Opposite or adjacent – does it make a difference? Delimiting the continental shelf beyond 200 nm

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Case commented on: ITLOS Special Chamber, Judgment in Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, 23 September 2017.

In Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) was requested to delimit all maritime areas appertaining to Ghana and Côte d’Ivoire in the Atlantic Ocean, including the continental shelf beyond 200 nm. This is the first time an international court or tribunal has delimited the continental shelf beyond 200 nm where one of the parties to the dispute had received recommendations concerning the location of the outer limit of its continental shelf from the Commission on the Limits of the Continental shelf (CLCS). This makes the case particularly interesting for the purpose of clarifying procedural issues and the relationship between the CLCS, its recommendations, and international courts and tribunals.

A previous post by Nigel Bankes provides a general commentary on the Judgment of the Special Chamber.

The purpose of this post is to take a closer look at the parts of the Judgment dealing with the outer continental shelf delimitation, and discuss both procedural and substantive issues. Did the Special Chamber act in accordance with previous judicial practice, contributing to establishing a predictable and consistent practice? Further, the blogpost looks ahead to future delimitation cases, and considers whether the delimitation methodology applied by courts and tribunals in delimitation disputes between adjacent States should also be applied in delimitations between opposite States. The post uses the upcoming delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nm from the Nicaraguan coast as an example.

Jurisdiction of the Special Chamber

Ghana and Côte d’Ivoire agreed that the Special Chamber had jurisdiction to delimit the continental shelf beyond 200 nm, up to the outer limit of the continental shelf. Both parties share the position that the respective roles of the CLCS and the Special Chamber are not conflicting and the one does not constrain the other in exercising their functions. The Special Chamber still had to decide on its jurisdiction proprio motu, and whether the submissions of the parties concerning the continental shelf beyond 200 nm were admissible (at para. 489).

In accordance with international judicial practice (see Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them, at para. 213; Bangladesh/Myanmar, para. 362) the Special Chamber emphasized that in law there is only a single continental shelf, rather than an inner continental shelf and a separate outer continental shelf. Upon this basis, the Special Chamber found that it had jurisdiction to delimit the shelf beyond 200 nm, but only if such a continental shelf existed (at para. 491). The Special Chamber found that “[t]here is no doubt about this in the case before the Special Chamber. Ghana has already completed the procedure before the CLCS. Côte d’Ivoire has made its submission to the CLCS and, although as yet the latter has not issued any recommendation, the Special Chamber has no doubt that a continental shelf beyond 200 nm exists for Côte d’Ivoire since its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist.” (para. 491).

Admissibility of the case
Although having jurisdiction to delimit the continental shelf beyond 200 nm, the Special Chamber, similar to the ITLOS in *Bangladesh/Myanmar* (at para. 369), raised the question if exercising such jurisdiction would interfere with the competence of the CLCS, or if it should await the Commission’s recommendations on the submission by Côte d’Ivoire (at para. 492). The Special Chamber asserted that the fact that Côte d’Ivoire had not received recommendations from the CLCS did not affect the admissibility of the case, as the CLCS and the Special Chamber possess different functions, recalling from *Bangladesh/Myanmar* that:

> [T]here is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to the delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention. (*Bangladesh/Myanmar*, at para. 378)

In cases subsequent to *Bangladesh/Myanmar* where the question of delimitation of the continental shelf beyond 200 nm has been raised, the courts and tribunals have reached a common understanding that there is no requirement that the CLCS should have reviewed the submission and issued its recommendations in accordance with Article 76(8) before a court or tribunal can undertake the delimitation of the continental shelf beyond 200 nm (see *Bangladesh/Myanmar* at para. 373; *Bangladesh v. India* at para. 457-458; *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles*, at para. 105-106).

In accordance with judicial practice, the Special Chamber in *Ghana/Côte d’Ivoire* found that its delimitation of the continental shelf beyond 200 nm would not interfere with the functions of the CLCS. On this basis, the Special Chamber concluded that it had jurisdiction to decide on the delimitation, and that the parties’ relevant submissions were admissible (at para. 494).

**Entitlement to the continental shelf beyond 200 nm as prerequisite for delimitation**

Although earlier jurisprudence indicated that international courts or tribunals should not delimit the continental shelf unless the CLCS had decided on the entitlement of the parties to such shelf (see for example the decision of the International Court of Justice in *Nicaragua v. Honduras* at para. 319), recent jurisprudence demonstrates that the court or tribunal may undertake an assessment of entitlement, without encroaching on the functions of the CLCS, as delimitation and delineation are two different processes, the one without prejudice for the other. Similar to the Bay of Bengal cases, both parties in *Ghana/Côte d’Ivoire* had made submissions to the CLCS, serving as evidence of entitlement to the continental shelf beyond 200 nm. The Special Chamber was in no doubt that a continental shelf beyond 200 nm existed in respect of both Ghana and Côte d’Ivoire (at para. 496). Both parties agreed that each of them had an entitlement to the continental shelf beyond 200 nm, but disagreed on the scope of such entitlement (at para. 496).

Ghana pointed out that it had made a full submission to the CLCS and received recommendations from the CLCS, and “has already accepted the outer limits of its outer continental shelf based on the Commission’s recommendations” (*Ghana/Côte d’Ivoire*, at para. 500). Accordingly, the outer continental shelf limits of Ghana have become “final and binding” in accordance with article 76(8) of the LOSC. Ghana further asserted that in the present case “this Special Chamber, and indeed any international court, is bound to respect the decision of the Commission on the delineation of the outer limits of national jurisdiction” (at para. 501). Côte d’Ivoire acknowledged that Ghana has an entitlement which enables it to claim rights over the continental shelf beyond 200 nm (para. 507), but maintains that it has overlapping entitlements to the same area, as demonstrated in its
revised submission to the CLCS. Therefore, Côte d'Ivoire points out that although “Ghana’s entitlement is particularly incontestable in that the CLCS has already adopted recommendations in this regard” it also emphasizes that “the delineation by the CLCS is in the form of a recommendation, without prejudice to the (lateral) delimitation between the States with adjacent or opposite coasts” (at para. 510). Upon this basis Côte d’Ivoire maintained that the recommendations do not preclude the right of Côte d’Ivoire to claim a continental shelf in the area to which the recommendations apply.

The arguments by Ghana and Côte d’Ivoire give rise to an important discussion, namely what weight should be ascribed to the CLCS’ recommendations, for whom are such recommendations final and binding, and when do they achieve such status. In *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles*, the ICJ asserted that “pursuant to paragraph 8 of Article 76 of UNCLOS, [limits established on the basis of CLCS recommendations] are “final and binding” upon the States parties to that instrument” (at para. 108). However, the ICJ further emphasized that “[b]ecause the role of the CLCS relates only to the outer limits of the continental shelf, and not to delimitation, Article 76 of UNCLOS states in paragraph 10 that ‘[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts’” (at para. 110). This lends support to the view that Côte d’Ivoire cannot be bound by the final and binding limits established by Ghana on the basis of CLCS’ recommendations.

On the same basis, the Special Chamber did not find it necessary to deal with the arguments of the parties concerning the recommendations of the CLCS, as the recommendations of the CLCS “are without prejudice to the lateral delimitation of the continental shelf between Ghana and Côte d’Ivoire”. The Special Chamber finds support for this assertion in the *summary of the CLCS’ recommendations to Ghana*, where the CLCS sets out that “in the absence of an international continental shelf boundary agreement between Ghana and Côte d’Ivoire, the Subcommission does not make recommendations with respect to the outer limit fixed point OL-GHA-9 as originally submitted by Ghana” (at para. 60). The Special Chamber chose to follow previous judicial practice, where it has thoroughly been established that just as the functions of the CLCS are without prejudice to the question of delimitation of the continental shelf, so is the exercise by international courts and tribunals of their jurisdiction with regard to delimitation of maritime boundaries, including that of the continental shelf, without prejudice to the CLCS’ exercise of its function on matters related to the delineation of the outer limits of the continental shelf (*Bangladesh/Myanmar*, at para 379).

**Delimitation methodology beyond 200 nm**

_Ghana/Côte d’Ivoire_ is the third time an international court or tribunal has delimited the continental shelf beyond 200 nautical miles (nm). The two other cases, the Bay of Bengal cases, apply to an area of special geographical circumstances, and it has therefore been argued that the Bay of Bengal cases may have limited precedential value. However, this assessment only applies to the question of entitlement, not to the delimitation methodology.

Ghana asserted that “because ‘there is only a single continental shelf under the Convention’, it follows that the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200 M” (at para. 522). Côte d’Ivoire shared this opinion, and maintained that “in the present case, no particular circumstance justifies recourse being made to different objective delimitation methods within and beyond 200 nautical miles” (at para 524).

In accordance with previous judicial practice in the Bay of Bengal cases (*Bangladesh/Myanmar*, at para. 455; *Bangladesh v. India*, at paras. 457-458), the Special Chamber asserted that there is only one
single continental shelf, and therefore it would be inappropriate to make a distinction between the shelf within and beyond 200 nm as far as the delimitation methodology was concerned (at para. 526). Therefore, the delimitation line for the territorial sea, EEZ and continental shelf within 200 nm, continues in the same direction until it reaches the outer limits of the continental shelf.

Although case law on delimitation methodology for the continental shelf beyond 200 nm is sparse, it is at the same time uniform and consistent, and ensures predictability for other delimitation disputes.

**Can current judicial practice on delimitation between adjacent States serve as a model for delimiting the outer continental shelf between opposite States?**

The Special Chamber’s decision in *Ghana/Côte d'Ivoire*, contributes to a line of relatively uniform practice amongst the variety of adjudicative bodies delimiting the continental shelf beyond 200 nm. It seems to be well established that in so far as the parties to the dispute have entitlements to the disputed area beyond 200 nm, supported by means of a submission to the CLCS in accordance with Article 76(8), there is no requirement for the CLCS to issue recommendations before the proceedings may continue. In fact, in *Ghana/Côte d'Ivoire*, the recommendations were assigned no weight as they are deemed to be without prejudice for the delimitation of maritime boundaries between States.

Although judicial practice at this stage comes across as uniform, it is worth noting that all delimitation cases thus far, have been concerned with delimitation between adjacent States. There is still considerable uncertainty as to whether the same practice should be maintained in cases of delimitation between States with opposite coasts, such as in the merits phase of *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles*, in which a delimitation line between the States’ continental shelf beyond 200 nm would also constitute a delineation line. A brief analysis of this case in light of previous judicial practice, serves as a good example for such discussion.

On the procedural issue of admissibility, the ICJ in *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles*, suggested that in accordance with previous judicial practice (but without any particular references) that Nicaragua, as a State party to the LOSC is required to make an submission to the CLCS in accordance with article 76(8), but that there is no requirement for the Court to await the CLCS’ recommendations, since the delimitation of the continental shelf can be undertaken independently of recommendations from the CLCS (at para. 114). Upon this basis, the ICJ found that the delimitation of the continental shelf beyond 200 nm was admissible.

Awaiting the ICJs decision on the merits, only a hypothetical analysis may be offered on the remaining issues.

Previous practice implies that in the merits phase of the case, the Court will first be faced with the question of whether it has jurisdiction to delimit the continental shelf between Nicaragua and Colombia, and if so, if there is any reason why it should decline to exercise such jurisdiction.

In all previous cases, the main conclusion of the court or tribunal has been that in exercising its jurisdiction to delimit the continental shelf beyond 200 nm, it would not encroach upon the functions of the CLCS, as the delimitation of the continental shelf between States is different from delineating it towards the Area (*Bangladesh/Myanmar* at para. 393; *Bangladesh v. India* at para. 76; *Ghana/Côte d'Ivoire* at para. 492-495). Also in the preliminary objections phase in *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles*, the ICJ seems to adhere to the same idea, when it observes that the role of the CLCS
is “preventing the continental shelf from encroaching on the ‘area and its resources’, which are ‘the
common heritage of mankind’” (at para. 109). However, in the process of delimitating the
continental shelf beyond 200 nm between opposite States with overlapping claims, there is no
question of drawing a line with the Area, but only a delimitation line between the States.

An important discussion of the Court will accordingly be the States’ entitlement to the continental
shelf beyond 200 nm. If the Court concludes that they have overlapping entitlements to the
continental shelf beyond 200 nm, the function of the CLCS of drawing a delineation line between
areas subject to national jurisdiction and the Area, will be irrelevant.

The issue of entitlement has come up in all previous delimitation cases beyond 200 nm, and ITLOS
observed that “the question the Tribunal should first address (…) is whether the Parties have
overlapping entitlements to the continental shelf beyond 200 nm. If not, it would be dealing with
a hypothetical question” (Bangladesh/Myanmar at para. 399). The Tribunal concluded that “as the
question of the parties’ entitlement to the continental shelf raises issues that are predominantly
legal in nature, the Tribunal can and should determine entitlements of the parties in this particular
case” (Bangladesh/Myanmar at para. 413). Bangladesh and Myanmar denied each other’s entitlement
to the continental shelf beyond 200 nm, and claimed there was no overlap, but the Tribunal
concluded that both States had entitlements to the continental shelf beyond 200 nm, and that their
submissions to the CLCS indicated that such entitlements overlap (at para. 449). In Bangladesh v.
India, both parties agreed that they had entitlements beyond 200 nm, and neither party denied that
there is a continental shelf beyond 200 nm in the Bay of Bengal (at para. 78). In Ghana/Côte d’Ivoire,
the Special Chamber had no doubt that a continental shelf beyond 200 nm existed. Ghana had
already completed the CLCS procedure, and although Côte d’Ivoire had not yet received
recommendations, the Special Chamber observed that it had “no doubt that a continental margin
beyond 200 nm exists for Côte d’Ivoire since its geological situation is identical to that of Ghana”
(at para. 491).

The forthcoming delimitation between Nicaragua and Colombia is different from previous cases
for several reasons. The parties disagree on the entitlement beyond 200 nm. Nicaragua has made a
submission to the CLCS documenting its continental shelf in accordance with Article 76(8).
Colombia is in no position to make its own submission to the CLCS, as it is not a party to the
LOSC, but it has submitted several notes verbale to the CLCS addressing the submission by
Nicaragua, maintaining that the Nicaraguan submission overlaps with the entitlement of Colombia
to the continental shelf appurtenant to the Colombian Islands in the Caribbean as well as
Colombia’s continental territory. Colombia argues that “there are no areas of extended continental
shelf within this part of the Caribbean Sea given that there are no maritime areas that lie more than
200 nautical miles from the nearest land territory of the coastal States” (in Territorial and Maritime
Dispute (Nicaragua v. Colombia), at para. 122). In any case, the ICJ has already established in the
Territorial and Maritime Dispute (Nicaragua v. Colombia), that “the definition of the continental shelf
set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law” (at para.
118). This also means that States non-parties to the LOSC are entitled to the continental shelf
extending beyond 200 nm, to “the outer edge of the continental margin”. In the forthcoming case,
the ICJ has to determine whether the States have overlapping entitlements in an area beyond 200
nm from the coast of Nicaragua.

The Bay of Bengal is in a unique geological position, and there is great scientific certainty as to the
extent of the continental margin in the area, but the Tribunal observed 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 of question”
(Bangladesh/Myanmar at para 443). It seems that the Tribunal is of the opinion that such a situation
could encroach upon the function of the CLCS, as a scientific body. The only alternative to
proceeding with the delimitation, is to await CLCS’ assessment of the submission in accordance with Article 76(8). However, if a court or tribunal were to decide not to proceed with the delimitation beyond 200 nm, it would in many instances leave the dispute in a deadlock. In both Bay of Bengal cases, the States had blocked the work of the CLCS in accordance with Rule 46 of the CLCS’ Rules of Procedure, which provides that the CLCS cannot consider the submissions until the delimitation has been resolved (*Bangladesh*/*Myanmar* at para. 390-392; *Bangladesh v. India* at para. 82). Similarly, Colombia has submitted several *notes verbales* requesting the CLCS not to consider the submission of Nicaragua pending the delimitation of the continental shelf between the States. If the ICJ were to decide not to proceed with the delimitation of the area beyond 200 nm between Nicaragua and Colombia, the dispute would remain unresolved.

In addition, it is quite clear from the Special Chamber’s discussion in *Ghana/Côte d’Ivoire* that the recommendations, and the limits established on the basis of such recommendations, as a consequence of LOSC Art. 76(10) are not binding either for the Court, or for States with overlapping entitlement (at para. 519). As for the specific case of Nicaragua and Colombia, Colombia would at any rate, as a non-party with an overlapping claim of entitlement, not be bound by the potential CLCS recommendations to Nicaragua.

Consequently, in so far as the Court establishes the existence of entitlement to the continental shelf, it seems inevitable that the ICJ undertakes the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nm from the Nicaraguan coast.

The question can thus be raised if the ICJ could and should apply the same methodology as applied by courts and tribunals in previous delimitation cases beyond 200 nm. A uniform practice has developed in the case law, where the court or tribunal has maintained that there is only one continental shelf, and therefore the same principles for delimitation applies both within and beyond 200 nm (*Bangladesh*/*Myanmar* at paras. 454-455; *Bangladesh v. India* at paras. 457-458; *Ghana/Côte d’Ivoire* at para. 526). However, as all previous cases have concerned delimitation between adjacent cases, the method applied in practice has been to continue the delimitation line between the States, in the same direction, until it reaches the outer limits of the continental shelf, where the final and binding continental shelf limits established on the basis of CLCS recommendations would mark the outermost point of the delimitation line. This suggests that the Court should apply the general principles of maritime delimitation also in the delimitation between Colombia and Nicaragua in the area seaward of 200 nm from the Nicaraguan coast.

However, several factors complicate the delimitation. The location of the Colombian archipelago in the Southwestern Caribbean sea, San Andrés and Isla de Providence, situated approximately 120 nm from the Nicaraguan coast and well beyond 400 nm from the coast of Colombia, makes the construction of a median line difficult. If the Court were to conclude that both parties have entitlements to the continental shelf in the disputed area, the Court would be required to consider whether there exists a priority in the entitlement to the continental shelf within and beyond 200 nm. Due to the circumstances in the Caribbean sea, it is hard to predict if and how the Court can continue the practice of delimiting the continental shelf beyond 200 nm in accordance with the general principles for maritime delimitation.

**Concluding remarks**

The argumentation and decision of the Special Chamber in *Ghana/Côte d’Ivoire*, places the judgement in line with previous delimitation cases, contributing to a uniform and predictable practice, and confirming that the different courts and tribunals dealing with international adjudication of delimitation disputes are speaking in unison. If one relies on the international courts and tribunals to continue such practice, this gives promise for an interesting decision in the merits phase in the delimitation of the continental between Nicaragua and Colombia in the area beyond
200 nm from the Nicaraguan coast, where we can expect a clarification of the relationship between the CLCS and courts and tribunals, the position of non-parties in continental shelf disputes, and the potential priority between the right to a continental shelf within and beyond 200 nm – all within the context of a dispute between opposite states rather than adjacent states.

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