

Settlement of disputes relating to the delimitation of the outer continental shelf: the role of international courts and arbitral tribunals*

VICENTE MAROTTA RANGEL

I. Introduction

I am indebted to the organizers of this Symposium, Professor Doris König and Professor Rainer Lagoni, for their kind invitation. My thanks are also addressed to Judge L.D.M. Nelson, the President of the Tribunal, for his contribution to some aspects of the matter I am required to explore. This matter – Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Tribunals – follows in a logical sequence other items the Symposium has discussed so far today, in particular those developed by Professor Oude Efferink from the Netherlands Institute for the Law of the Sea. I am also pleased to see as a commentator my distinguished and learned colleague, Judge and Professor Tullio Treves.

2. In the Anglo-Norwegian Fisheries case¹, the International Court of Justice (hereinafter ICJ) argued that “although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to perform it, the validity of the delimitation with regard to other states depends upon international law”. Notwithstanding the relevance of the case to territorial waters, the decision has pertinence with continental shelf delimitation. The Court, in the same case, declared that “it is the land which confers upon the coastal State a right to the waters off its coasts”.²

The 1982 United Nations Convention on the Law of the Sea³ (hereinafter

Convention) brings equally to the fore the importance of the State decision-making power to define which areas are subject to its sovereignty or jurisdiction. The exercise of this competence undergoes stronger restriction in the case of the continental shelf because of the impact of geophysical and geomorphological realities upon this particular delimitation. This exercise also has a multiple dimension because of its impuise to the entitlement of other States, to their own maritime areas and on the international community interest as a whole. For these reasons, the delimitation of the continental shelf requires an international control, both administrative and technological by the Commission on the Limits of the Continental Shelf (hereinafter the Commission), as well as a judicial control (although not satisfactory) by the institutions referred to in the Convention, article 287, §1.

II. Outer continental shelf delimitation

3. Taking into account technical and scientific concepts, “the breadth of the shelf can vary considerably and is usually about 40 nm wide, unless truncated by faults. A shelf is dependent on the type of margin in which it is situated. It can extend seawards beyond 200 nm in a passive margin, whereas in an active or shared margin, shelf width could be as little as 5 nm”⁴. Article 76 refers to “continental shelf” not only as a geomorphological but also as a special legal term, which could apply to the area of the seabed, beyond the territorial sea under the sovereign rights of the coastal State for the purpose of exploiting it and exploring its natural resources. As the continental shelf comprises – according to paragraph 1 of the same article – “the sea-bed and subsoil of the submarine areas” that extend “throughout the natural prolongation of its land territory”, the outer limit may alternate: either 200 nautical miles measured from the territorial sea baselines, where the outer edge of the continental margin does not extend to that distance; or, where this extension exceed it, different criteria in accordance with article 76, paragraphs 4, 5 and 6, of the Convention. Incidentally these paragraphs have been described as combining the “influences of geography, geology, geomorphology and jurisprudence, a *tour de force* of interdisciplinary co-operation”⁵.

4. As it is known, for a continental shelf there are two kinds of delimitation. The first one occurs between States with opposite or adjacent coasts. In this case, according to the Convention, article 83, § 1, the delimitation “shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”. This paragraph was proposed by the President of the Third United Nations Conference on the Law of the Sea (T.T.B. Koo, from Singapore) and could receive the support of all interested States. It contributed to reduce the role of other criteria (equitable

* This article has been already published in *The International Journal of Marine and Coastal Law*, Vol 21, No 3 © Koninklijke Brill NV, 2006.

¹ ICJ Reports, 1951, p. 116.

² *Ibidem*, p. 133.

³ Adopted on 10 December 1982; 1933 UNTS 396.

⁴ N. E. Guy, “The relevance of non-legal technical and scientific concepts in the interpretation and application of the law of the sea”, *International Hydrographic Organization*, November 2000, reprint 2000, p. 96.

⁵ D. M. Johnston, *The Theory and History of Ocean Boundary-Making*, Montreal, McGill-Queen's University Press, 1988, p. 91.

Pierre and Miquelon to be an economic zone under its jurisdiction. After further unsuccessful negotiations, an agreement was signed on 30 March 1989 establishing a Court of Arbitration to proceed with the delimitation of the maritime areas between the two countries. Among the counsels and lawyers of one of the Parties, before his election to this Tribunal, we have the satisfaction to mention Professor Tulio Treves, and welcome comments he eventually intends to make on this case.

On June 10, 1992, the Court settled the dispute on the disagreement over coastlines and continental shelf either opposite or adjacent. After rejecting the proposed solutions of the parties, the Court decided to present its own proposal taking into account two different sections of the maritime area where the delimitation should be effected. On the delimitation of our special concern, the Court did not find it within its competence to comment upon arguments presented by the parties regarding rights to shelf areas beyond 200 nautical miles. Any decision on these areas, in the view of the Court, "would constitute a pronouncement not between the Parties but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed Area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind"⁶. As a matter of fact, "The dictum" – according to Judge L. D. M. Nelson – "was in a sense unnecessary, because of the limits of the mandate" and because, as the Court itself acknowledged, "the geological and geomorphological data in the relevant area" were "not sufficient to permit the application of Article 76"⁷.

III. The coastal state's rights

6. The rights of the coastal State over its continental shelf are not coming into question today. They are independent on the State's participation or not in the Convention. They are clearly expressed in paragraph 1, article 76, which reproduces with no alteration the first negotiating paper of the Conference circulated in 1975, i.e., the Informal Single Negotiating Text.

The interest of the State is evident in defining with accuracy its own territory. The extended legal continental shelf, with boundaries marked as "final and binding", is the major impetus for States to submit the particulars of the outer limit line of the continental shelf to the Commission. The legal uncertainty may hinder the activities to be undertaken in the international seabed area and may raise the question of payments and contributions to the Authority. In addition, until the outer limits are established so that they are final and binding, States with opposite or adjacent coasts are not in a good position to negotiate their joint boundaries in the area beyond 200 miles. Furthermore, they are not able to define in this area their respective interests in relation with third States. For these reasons, the expedient

principles, median or equidistance line, relevant circumstances). "If no agreement can be reached" – adduces § 2 – "within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV".

The second case of delimitation has currently drawn our attention, since the beginning of the colloquium, our attention. It occurs when the coastal State's continental shelf outer limit extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It takes place in relatively few areas; only twenty nine outer continental shelves were identified in 1988, among them twenty-two involving more than one State and only seven just one State⁸. The latter occurrence requires no mention for agreements nor for procedures stipulated in Part XV. The coastal State shall delineate the outer limits "by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude" (art. 76, § 7); and shall submit information on these limits "along with supporting scientific and technical data as soon as possible", to the Commission. The technical data, upholding the coastal State's outer limit "likely to be of a varied and complex nature will probably include bathymetric, acoustic and seismic data", in order to reflect the purpose designed⁹.

5. These two different categories of delimitation can be illustrated by a single case: the arbitration on the overlapping continental shelf claims between Canada and France, in connection with the French islands St. Pierre and Miquelon, in the outer Gulf of St. Lawrence. The chronology of the dispute can be traced back to 1966, when the exchange of views between the French and Canadian governments was prompted by the issuing of hydrocarbon exploration permits in the area.

Whereas for France – on the question of opposite and adjacent delimitation – the principle of equidistance should prevail, Canada maintained that the "special circumstances" rule was applicable to the area. Both Parties had ratified the 1958 Convention on the Continental Shelf, but France made several reservations among which those made to article 6 on the delimitation of continental shelf. They were not accepted by Canada. Since then many rounds of negotiations have been held to settle the dispute. In 1977 both States extend their maritime jurisdictions up to 200 nautical miles from their respective coasts. In February of the same year France declared the zone extending 188 miles beyond the territorial waters of Saint

⁶ V. Prescott, "National rights to hydrocarbon resources", in G. H. Blake and others (eds.), *Boundaries and Energy Problems and Projects*, The Hague, Kluwer, 1986, p. 56, note 88.

⁷ *The Law of the Sea: Delimitation of the Continental Shelf*, United Nations, New York, 1983, p. 28.

⁸ *International Legal Materials*, 1145 (1992), 78.

⁹ "Claims to the continental shelf beyond the 200 mile limit" *Liber Amicorum Günther Jaenicke* – Zum 85. Geburtstag, Springer, pp. 574-575.

length, connecting fixed points, defined by coordinates of latitude and longitude" (article 76, § 7) and submit "particular of such limits" to the Commission "along with supporting scientific and technical data" (Convention, article 76, § 8; Annex II, article 4), probably including bathymetric, acoustic and seismic data, in order to reflect the conditions claimed.

Despite its scientific purposes, the Commission is obliged to deal with issues related to the interpretation and application of the relevant articles of the Convention "to the extent that it is required to carry out the tasks assigned to it" and "to make its own assessment of provisions of whether the interpretation the coastal State has adopted in its submission in accordance with article 76"¹².

8. Each State submission is recorded by the United Nations (hereinafter UN) Secretary-General upon receipt, which shall promptly notify the Commission and the Members of the UN of the receipt of submission. (Commission, Rules of Procedure, Rules 49 and 50). This proceeding preceded the submissions formerly addressed to the Commission. The first submission was made by the Russian Federation on 20 December 2001 and received initial comments from Canada, Denmark, Japan, Norway and the United States. They pointed to the lack of substantiating data that would permit an independent evaluation of the Arctic component of the application.

That submission was followed by that of Brazil on 17 May 2004 and by that of Australia on 15 November 2004. Both received reactions from the United States of America; Australian submission received additional comments from Russian Federation, Japan, East Timor, France, The Netherlands and Germany. On 25 May 2005, the fourth submission was presented by Ireland. This sequence of comments seems to fulfill (at least partially) the demand for transparency, as reasonably required¹³. The Commission shall act by way of subcommittees composed of seven members. The approval to the submission's recommendation shall be by a majority of two thirds of the Commission members present and voting (Annex II to the Convention, articles 5 and 6).

The functions of the Commission comprise: a). to consider the data and other material submitted by coastal States; b). to make recommendations; c). to provide scientific and technical advice, if requested by the coastal State concerned; d). to cooperate with competent international organizations, with a view to exchanging scientific and technical information which might be of assistance in discharging Commission responsibilities (Annex II, article 3).

9. Article 6, § 3, in the same Annex, requires that the Commission's recommendations be reported in writing to the coastal State that made the submission and to the

determination of the outer limits of continental shelf beyond 200 nautical miles is beneficial for all States, and not only for those which possess such a shelf.

Although the rights of the coastal State over its continental shelf are independent of its participation or not in the Convention, it seems that only this participation is determinant to the precise geographical extent of the exercise of these rights. These remarks derive from what has occurred with some submissions presented to the Commission. They have received comments from a non-State Party to the Convention and this fact has occurred, apparently, with general acquiescence, but raises the question whether a non-State Party would be allowed to submit its own request on outer continental shelf delimitation, on the basis of article 76, §§ 8 and 9, as well as of articles 2 and 4 of Annex II to the Convention.

The answer to the question depends on whether these Convention's rules have already acquired the nature of customary rules¹⁴. Twenty-five years ago Professor Tulio Treves tried to respond the question in a more precise context¹⁵. My understanding is that some of these rules keep their original nature, as those related to the Commission's role and jurisdiction.

IV. The commission's recommendation

7. Since our concern deals with the settlement of disputes relating to the outer continental shelf delimitation, we are induced to refer to the Commission's competence and to see whether and how its recommendation would interfere with the role of international courts and arbitral tribunals. May we recall that the Commission is not a jurisdictional but a technological and scientific body, aimed at analyzing the data supporting the coastal State's submission. It is guided by its own Scientific and Technical Guidelines as well as its Rules of Procedure, drafted by the Commission itself and approved by the Meeting of States Parties. The Commission consists "of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties from among their nationals, having due regards to the need to ensure equitable geographical representation, who shall serve in their personal capacities" (Annex II, article 2, § 1).

For obtaining the required recommendation, the interested State is expected to delineate its outer limits "by straight lines not exceeding 60 nautical miles in

¹² Yida John King Gamble, Jr. and Maria Frankowska, "The 1982 Convention and customary law of the sea: observations, a framework, and a warning", *San Diego Law Review*, June 1984, pp. 491-512.

¹³ "La limitation extérieure du plateau continental: évolution récente de la pratique", *Annuaire Français de Droit International*, XXV, 1980, pp. 724-735.

¹⁴ Alex G. Oude Elferink, "The continental shelf beyond 200 nautical miles: the relationship between the CLCS and third party dispute settlement", in *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (S. G. Oude Elferink and D. R. Rothwell, eds), p. 111.

¹⁵ Yida Ron Macnab, "The case for transparency in the delimitation of the outer continental shelf in accordance with UNCLOS article 76", *Ocean Development and International Law*, 35, 2004, pp. 1-17.

V. Settlement of disputes

10. International maritime boundaries are probably the most litigated of any other contemporary international law subject. Early in the last century, on 23 September 1909, one dispute was settled by the Permanent Court of Justice: the *Grisbasdarne* Case between Norway and Sweden. About ten cases have been settled by the ICJ and many others by *ad hoc* tribunals, dealing with territorial seas, contiguous zones, exclusive economic zones or continental shelf delimitation.

Recourse to international settlement of disputes shall at this point be envisaged. They occur ordinarily between States; exceptionally, in relation with entities, such as the International Sea-Bed Authority (hereinafter the Authority), as stipulated in the Convention. Article 187 (c) provides, for instance, that the Sea-Bed Disputes Chamber "shall have jurisdiction" under Part XI and in the respective Annexes, on disputes between a State Party and the Authority concerning "disputes between States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons". In this connection, the Enterprise is another example to give. It is the organ of the Authority "which shall carry out activities in the Area directly pursuant to article 153, paragraph 2 (a), as well as the transporting, processing and marketing of materials recovered from the Area".

A dispute involves a clear opposition between the parties, manifesting itself with a certain intensity. As said by the ICJ, "It must be shown that the claim is positively opposed to the other"¹⁶.

11. A preliminary consideration to be taken into account is that not only the settlement may be international but also the dispute itself and that in both cases subsist the notion and the reality of sovereignty. As it is recently said, "La permanence de la souveraineté, qui garde à travers des principes tels que le consentement et le libre choix des moyens de règlement, continue à y étouffer le progrès du droit."¹⁷ Contemporary international law maintains, with few exceptions, the traditional system which requires specific consent of the parties before any arbitral or judicial tribunals where the settlement of a dispute could be undertaken. "The heart of the problem lies in the attitude of States, which are generally unwilling to refer their disputes with each other to impartial third party adjudication", remarks Sir Arthur Watts to add that "States remain stubbornly attached to what they see as their sovereignty, and consequently highly resistant to any third party "interference" with their exercise of it"¹⁸. The concept of sovereignty squares itself with the contemporary relations among States and reflects on the international system of disputes – as it is often remarked – on the law of the sea, and particularly on territorial and maritime delimitations; in cases related to the jurisdiction of an international tribunal or court of arbitration the concurrent will of the parties is decisive.

UN Secretary-General. "In the case of disagreement by the coastal State with the recommendations of the Commission" – adduces Annex II, article 8 – "the coastal State shall, within a reasonable time, make a revised or new submission to the Commission". In making its recommendations with a coastal State's agreement, or even at a later stage, after a State's disagreement, the Commission's function is over.

The outer limits of the shelf established by a coastal State on the basis of the Commission's recommendation shall be "final and binding" (Convention, article 76, § 8). Each of these terms has a separate meaning. "The reference to final entails that the outer limit line shall no longer be subject to change but becomes permanently fixed. The reference to binding implies an obligation to accept the outer limit line concerned"¹⁴.

Formalities subsequent to the Commission's recommendation are incumbent upon the coastal State. Article 76, § 9, of the Convention provides: "The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto". Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted for such outer limit line or lines of delimitation (article 84, § 1). Otherwise, "The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the UN and, in the case of those showing the outer limit lines of the continental shelf, with the Secretary-General of the Authority" (*ibidem*, § 2). Therefore it seems reasonable to conclude that the final formalities on the outer continental shelf delimitation comprise two stages: before the UN Secretary-General; and before the Secretary-General of the Authority, that is to say the organization through which Parties shall, in accordance with Part XI, "organize and control activities in the Area. As it is known, Area and its resources are the "common heritage of mankind" (Convention, articles 136 and 157).

As the Commission's duty is to make "recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf" it "may request this State "to cooperate with it in order not to prejudice matters relating to the delimitation of boundaries between opposite or adjacent States"¹⁵.

Let us underline that between the Commission and the coastal State there may be some disagreement but never dispute, the concept and definition of which we are going to consider next.

¹⁴ "Legal issues to the outer continental shelf", IJA Report, Berlin Conference 2004, p. 36.

¹⁵ Rules of Procedure of the Commission, 2 July 2004, Annex 1, § 6.

¹⁶ ICJ Reports, 1962, p. 328.

¹⁷ Robert Kolb, "Note sur certaines caractéristiques du différend international", *The Global Community Yearbook of International Law and Jurisprudence* 2004, 4 (1), p. 227.

12. According to the Convention (article 279), States Parties shall settle any dispute between them "by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter", that is to say: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". Rules on settlement of disputes are located in the Statute of the ICJ (Chapters II, III and IV), in the Rules of ICJ (Part III and IV) as well as in Part XV, Part XI Section 5, and Annex V, VI, VII and VIII to the Convention. The dispute settlement system is an integral part of the Montego Bay Convention instead of an optional protocol. The structure of its Part XV divides the dispute settlement procedures into three sections. Section 1 offers States a wide range of non-compulsory procedures; section 2 refers to compulsory procedures entailing binding decisions; section 3 deals with limitations and exceptions to applicability of section 2. As regards the exploration and exploitation of the international sea-bed area, the settlement of disputes system is expressed in Part V, section 5, as well as in Annex VI to the Convention, articles 35 to 40.

VI. The role of international courts and arbitral tribunals

13. Disputes shall be submitted to international courts or arbitral tribunals having jurisdiction to make a decision towards them. As jurisdiction "is a magical and protean term", "with confusing spread of meanings",¹⁹ the word requires precise concept and legal support. With a narrower concept than "competence", "jurisdiction" relates "to the capacity" of tribunals "to decide a concrete case with binding force".²⁰ So article 59 of the ICJ Statute reads: "The decision of the Court has binding force between the parties in that particular case".

Let us look now at the role of international courts and arbitral tribunals on the delimitation of the outer continental shelf. A State may choose, by written declaration, one or more of these means. They are mentioned in the Convention, article 287, § 1: "a). The International Tribunal of the Law of the Sea; b). The International Court of Justice; c). an arbitral tribunal constituted in accordance with Annex VII; d). a special arbitral tribunal constituted in accord with Annex VIII for one or more of the categories of disputes specified therein". They "shall have jurisdiction over any dispute concerning the interpretation or application of

¹⁹ "Enhancing the effectiveness of procedures of international settlement dispute", *Max Planck UNYB*, 5 (2001), p.23.
²⁰ *Encyclopedia of the American Constitution*, McMillan Publishing Company, 1968.

²¹ Shabtai Rosenne, *The Law and Practice of the International Court*, Leyden, A. Sijhoff, 1961, vol. 1, p. 302.
²² For a more complete list of these conventions, vide Hugo Caminos, "The jurisdiction of the International Tribunal for the Law of the Sea: an overview", in *Oceans Policy* (edited by Myron H. Nordquist and John Norton Moore), Martinus Nijhoff Publishers, 1999, pp. 99-100; and *Yearbook 2002*, International Tribunal for the Law of the Sea, volume 6, pp. 125-131.

an international agreement related to the purposes of the Convention, which is submitted to them in accordance with the agreement" (article 288, §§ 1 and 2). The reference to the International Tribunal for the Law of the Sea (hereinafter ITLOS) includes the Sea-Bed Disputes Chamber established in accordance with the Convention, Annex VI. This Chamber and "any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith" (art. 288, § 3). "If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitrations in accordance with Annex VII, unless the parties otherwise agree" (article 287, §5).

Article 287 reproduces the so-called "Montreux compromise". It represents virtually an absolute compromise, giving States a choice of all the various forums for compulsory procedures. The flexibility therein maintained is intended to lead to a wider acceptance of the system as a whole and is inspired by one discernible and legitimate goal: disputes shall be settled by peaceful means chosen by the parties, including compulsory procedures entailing binding decisions. This relevant purpose explains the repercussion of the Montreux compromise on some current international agreements such as those related to compliance with international conservation and management measures for fishing vessels on the high seas (Rome, 1.993, FAO Conference).²¹

14. The Convention entitles articles 287 and 288 "Choice of procedure" and "Jurisdiction" respectively. The word jurisdiction is taken here in its strict sense; not as a power or authority in general, but as the power of declaring and administering justice. According to article 288, "A court or a tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance" with Part XV (paragraph 1). This court or tribunal "shall also have jurisdiction over dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it, in accordance with the agreement" (paragraph 2). An example in this regard is the Agreement on The Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 10 December 1982, which contains in article 30 a clause giving jurisdiction for its interpretation and application to the procedures provided for in the Convention. Paragraph 3, of the same article (288) adds that the "Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith." In continuation, article 288 prescribes in paragraph 4, that "In the event

of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". In other words, the court or the tribunal have the so-called "competence of the competence".

15. Either the ICJ or the ITLOS have not only contentious jurisdiction but also advisory jurisdiction. On the contentious jurisdiction, the ICJ Statute asserts that "Only States may be parties in cases before the Court". Annex V to the ITLOS Convention provides in article 20 that: "1. The Tribunal shall be open to the States Parties. 2. The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case" (vide also Convention, article 1, § 2). Part XI of the Convention deals with the jurisdiction of the Sea-Bed Disputes Chamber in article 187, regarding as parties the Authority, the Enterprise, State enterprises and natural or juridical persons.

On the advisory jurisdiction, the UN Charter provides in article 96: "1. The General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities". Otherwise, according to the Convention, only the Sea-Bed Disputes Chamber is authorized to give advisory opinions, "at the request of the Assembly or the Council on legal questions arising within the scope of their activities" (article 191). The Assembly and the Council are (along with the Secretariat) "the principal organs of the Authority" (article 158).

16. Despite the acknowledged merits of the Convention on its outer shelf delimitation rules, some criticism is still addressed to it. A small part of this criticism is expressed notwithstanding the agreement rules. In an authorized publication it is written for instance that in "complex (constricted) geographical situation involving three or more States which consider themselves entitled to the same area of the outer shelf, the overall situation, however, may be hard to embrace and assess particularly in terms of delimitation". After analysis of five examples, it is written that in hypothetical geographical setting in which they are supposed to be representative of the majority of enclaves of the outer shelf around the world, "the

²¹ Jørgen Lijie Jensen and Milan Thamsborg, "The role of natural prolongation in relation to shelf delimitation beyond 200 nautical miles", *Nordic Journal of International Law* 64, 1995, pp. 631-632.

²² Symeon Karagiannis, "Observations sur la Commission des Limites du Plateau", *Espaces et Ressources Maritimes*, 1994, n. 8, p. 194.

²³ Document CLCS/40, which embodies amendments and additions adopted by the Commission as at 30 April 2004.

idea of a scientific approach to the interpretation of neutral prolongation must be rejected"²². It has also been alleged that over the conventional rules the following purpose has prevailed: the quick delimitation of the Area, because of the urgent need for the exploration of its resources. In the words of another author: "Ce qui prévaut, dans la logique de la Convention de Montego Bay, est le règlement rapide des difficultés concernant les frontières de la Zone pour que l'exploitation des ressources de celle-ci puisse commencer promptement après l'entrée en vigueur de la Convention"²³.

VII. Specific issues

17. Let us envisage some specific issues on the role of international courts and tribunals on the outer continental shelf delimitation. Annex II to the Convention provides in article 9 that "The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts". Rule 46 of the Procedure of the Commission²⁴ adduces: "1. In case there is a dispute on the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be and shall be considered in accordance with Annex I to these Rules. 2. The actions of the Commission shall not prejudice matters relating to the delimitation between States". Annex I provides that the Commission shall be informed of such disputes by the submitting State and asserts in its § 5 the following: "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 submission in the areas under dispute with prior consent given by all States that are parties to such a dispute. (b). The submissions made before the Commission thereon shall not prejudice the position of States that are parties to a land or maritime dispute". Therefore, although the Commission is not qualified to take any final decision on disputes between coastal States, it plays an important role: that of promoting either the identification or the final settlement of these disputes.

18. The Convention provides a legal basis for courts and tribunals jurisdiction. Though the direct interest towards the outer shelf delimitation is apparently restricted to the coastal State and to the Area, third States are not far from having interest on this issue, since they are entitled, under the conditions laid down by the Convention (article 87), to some freedoms such as laying submarine cables and pipelines or constructing artificial islands and other installations in the high seas. The exercise of these rights is allowed until a precise date, however: that of the final and binding outer shelf delimitation.

21. As I have myself expressed, it is deployed "que la Convention n'est pas accordé à l'Autorité (des fonds marins) le pouvoir de négocier avec l'État côtier leurs frontières communes"²⁷. This remark involves an important issue related to the role of the Authority in the process of delimitation. Although regrettable, the truth is that the Authority "is given no right of participation whatsoever in the process of determining the outer limit of the continental shelf, even though such limits are the bounds of the part of the sea-bed over which the Authority will exercise its jurisdiction on behalf of mankind"²⁸. It "does not seem to have any right to state its view regard to the information submitted by the coastal States to the Commission in conformity with Annex II, Article 3, paragraph 1 (a), concerning the outer limits of the shelf, and even less right to challenge the recommendation of the Commission or the decisions of the coastal States based on those recommendations"²⁹.

22. The Authority – as well as the Commission – does not have *locus standi* before the settlement of dispute rules under Part XV of the Convention. "The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in the Convention" (article 291, §2).

However, Part XI of the Convention refers specifically to the Authority. Article 187 provides that "The Sea-Bed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: ... b). disputes between a State Party and the Authority concerning: (i). acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith". The jurisdiction of the Sea-Bed Disputes Chamber on a dispute relating to the outer continental shelf delimitation would depend on two conditions: a). the dispute should deal with "activities in the Area"; b). it should imply in "acts or omissions of the Authority" or in those of the opposite State Party, alleged to be in violation of Part XI "or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith" (emphasis added).

Part XI refers also to the Sea-Bed Disputes Chamber's advisory jurisdiction in article 191. Under this article, the Chamber "shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities". They are organs of the Authority (article 158) and the legal basis for their request to advisory opinions does not seem sufficiently sound for raising complex questions as those related to continental shelf delimitation.

23. One function, albeit restricted, is conferred by the Convention to the Authority, or more precisely, to its Secretary-General. As already indicated, article 84, § 2,

However, even after this date, third States should be interested in challenging the legality of State A's outer limit. Let us suppose that this State has established its outer limit contrary to the Commission's recommendation. Does State B have the right to take judicial proceedings against State A? Any court or tribunal referred to in the Convention, article 287, should have jurisdiction over this dispute. However, as E.D. Brown explains, "It would of course be necessary for State B to demonstrate a legal interest in the location of State A's limit. Even then, it should be recognized that the absence of specific provision for the settlement of such disputes was by no means accidental and there are many States which would decline to accept that they were bound by a third-party decision on this question"³⁵.

19. Another legal basis that would provide for a judicial control over the Commission's recommendation follows "from the fact that the Commission is bound to make recommendations in accordance with article 76" of the Convention. "In other words, article 76 forms frame of coherence which cannot be altered at the discretion of the Commission"³⁶.

20. Censorious remarks are sometimes directed to the rules and procedures on continental shelf delimitation due to the fact that they are restricted to the submitting States and to the Commission.

In order to confine or avoid this criticism, it is possible to refer to *argumentandum* to Annex VI, article 20, to the Convention. As it is known, after declaring that the ITLOS "shall be open to States Parties" (paragraph 1), this article asserts that the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" (paragraph 2). As any provision in Part XI confers jurisdiction to the Commission to accede the Tribunal, the alternative of an agreement between the Commission and the discontent coastal State for this purpose could be considered. It shall be discarded, however, because this hypothetical agreement would go against the Commission's very nature and *raison d'être*.

²⁴ Sea-Bed Energy and Minerals: the International Legal Regime, vol. 2, Sea-Bed Mining, Martinus Nijhoff Publishers, 2001, p. 374.

²⁵ Alex G. Ouds Eferink, *op. cit.*, note 12, p. 170.

²⁶ "Le plateau continental dans la Convention de 1982 sur le droit de la mer", *Collected Courses, A.D.I.*, 1-985-V, vol. 194, p. 364. Vide also Mamoru Toga, "Boundary of continental shelf and deep sea-bed from the aspects of their regimes", *The Frontiers of the Seas. The Problem of Delimitation*, Tokyo, the Ocean Association of Japan, 1980, pp. 25-26.

²⁷ E.H. Paolillo, "Arrangements for the international sea-bed", *Collected Courses, A.D.I.*, 1986, vol. 188, p. 190.

²⁸ *Ibidem*.

asserts that the coastal State "shall give due publicity to charts of a scale adequate for ascertaining the position of the outer limits of the continental shelf or lists of geographical coordinates of points, specifying the geodetic dictum" with the Secretary-General of the UN, "and in the case of those showing the outer limit lines of the continental shelf, with the Secretary-General of the Authority".

Why "with the Secretary-General of the Authority?" "Because, as it is known", answers E.D. Brown, "the Authority, as the representative of mankind as a whole" in whom "all rights in the resources of the Area are vested" (Convention, art. 137 (2) "has a legal interest in the boundary between the areas within the limits of national jurisdiction and the Area beyond"³⁰.

Nevertheless, in spite of this legal interest, it is less clear, according to the same author, "how the Authority could challenge any boundary line. Like third States, it would apparently be bound to accept any limit established by the coastal State on the basis of recommendations of the Commission on the Limits of the Continental Shelf. Even if the limits were established unilaterally and contrary to these recommendations, it is less than certain that there is any forum with compulsory jurisdiction over such a dispute between the coastal State and the Authority. Since the Authority does not in general have access to the range of procedures established in Part XV, it would probably have to rely on Article 187 (b) (i) to found the jurisdiction of the Sea-Bed Disputes Chamber. The argument would be that State A, by extending the limits of its continental shelf to include a part of the area considered by the Authority to form part of the Area, had acted in violation of Part XI"³¹.

VIII. Concluding remarks

24. The Convention has assigned to the Commission the responsibility to establish the delimitation of the coastal State's outer continental shelf. The delimitation procedure is intended to be a technical task entrusted to a scientific body composed by experts in the field of geology, geophysics and hydrography. The recommendations of the Commission shall be addressed to the interested coastal State and the limits established on the basis of these recommendations shall be final and binding.

25. With reference to legal rules, there is no doubt that many of them, dealing with the continental shelf, were or became customary. A few of them remain conventional because of their nature and multilateral implications, as for example those related

to the access of non States Parties to the procedures on the delimitation of their own continental shelf.

26. Legal lacunas occur on the delimitation proceedings. The Commission, intended to be an independent body, composed of highly qualified scientists but not of legal experts, has no *locus standi* before any judicial and arbitral courts.

27. According to the Convention, the Commission intends to accomplish its task without involvement with territorial or maritime disputes between or among States.

Its role can be accomplished since these disputes are settled beforehand. Therefore the Commission concurs indirectly to the improvement of tribunals' and courts' duties and performance.

28. Before and even in the course of a coastal State delimitation procedure, disputes with other States can occur and be settled regardless of this particular procedure, as those related to freedom of the high seas, laid down in the Convention, article 87.

29. Judicial and arbitral control are admissible even after the Commission's recommendation, taking into account that the Commission is bound by article 76 and Annex II to the Convention.

30. The Authority has no *locus standi* before the settlement of disputes rules under Part XV of the Convention.

Under Part XI it would be able to accede to the Sea-Bed Disputes Chamber, to its contentious and advisory jurisdiction, since some conditions specified in the Convention, articles 187 (b) (i) and 191, are effectively met.

31. Lacunas and shortcomings, as above mentioned, demanded revision and correction. As amendment to the Convention requires the accomplishment of very complex proceedings, some institutions are in conditions to give a contribution to the improvement of the rules on the delimitation of the outer continental shelf. Among these institutions the Meeting of States Parties should be included.

³⁰ Sea-Bed Energy and Minerals: the International Legal Regime, vol.2, Sea-Bed Mining, Martinus Nijhoff Publishers, 2001, p.374.

³¹ *Ibidem*.

Outras obras produzidas pelo Centro de Direito Internacional – CEDIN

1. Coleção Para Entender

Leonardo Nemer Caldeira Brant – Coordenador.
Editora Del Rey, Belo Horizonte, 2006.

– Para Entender a Organização das Nações Unidas

Jorge Mascarenhas Lasmar e Guilherme Stolle Paixão e Casarões.
Editora Del Rey, Belo Horizonte, 2006.

– Para Entender a Proteção Internacional dos Direitos Humanos

Fabiana de Oliveira Godinho. Editora Del Rey, Belo Horizonte, 2006.

– Para Entender o Direito Internacional Humanitário

Leonardo Estrela Borges. Editora Del Rey, Belo Horizonte, 2006.

– Para Entender o Tribunal Penal Internacional

Renata Mantovani de Lima e Marina Martins da Costa Brina.
Editora Del Rey, Belo Horizonte, 2006.

– Para Entender o Direito do Comércio Internacional

Welfer Barral. Editora Del Rey, Belo Horizonte, 2007.

– Para Entender o Direito da Integração Regional

Cynthia Soares Carneiro. Editora Del Rey, Belo Horizonte, 2007.

– Para Entender o Direito das Relações Diplomáticas

Vincenzo Rocco Sicari. Editora Del Rey, Belo Horizonte, 2007.

– Para Entender o Fundo Monetário Internacional - FMI

Leonardo Andrade Macedo. Editora Del Rey, Belo Horizonte, 2007.

2. A Corte Internacional de Justiça e a Construção do Direito Internacional

Leonardo Nemer Caldeira Brant. Editora CEDIN.

3. O Brasil e os Novos Desafios do Direito Internacional

Leonardo Nemer Caldeira Brant – Coordenador.
Editora Forense, Rio de Janeiro.

4. L'Autorité de la Chose Jugée en Droit International Public

Leonardo Nemer Caldeira Brant. Editora L.G.D.J., Paris.

5. Direito e Terrorismo – Os Impactos do Terrorismo na Comunidade

Leonardo Nemer Caldeira Brant – Coordenador.
Editora Forense, Rio de Janeiro.

6. A Autoridade da Coisa Julgada no Direito Internacional Público

Leonardo Nemer Caldeira Brant. Editora Forense, Rio de Janeiro.

7. I Anuário Brasileiro de Direito Internacional

Coordenador: *Leonardo Nemer Caldeira Brant*. – v.1, n.1, 2006 – Belo Horizonte:

CEDIN, 2006.

SUMÁRIO

- 10 *Cours Général: le Droit International entre souveraineté et communauté internationale*
ALAIN PELLET
- 76 *UCP 600 – A nova publicação da Câmara de Comércio Internacional sobre créditos documentários*
ANDRÉ RENNÓ LIMA GUIMARÃES DE ANDRADE
- 94 *O princípio do ne bis in idem no direito penal internacional*
CARLOS EDEARDO ADRIANO JAPIASSÚ
- 114 *Brasil e o Sistema Interamericano de Proteção dos Direitos Humanos: impacto, desafios e perspectivas*
FLÁVIA PIOVESAN
- 132 *O processo de revisão da sentença perante a Corte Internacional de Justiça à luz de suas últimas decisões (Jugoslávia vs. Bósnia e El Salvador vs. Honduras)*
LEONARDO NEMER CALDEIRA BRANT
- 152 *A Comissão e a Corte Africana de Direitos Humanos e dos Povos*
LUCIANA DINIZ DURÃES FERREIRA
MARINANA ANDRADE E BARROS
- 166 *L'espace de liberté, de sécurité et de justice européen: deux exemples de discussion des législations*
MARIE ROTA
VINCENT SOUBY
- 204 *A criação do Tribunal Permanente de Revisão e seu papel na consolidação do sistema de revisão e interpretação das normas do Mercosul*
NADIA DE ARAUJO
- 216 *As relações do Brasil com os países do Oriente Médio*
RODRIGO DO AMARAL SOUZA
- 232 *Settlement of disputes relating to the delimitation of the outer continental shelf: the role of international courts and arbitral tribunals*
VICENTE MAROTTA RANGEL



CEDIN
CENTRO
DE ESTUDO
DE DIREITO
INTERNACIONAL



FUNAG
FUNDAÇÃO
ALEXANDRE
DE GUSMÃO



Konrad
Adenauer
Stiftung



Programa ético de atuação para advogados