

DECLARATION OF JUDGE GAJA

Under “the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS [which] forms part of customary international law” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 666, para. 118), a coastal State’s entitlement to an extended continental shelf does not depend on an assessment by the Commission on the Limits of the Continental Shelf (CLCS). Thus, the basis of a claim concerning the delimitation of an extended continental shelf does not change because of a submission to the CLCS in respect of that shelf. However, with regard to the outer limits, one would conceivably face a situation that is new in relation to that existing before the submission once the CLCS made a recommendation for “the establishment of the outer limits of [the] continental shelf” under Article 76, paragraph 8, of UNCLOS and the coastal State acted upon it.

It is understandable that, when making recommendations on the establishment of the outer limits of the continental shelf, the CLCS has so far refrained from examining submissions concerning areas under dispute in the absence of “prior consent given by all States that are parties to such a dispute” (Art. 5 (a) of Ann. I to the Rules of Procedure adopted by the CLCS).

There may be cases where a delimitation involving an extended continental shelf could be effected without difficulty by the Court or an international tribunal pending the delineation of the outer limits of the continental shelf. One such case arguably concerned the delimitation between Bangladesh and Myanmar, where the International Tribunal for the Law of the Sea (ITLOS) found that it could make the delimitation by tracing a line with an arrow (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS, paras. 505 and 506 (6)). However, in most instances the delineation of the outer limits should come first, because it would otherwise be difficult to pursue the “equitable solution” required by Article 83 of UNCLOS. It would therefore be appropriate for the CLCS to modify its Rules of Procedure and consider submissions also when the delimitation is under dispute, an option left open by the Court (Judgment, para. 113). In any event, under Article 76, paragraph 10, of UNCLOS, the CLCS, when making recommendations on the establishment of the outer limits of the continental shelf, does so “without prejudice to the question of the delimitation of the

continental shelf between States with opposite or adjacent coasts” (see also Art. 9 of Ann. II to UNCLOS), and therefore irrespective of the existence of a dispute on delimitation.

(Signed) Giorgio GAJA.
