

SEPARATE OPINION OF JUDGE HIGGINS

Discretionary power of the Court concerning sequence in which it settles issues before it — Sufficiently precise character of a dispute — Whether existence of a dispute under Article 38 of the Statute — Court's powers proprio motu regarding objections to jurisdiction.

As is recalled in the first paragraph of the Court's Judgment, Cameroon on 29 March 1994 instituted proceedings against Nigeria in respect of a dispute "relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula". Cameroon recalled in its Application that the delimitation of its maritime boundary with Nigeria had been partial and the two Parties had been unable to complete it. It accordingly requested the Court, "in order to avoid further incidents between the two countries, . . . to determine the course of the maritime boundary between the two States beyond the line fixed in 1975".

Nigeria, in its seventh preliminary objection, stated:

"There is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court, for the following reasons:

- (1) no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula;
- (2) at the juncture where there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'."

In its written pleadings Nigeria advanced certain arguments to support this preliminary objection. These were further developed and elaborated in oral argument before the Court. As the Court recounts at paragraphs 104 to 108 of its Judgment, Nigeria contended that as determination of title to the Bakassi Peninsula must precede a delimitation of the maritime boundary, a claim as to the latter was inadmissible. Nigeria also stated that there had been no negotiations on any delimitation beyond the point identified as "G" in Cameroon's proposed maritime frontier line.

The Court recalls Cameroon's responses to these points at paragraph 105 and it has rendered its judgment on them at paragraphs 106 to

110. I am essentially in agreement with what it says in paragraphs 106 to 109 but not in paragraph 110.

There is an aspect related to the first limb of Nigeria's objection which seems to me important. I refer to the question of whether there is, in fact and in law, a dispute relating to the maritime zones of Cameroon and Nigeria out to the limit of their respective jurisdictions. Nigeria, in its written and oral pleadings on its seventh preliminary objection, has focused on the alleged absence of relevant negotiations. It contends that as a matter of general international law and by virtue of Articles 74 and 83 of the United Nations Convention on the Law of the Sea, a State must negotiate its maritime boundary and not impose it unilaterally and that the Court thus lacks jurisdiction and/or the claim on maritime delimitation is inadmissible. But it may be that the real relevance of the issue of negotiation lies rather in providing an indication as to whether a dispute exists at all over this matter. This, rather than whether negotiation is a "free standing" pre-condition for bringing a claim on a maritime boundary, seems to me the real issue.

In its Application Cameroon states its purpose in seeking the maritime delimitation as the avoidance of further incidents. The Court has not been informed of any maritime "incidents" beyond the territorial seas. Further, paragraph 20 (*f*) of its original Application, is in the following terms:

"In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions." (Emphasis added.)

Whose fault it was that no agreement had been reached beyond point G, and whether the record shows that it was because of Nigeria's change of position on the Maroua Declaration or because both sides accepted that delimitation beyond G should be on a multilateral basis in order to take account of the interest of other States in the region, is in a sense beside the point. These matters, which assume a certain importance if the key issue is whether there is a duty to negotiate before bringing a maritime delimitation claim (and if so, whether this is a preliminary or substantive matter), become less pertinent if the real preliminary issue is whether a dispute exists between the parties as to the maritime boundary out to the limit of their respective jurisdictions.

An initial question that I have carefully considered is as to whether it is appropriate to be concerned about this issue at all, given that Nigeria has not chosen to advance the point in these terms. Although the Court

always may raise points of law *proprio motu*, it is in principle for a respondent State to decide what points of jurisdiction and inadmissibility it wishes to advance. If a State is willing to accept the Court's jurisdiction in regard to a matter, it is generally not for the Court — its entitlement to raise points *proprio motu* notwithstanding — to raise further jurisdictional objections. However, I think that an exception to this principle exists where the matter relates to the requirements of Article 38 of the Statute. Article 38 is not a clause to be accepted or waived by respondents at will. It prescribes the fundamental conditions for the Court to be able to exercise its jurisdiction. And it is there that the Court's function is described as "to decide in accordance with international law such disputes as are submitted to it".

The Court must always therefore itself be satisfied that a dispute exists. The Court has recalled, when pronouncing upon Nigeria's fifth preliminary objection, the various legal requirements elaborated in its case-law on the question of the existence of a dispute (see Judgment, paras. 87-89, above). It is not necessary to repeat them here. But in my view these legal requirements should have been systematically tested in relation to the seventh preliminary objection and not just in relation to the fifth.

The record shows that it was intended by the Parties that their entire maritime frontier should be delimited. There were some discussions about the totality of such a frontier, even going beyond what came to be agreed up to point G. At the same time, the specific line that was negotiated and agreed upon, in 1975, was the line to point G. Nigeria has informed the Court, and Cameroon has not denied, that "the very first time Nigeria saw [Cameroon's claim] line, or indeed any Cameroon continental shelf or EEZ claim line, was when it received the Cameroon Memorial" (CR 98/2, p. 40).

Nigeria resiled from the Maroua Declaration and the record shows that meetings held at the Joint Expert level were understandably pre-occupied with the legal status of that Declaration. The information provided to the Court also shows that there had been an intention that progress beyond point G should be on a multilateral basis, given the proximity, in particular, of Equatorial Guinea beyond that point. Possible ways to engage Equatorial Guinea in discussions had been canvassed.

It matters not whether the failure to reach agreement beyond point G was due primarily to the dispute over the status of the Maroua Declaration; or difficulties in engaging the interest of Equatorial Guinea in the delimitation; or what Cameroon terms the invasion of the Bakassi Peninsula by Nigeria in December 1993. Nor is it legally pertinent that the Parties entered into negotiations with a view to regulating the whole of the boundary, or even that there were some discussions about the frontier beyond point G. These elements are indeed relevant to the issue as

formulated by the Parties — namely, whether there is an obligation to negotiate before bringing a maritime boundary claim to the Court, and if so, if that is a procedural or substantive matter, and if the former, to whom fault may be attributed and whether there are circumstances in which negotiations became impossible and thus legally unnecessary.

But whether there exists a dispute or not is a different question and is “a matter for objective determination” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). Quite different elements from those the Parties have debated apply. There has to be a “claim of one party [that] is positively opposed by the other” (*South West Africa cases, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). It is not sufficient for this purpose to say that as the Bakassi Peninsula is disputed, it necessarily follows that the maritime boundary is in dispute. And, in contrast to the position with regard to the land boundary, there is (beyond point G) no existing treaty line which constitutes the claim of one Party and which the other Party — even by implication — appears not to accept. No specific claim line beyond point G had, before the institution of these proceedings, been advanced by Cameroon and rejected by Nigeria.

The fact that Nigeria and Cameroon have not been able to have detailed negotiations, still less agreement, beyond point G does not mean that there exists a dispute over H to K. Indeed, Nigeria has offered no opinion on where the line should run after point G.

What the Court will decide on the merits as to title over the Bakassi Peninsula will inevitably have implications for the drawing of the maritime boundary out to the limits of the jurisdiction of the two States. This is so whether the decision would favour Cameroon or Nigeria. The Court has no way to know whether any specific line that might, as a consequence, be proposed by one Party would be accepted or rejected by the other. The point is not that a maritime boundary cannot be drawn before the territorial title to Bakassi is determined and, as Nigeria contends, a request to the Court to determine the line must be rejected as inadmissible. As the Court correctly says, the handling of the territorial and maritime elements would be within its own discretion and cannot be the basis of a preliminary objection (Judgment, para. 106). The point rather is that the claim as formulated in Cameroon’s Application at paragraph 20 (*f*) is unattached to a defined dispute and thus also lacks a certain reality.

Nor can it be the case that where there is jurisdiction over a territorial dispute, and the parties have in consequence (and perhaps also for other reasons) not been able to agree a maritime boundary, there is *ipso facto* and without need to show anything more, a dispute over the entirety of their maritime boundary to the limits permitted under international law. Such a contention — had it been formulated this way — would both have been inconsistent with the Court's jurisprudence on the concept of a dispute for purposes of Article 38 of the Statute, and have disturbing policy implications.

It is because paragraph 110 has not satisfied me on this matter, and notwithstanding my agreement with the rest of what the Judgment has to say on Nigeria's seventh preliminary objection, that I have had to vote against paragraph 1 (*g*) of the *dispositif*.

As I believe the Court presently has no jurisdiction over the question of maritime delimitation beyond point G, Nigeria's eighth preliminary objection thus becomes without purpose and falls away, and the Court's response to it too. It is for that reason, and that reason only, that I have voted against paragraph 2 of the *dispositif*. My views on the seventh preliminary objection have certain consequences for the eighth. But I do not otherwise disagree with what the Court has to say at paragraphs 115 to 117.

(Signed) Rosalyn HIGGINS.