁹) decided to defer further consideration of the submissions and the notes verbales of both Parties, Myanmar

14) See UNCLOS, Article 76 (8).

15) See UNCLOS, Article 76 (10).

16) *Bangladesh/Myanmar*, p.111-112, p.377.

17) *Bangladesh/Myanmar*, p. 107, para 358.

18) Note verbal dated 23 July 2009 .

19) See paragraph 5 (a) of Annex I of the Rules of Procedure, which states that “5. (a) 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.”

and Bangladesh.²⁰⁾ The Commission expressed the view that by deferring its consideration of the submission of Bangladesh as well, it would facilitate further developments among the Parties, including the possible adoption of an arrangement of a practical nature.²¹⁾

Bangladesh further argued that if ITLOS would not have carried out the maritime delimitation, a jurisdictional black hole would have been opened²²⁾. The possible impasse was clear and obvious: if each body waited for the other to take its decision, both the CLCS and international courts or tribunals would have to wait for an indefinite period of time and, consequently a dispute will never be resolved. This concern was raised by the Arbitral Tribunal in the *Bangladesh/ India* case, in which the Arbitral Tribunal considered that:

“82. [...] 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.”²³⁾

After ITLOS addressed the question concerning its jurisdiction to delimit the continental shelf beyond 200 nm, it turned to the question of entitlements over that area. Contrary to Bangladesh, Myanmar argued that the Tribunal should not have addressed the issue of entitlement of both Parties to an extended continental shelf, because “this is an issue that lies solely within the competence of the Commission [and] not of the Tribunal”²⁴⁾. Nevertheless, ITLOS did not agree with Myanmar. It is well established that the entitlement of a State over the adjacent continental shelf exists ipso facto and ab initio and does not depend on “occupation, effective or notional, or on any express proclamation”²⁵⁾. Those rights “exist by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present”.²⁶⁾ Thus, and as stated by ITLOS, no prior establishment of outer limits are necessary

20) See the Statement by the Chairman of the Commission on the progress of work in the Commission, CLCS/64 of 1 October 2009, p. 10, paragraph 40. See also *Bangladesh/Myanmar*, p. 114, para 388-389. Similar language was used by the Commission in the case of the submissions of Iceland and from Denmark (CLCS/64, para. 46) and Nicaragua (CLCS/83, para.83).

21) See the Statement by the Chairman of the Commission on the progress of work in the Commission, CLCS/72 of 16 September 2011, p. 7, paragraph 22.

22) *Bangladesh/Myanmar*, p. 107, para 358.

23) Award, p.22, para.82, available at http://archive.pca-cpa.org/BD-IN%2020140707%20Award2890.pdf?fil_id=2705

24) *Bangladesh/Myanmar*, p. 188, para. 400.

25) See UNCLOS, Article 77, para. 3.

26) *Bangladesh/ Myanmar*, p.120, para. 409.

for such an entitlement to exist²⁷⁾. This point was observed by the ILA Committee in its 2006 Report. The Committee considered that coastal States are entitled to a continental shelf even if the State concerned has not established the outer limits of its continental shelf.²⁸⁾ Nonetheless, in order to determine the extent of the continental shelf beyond 200 nm, certain procedural obligations have to be met.

The ITLOS stated that “it 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”²⁹⁾. Nevertheless, given the unique situation of the Bay of Bengal’s thick layer of sedimentary rocks, which covers practically the entire floor of the Bay, ITLOS found that both States have an entitlement to a continental shelf extending beyond 200 nm³⁰⁾ and decided that it had jurisdiction to carry out the delimitation.³¹⁾

Similarly, in the *Bangladesh/India case* the Arbitral Tribunal took note of the limited jurisprudence³²⁾ concerning delimitation of the continental shelf beyond 200 nm and recalled the reasoning of the 2012 Judgment of ITLOS. The Arbitral Tribunal decided that it saw “no grounds why it should refrain from exercising its jurisdiction to decide on the lateral delimitation of the continental shelf beyond 200 nm before its outer limits have been established”³³⁾. The maritime boundaries established by ITLOS and the Arbitral Tribunal are depicted at page 163 of the *Bangladesh/ India Award*.

3. Nicaragua’s case against Colombia; Maritime delimitation beyond 200 nm.

The subject of the *Nicaragua II* case is the delimitation of the maritime boundaries “between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia.”³⁴⁾ Before Nicaragua’s application there had been only one occasion in the history of

27) Bangladesh/ Myanmar, p.120, para. 409.

28) 2006 Report, p.2.

29) Bangladesh/Myanmar, p.129, para. 443.

30) Bangladesh/Myanmar, p. 131, para. 449.

31) Bangladesh/Myanmar, p. 147 (Operative Clauses), 506 (2).

32) The Award of 11 April 2006 by the Arbitral Tribunal in the case between *Barbados and Trinidad and Tobago* (RIAA, Vol. XXVII, p. 147), the Judgment of 14 March 2012 of the International Tribunal for the Law of the Sea on the *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, and the Judgment of 19 November 2012 of the International Court of Justice in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment, *I.C.J. Reports 2012*, p. 624).

33) Award, pp.20-21, para.75.

34) Nicaragua’s Application, para.2, p.2.

the ICJ in which a State has requested a maritime delimitation beyond 200 nm: and it was by Nicaragua, in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (hereinafter “*Nicaragua I*”). In the *Nicaragua I* case, Nicaragua had requested the Court to adjudge and declare:

“3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties.”³⁵⁾

In that case the Court decided that it could not uphold Nicaragua’s claim to delimit its continental shelf beyond 200 nm ³⁶⁾, because Nicaragua had not established that “ it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical –mile entitlement to the continental shelf [...]”³⁷⁾. The Court considered that the preliminary information submitted by Nicaragua to the CLCS on the outer limits of its continental shelf beyond 200 nm fell short of meeting the full requirements of the CLCS for information, as was acknowledged by Nicaragua itself³⁸⁾.

For some time the legal consequences of the decision were uncertain. That uncertainty was clarified by the International Court in its recent Judgment on Preliminary Objections, delivered on 17 March 2016. In that Judgment the Court explained that it could not uphold Nicaragua’s original claim, because at the time of the Judgment of 2012 Nicaragua had not discharged its obligation under paragraph 8 of Article 76 of UNCLOS, i.e., “to deposit with the CLCS the [full] information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS”.³⁹⁾

As indicated above, several factors had permitted ITLOS and the Arbitral Tribunal to carry out the delimitation in the Bay of Bengal, notably the unique situation of the Bay, the fact that all States concerned- Bangladesh, Myanmar and India- are parties to UNCLOS, and the fact that all of those States had fulfilled their obligation under Article 76 (8) and submitted their information on the continental shelf beyond 200 nm to the CLCS by the time the dispute came for adjudication.⁴⁰⁾ Nevertheless, the decisions delivered in the *Bay of Bengal* cases left question marks over cases where no such unique situation is present, and cases where the Parties involved in a dispute have not submitted their information to the CLCS at the moment of the dispute. Both questions can be answered by the recent Judgment of the ICJ,

35) (CR 2012/15 - Arguello) Final Submissions (3) p. 50.

36) *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 719, para 251 (3) (hereinafter “*Nicaragua/ Colombia, Judgment 2012*”).

37) *Nicaragua/Colombia, Judgment 2012*, p. 669, para. 129.

38) *Nicaragua/Colombia, Judgment 2012*, p.669, para. 127.

39) Judgment of 17 March 2016, p.32, para. 84.

40) In the *Bangladesh/ India* case both parties agreed on the jurisdiction of the Tribunal to delimit the continental shelf beyond 200 nm. See Award, p.20, para.74

as will be further explained in this paper.

In contrast to the States involved in the *Bay of Bengal* cases, Colombia is not a State Party to UNCLOS. In this regard, the ICJ made clear that the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua of its obligations under Article 76.⁴¹⁾ On 24 June 2013, Nicaragua submitted to the CLCS its full detailed Submission concerning the limits of its continental shelf beyond 200 nm.⁴²⁾ It accordingly considered that “in accordance with the Court’s Judgment, [it] has now submitted the necessary information to the CLCS [...] and the Court is now in a position to completely and definitively settle the dispute between Nicaragua and Colombia brought by Nicaragua in 2001”.⁴³⁾

According to Colombia, the ICJ could not consider Nicaragua’s new Application because the “CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua’s continental shelf beyond the 200-nautical mile line are satisfied and, consequently, has not made a recommendation.”⁴⁴⁾ Colombia’s interpretation of the CLCS’ mandate and Article 76 of UNCLOS is that the recommendations of the CLCS are required before a State can ask a court or tribunal to settle a dispute over an area that extends beyond the 200 nm.⁴⁵⁾ In regard to this point the ITLOS indicated in its Judgment of 2012, that there is nothing in UNCLOS or in the jurisprudence of international courts or tribunals that supports such a position. The ITLOS explicitly stated in its Judgment that “the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.”⁴⁶⁾ In both the *Bangladesh/ Myanmar* case and the *Bangladesh/ India* case, the parties had made full submissions to the CLCS, but had not received its recommendations. That did not prevent the judicial bodies from proceeding with the delimitation of the continental shelves: nor did

41) Nicaragua/Colombia, Judgment 2012, p. 669, para. 126

42) Colombia informed about its position to the CLCS through several notes, in which it stated that:

“Nicaragua’s submission makes reference to submarine areas in the Caribbean Sea that belong to Colombia under international law. The Republic of Colombia rejects Nicaragua’s submission in which it claims rights to the seabed and the subsoil of the submarine areas appurtenant to the Colombian islands in the Caribbean as well as Colombia’s continental territory. It should also be noted that Nicaragua’s submission disregards matters relating to the delimitation of boundaries with Colombia which have already been resolved. Furthermore, we reaffirm that the Republic of Colombia is not a party to the United Nations Convention on the Law of the Sea. As a result, Nicaragua’s submission is not opposable to Colombia and does not affect Colombia’s rights to its continental shelf. Colombia also reiterates that it has not consented to this procedure. By virtue of the above, the Republic of Colombia reiterates the terms of our notes of 22 April 2013 and 24 September 2013 submitted to you, and trusts that the Commission on the Limits of the Continental Shelf will refrain from considering Nicaragua’s submission of 24 June 2013.” Available at http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm

Similar position of other States can be found in the web page of the Commission, i.e. Japan objections to the Submissions of China and Korea.

43) Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, dated 19 January 2015, p.29, para.3.21., available at <http://www.icj-cij.org/docket/files/154/18780.pdf>

44) Colombia’s Preliminary Objections, para.7.15.

45) Judgment of 17 March 2016, p.34, para. 99.

46) Bangladesh/Myanmar Case, p. 99, para. 379.

Colombia's argument prevent the ICJ from deciding that it has the jurisdiction to delimit a continental shelf beyond 200 nm.

Myanmar, in the Bangladesh/Myanmar case (like Colombia in the Nicaragua v Colombia case), claimed that "as long as the outer limits of the continental shelf has not been established on the basis of the recommendations of the CLCS the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are"⁴⁷⁾ Moreover, Myanmar argued that the recommendations of the CLCS were a "necessary prerequisite for any determination of the outer limits of the continental shelf" and a "precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 [nm]"⁴⁸⁾.

As the ITLOS had done in respect of Myanmar, the ICJ rejected Colombia's position, and in doing so shed light on what it considers to be the necessary prerequisites to be fulfilled prior to seeking a judicial delimitation of the continental shelf beyond 200 nm. The Court stressed that Nicaragua had to submit the full information required to the CLCS, as a prerequisite for the Court to carry out a delimitation of the continental shelf beyond 200 nm miles⁴⁹⁾. The Court recalled that it was because Nicaragua had not submitted such information at the time of the Court's 2012 Judgment that the Court had concluded that Nicaragua had not "established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile [...]"⁵⁰⁾ and therefore the Court could not uphold Nicaragua's request regarding delimitation of the shelf beyond 200nm in that case. This ruling constitutes a major development in maritime delimitation disputes concerning areas of the continental shelf beyond 200 nm. It establishes two key points; first, recommendations from the CLCS are not a prerequisite "that need to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State" concerning delimitation of the extended continental shelf;⁵¹⁾ and second, the submission of the full information on the limits of the continental shelf beyond 200 nm, as required by the CLCS, does constitute a prerequisite, which must be satisfied prior to seeking judicial delimitation of the continental shelf beyond 200 nm.

The decision of the Court was not achieved through a unanimous decision. On the contrary, there were several Judges who opposed to that decision. In a joint dissenting opinion 8 Judges considered that the Court had adopted its 2016 decision in order to avoid declaring that Nicaragua's application was barred by the principle of res judicata and therefore was inadmissible. They pointed out that the procedural prerequisite identified by the majority of the Court is inconsistent with the provisions of Article 76 of UNCLOS. They considered that "[i]f delimitation can be effected

47) Bangladesh/Myanmar Case, at pp.92-93, para.345.

48) Bangladesh/Myanmar Case, at pp.92-93, para.345.

49) Judgment of 17 March 2016, p.36, para. 105.

50) Judgment of 17 March 2016, p.31, para. 82.

51) Judgment of 17 March 2016, p.37, para.114.

without recommendations from the CLCS, it can certainly be effected also without submission of information to the CLCS. It is illogical to say that the mere submission of information to the CLCS pursuant to Article 76 (8) constitutes a precondition for delimitation, whereas the recommendations of the CLCS, which are based on such submission and provided for under Article 76 (8) do not constitute a prerequisite for that purpose.”⁵²⁾ They stressed that the obligation of States parties under Article 76 does not constitute a prerequisite to recourse to dispute resolution procedures in order to delimit overlapping continental shelf entitlements beyond 200 nm. ⁵³⁾

In the same line Judge Donoghue stated in her dissenting opinion that “UNCLOS imposes no obligation on a State party to make a submission to the Commission prior to seeking judicial or arbitral delimitation of continental shelf beyond 200 nautical miles of its coast. On the contrary, it draws a distinction between delimitation of a maritime boundary, on the one hand, and delineation of the outer limits of the continental shelf, on the other hand [...]”⁵⁴⁾. The dissenting opinions of the Judges raise very interesting points, which will be the subject of analysis and discussion during the coming years, the presentation of which is not, however, within the subject-matter of this paper.

Another point stressed by the ICJ is the difference between delimitation under article 83 of UNCLOS and the delineation of the outer limits of the Continental Shelf under article 76.⁵⁵⁾ The ICJ stressed that the procedures before the CLCS relate to the delineation of the outer limits of the continental shelf, and “hence to the determination of the extent of the sea-bed under national jurisdiction”⁵⁶⁾ and not the delimitation of the continental shelf *per se* as regulated under Article 83 of UNCLOS. In addition, the ICJ recognized that both procedures, delineation and delimitation, may impact upon one another; and it recalled that in order to avoid an impasse or interference between the two processes “[t]he CLCS has, in its internal rules (Article 46 and Annex I), established procedures, in accordance with Article 9 of Annex II to UNCLOS, to ensure that its actions do not prejudice matters relating to delimitation”.⁵⁷⁾ In the *Bangladesh/India* case the Tribunal had also underlined such a distinction. It stated that on the one hand the function of settling disputes with respect to the delimitation of maritime boundaries is entrusted to the dispute settlement procedures under Part XV of the Convention, and on the other hand

52) Judgment of 17 March 2016, para. 51

53) For more see Joint Dissenting Opinion- Vice- President Yusuf, Judges Cancado Trindade, Xue, Gaja, Bhandari, Robinson and Judge Ad Hoc Brower, paras. 40-58.

54) Dissenting Opinion, Judge Donoghue, para. 49.

55) See also *Bangladesh/Myanmar* Case, at p.99, para.376. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, Judgment, I.C.J. Reports 2012, paragraph 125.

56) Judgment of 17 March 2016, p.37, para.112. Article 3 of Annex II to UNCLOS states that the functions of the Commission shall be “(a) 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”.

57) Judgment of 17 March 2016, p.37, para.113

the function of the delineation of the continental shelf beyond 200 nm is entrusted to the CLCS.⁵⁸⁾

The Judgment of 17 March 2016, reaffirmed that the delineation of the outer limits of the continental shelf, and its delimitation between States with either opposite or adjacent coasts, can exist independently from one another. Just as the CLCS does not require a delimitation to take place before it can issue its recommendations, so too an international court or tribunal does not require the CLCS to delineate the outer limits of the continental shelf to delimit a continental shelf beyond 200 nm. Accordingly, the Court concluded that “the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS”⁵⁹⁾.

4. Bilateral Maritime Boundary Agreements⁶⁰⁾

It is important to underline the importance and relevance of the State practice in support of the independence of the delimitation of the continental shelf from the delineation of the outer limits of the continental shelf. In this regard, bilateral maritime boundary agreements in which the continental shelf beyond 200 nm has been delimited are, if not yet numerous, at least sufficient to indicate that States understand that there is no need to await the recommendations of the CLCS before agreeing on the maritime boundary beyond 200 nm.

During the oral hearing in the *Nicaragua II* case, the Agent of Nicaragua pointed out that “[t]o this day approximately 15 maritime boundary agreements concerning the outer continental shelf have been concluded, 12 of these agreements have been concluded before one or both of the parties have received recommendations from the CLCS, or even before making a submission to the Commission”⁶¹⁾

As was stated by Nicaragua, its situation is far from being unique. As a matter of fact, practice shows that the CLCS takes into account maritime delimitation agreements prior to the issuance of its recommendations. One example is that of Mexico in respect of the western polygon in the Gulf of Mexico: the CLCS took into account the 09 June 2000 Continental Shelf Treaty between Mexico and the USA before it issued its recommendation.⁶²⁾ In practical terms, prior agreement over disputed

58) Award in the Bangladesh/India case, para. 80. This is coherently reinforced by Article 76 (10) of UNCLOS, which states that “[t]he provisions of this article are without prejudice to the questions of delimitation of the continental shelf between States with opposite or adjacent coast”. For more see Bjarni Már Magnússon (2015), “The Continental Shelf Beyond 200 Nautical Miles” Brill Nijhoff, p. 136.

59) Judgment of 17 March 2016, p. 37, para. 114.

60) This point was addressed by the Agent of Nicaragua. See CR 2015/29 (Arguello), pp.44-45.

61) See CR 2015/29 (Arguello), p.44

62) See para. 37, p.10 of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Mexico in respect of the Western Polygon in the Gulf of Mexico on 13

areas actually facilitates the work of the CLCS, since it cannot and does not make recommendations in situations where disputed claims to the outer continental shelf are present⁶³).

5. Conclusions

It is clear under treaty law, State practice and the recent jurisprudence of international courts and tribunals, that coastal States are free to agree at any time to delimit their continental shelf beyond 200 nm, by any peaceful mean of their own choice. The 2016 Judgment of the ICJ evidenced that in cases where a State party to UNCLOS seeks a judicial delimitation of the continental shelf beyond 200 nm, it must first submit its full information on the limits of its continental shelf beyond 200 nm to the CLCS.

With this recent Judgment, the ICJ has reinforced the complementarity of the CLCS and the ICJ. On one hand, it has strengthened the role of the CLCS, as the body to handle the delineation of the outer limits of the continental shelf, and on the other hand, it has emphasized the role of international courts and tribunals as the appropriate bodies to handle delimitations of the shelf beyond 200nm. More importantly it has decided that delimitation of continental shelves beyond 200 nm can be undertaken independently of the recommendations of the CLCS, and has considered that such recommendations are not required by “a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such delimitation”.⁶⁴

December 2007, available at http://www.un.org/depts/los/clcs_new/submissions_files/mex07/mex_rec.pdf For more example see Bjarni Már Magnússon (2015), “The Continental Shelf Beyond 200 Nautical Miles” Brill Nijhoff.

63) See Annex I, paragraph 5 (a) to the Rules of Procedure of the Commission on the Limits of the Continental Shelf.

64) Judgment of 17 March 2016, p.37, para.114.

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