Procedural Aspects Concerning Jurisdiction and Admissibility in Cases of Maritime Delimitation Before the ICJ

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There are an increasing number of cases concerning maritime delimitation that have been submitted to the International Court of Justice (ICJ), to arbitral tribunals and, since recently, to the International Tribunal for the Law of the Sea (ITLOS). In fact, it is thought that maritime delimitation is one of the most frequent issues in international relations. It unavoidably creates tension[1] between geography, history, politics, and law, which, as rightly pointed out by the former ICJ President, Rosalyn Higgins, "[c]an create bitter political relations or be perceived as threatening ways of life that have existed for centuries".[2]

The present study aims to describe certain questions concerning jurisdiction and admissibility in maritime delimitation cases before the ICJ. In so doing only those maritime delimitation cases brought before the Court by means of an unilateral

[1] The expression "tension between geography and law" has been borrowed from Nuno Antunes. However, the terms "history" and "politics" have been added because, in the author's opinion, they also play a large role within the present topic, see: Antunes 2003, p. 109 and also: Weil 1989, p. 281.

[2] Statement by Judge Rosalyn Higgins, President of the International Court of Justice, on the occasion of the tenth anniversary of the International Tribunal for the Law of the Sea, see: www.icj-cij.org. See also: Treves 2000, pp. 726–746.

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application, in which the respondent challenged the Court's jurisdiction by entering preliminary objections, will be examined. Those cases amount to four,[3] namely: *Aegean Sea Continental Shelf (Greece* v. *Turkey)*; *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*; *Land and Maritime Boundary (Cameroon* v. *Nigeria)*; and *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. Each time, there is a description of the Application, including the basis of jurisdiction invoked by the Applicant, an analysis of the Court's task, the Parties' submissions, and the judgment of the Court.

1 Aegean Sea Continental Shelf Case[4]

On 10 August 1976, Greece filed an Application instituting proceedings against Turkey and requesting the Court to declare (i) that the so-called "Greek islands"[5] were part of Greek territory; (ii) what was the course of the boundary between the portions of continental shelf appertaining to Greece and Turkey in the Aegean Sea, etc.[6] Greece found the basis of the jurisdiction of the Court in Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928; read together with Article 36.1 and Article 37 of the ICJ Statute, and a joint communiqué issued in Brussels on 31 May 1975.[7]

[3] The author is aware of other cases before standing international courts or tribunals in which such issues were discussed upon. However, they were not maritime delimitation cases. At ITLOS, for instance, one could refer to: M/V "Saiga" (no. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment (1 July 1999), paras 40–109, where the jurisdiction of the Tribunal was briefly discussed followed by a lengthier discussion on the admissibility of the claims put forward by the Applicant. For an appraisal of the first case of the ITLOS, see, e.g.: De la Fayette 2000, pp. 467–476. This list does not include the following cases in which the ICJ was seized by means of a unilateral application: Maritime Delimitation on the Area between Greenland and Jan Mayen (Denmark v. Norway), because Norway did not contest the jurisdiction of the Court; Maritime Delimitation between Guinea-Bissau and Senegal because the proceedings were discontinued following the agreement concluded between the Parties on 14 October 1993; Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), because Honduras contested neither the jurisdiction of the Court nor the admissibility of the claim; Maritime Delimitation in the Black Sea (Romania v. Ukraine), because Ukraine did not challenge the jurisdiction of the Court; and the Maritime Dispute (Peru v. Chile), because up to the date of this work's submission, no official objection to the jurisdiction of the Court has been entered by Chile.

[4] ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment (19 December 1978). Further reading: Athanasopulos 2001, pp. 46–82; McDorman et al. 2000, pp. 225–239; and Özgür 1996, pp. 615–638.

[5] Such islands are: Samothrace, Limnos, Aghios Eustratios, Lesbos, Chios, Psara and Antipsara. See ICJ: Aegean Sea Continental Shelf (Greece v. Turkey), Application of Greece, p. 3.

[6] Ibidem, p. 11.

[7] Ibidem, p. 10.

In the same Application, Greece also requested the Court to indicate provisional measures pending the final decision. Such measures were not indicated by the Court, which in its Order of 11 September 1976 considered that it did not require the exercise of its power under Article 41 of the Statute, i.e., the indication of interim measures of protection.

By a communication of 25 August 1976, Turkey asserted that the Court had no jurisdiction to entertain Greek's Application. Similarly, on 24 April 1978, the date in which the deadline fixed by the Court for the filing of Turkey's Counter-Memorial expired, the Registry of the Court received a letter sent by the government of Turkey in which it stated, *inter alia*, that it was evident that the Court lacked jurisdiction to entertain the Application of Greece in the particular circumstances of the case and therefore that it did not intend to appoint an Agent or file any Counter-Memorial whatsoever.

In this sense, the Court, while regretting Turkey's failure to appear before it, in accordance with its Statute and its settled jurisprudence, proceeded to examine *proprio motu* the questions of its own jurisdiction. It made particular reference to Article 53 of its Statute, which prescribes that when one of the Parties does not appear before the Court, or fails to defend its case, the Court must satisfy itself that it has jurisdiction.[8]

On 19 December 1978, the Court ruled, by 12 votes to 2 (Judges de Castro and Judge *ad hoc* Stassinopoulos dissenting), that it was without jurisdiction to entertain the Application filed by the Greek Government,[9] on the basis that the Joint Communiqué issued in Brussels on 31 May 1975 did not furnish the basis for establishing the Court's jurisdiction.[10]

2 Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

On 8 July 1991, Qatar filed an Application instituting proceedings against Bahrain and requesting the Court to determine that the State of Qatar had sovereignty over the Hawar Islands and sovereign rights over the shoals of Dibal and Qit'at Jaradah; and to draw, in accordance with international law, a single maritime boundary between the maritime areas of the two States.[11] Qatar founded the jurisdiction of

[8] Aegean Sea Continental Shelf, supra n. 4, para 15.

[9] Ibidem, para 109.

[10] Ibidem, para 108.

[11] For a general appraisal of the case, including the merits phase, see e.g.: Kwiatkowska 2002, p. 227. For the author this case is "the first major maritime delimitation dispute settled by the International Court of Justice" since the Jan Mayen case, ICJ: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment (14 June 1993). To determine whether such statement is true or not go beyond the scope of this study; however, it is generally known that both Preliminary Objections Judgments as well as the one on the merits

the Court upon two agreements concluded between the Parties, namely an exchange of letters of December 1987 and the 1990 Doha Minutes, both falling within the scope of Article 36.1 of the ICJ Statute. Bahrain contested the basis of the jurisdiction invoked by Qatar by letters dated 14 July and 18 August 1991. It was later agreed that the written proceedings should first deal with the questions of jurisdiction and admissibility.

In that sense, the Government of Qatar requested the Court to adjudge and declare that it had jurisdiction to entertain the dispute referred to in its Application and that the said Application was admissible. The Government of Bahrain, in turn, requested the Court to adjudge and declare, rejecting all contrary claims and submissions, that it had no jurisdiction over the dispute brought before it by the Application filed by Qatar on 8 July 1991. Bahrain maintained that the Minutes signed at Doha in December 1990 did not constitute a legally binding instrument and therefore did not enable Qatar to seise the Court unilaterally. The text which was proposed by Bahrain on 26 October 1988, and accepted by Qatar in December 1990, the so-called "Bahraini formula", read:

> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.[12]

2.1 First Judgment on Preliminary Objections (1994)

The Court found that the Minutes of 25 December 1990, like the exchange of letters between the King of Saudi Arabia and the Amirs of Qatar and Bahrain, dated 19 and 21 December 1987, together with the Doha minutes signed at Doha on 25 December 1990, by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, constituted international agreements[13]; that according to such agreements the Parties had undertaken to submit to the Court the whole of the dispute between them ("Bahraini formula"); and decided to afford the Parties with a new deadline to submit the whole of the dispute.

It is interesting to quote a part of the judgment in which the Court decided, by way of an innovative device,[14] regarding the still outstanding question of the subject-matter of the dispute,

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(Footnote 11 continued)
have greatly contributed to the development of the law in general and the law of maritime delimitation in particular. See also: Reichel 1997, pp. 725–744.

[12] ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (1 July 1994), para 18.

[13] Ibidem, para 41.

[14] Salmon and Sinclair 2004, p. 1172.

> (…) to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed. Such submission of the entire dispute could be effected by a joint act by both Parties with, if need be, appropriate annexes, or by separate acts (…) This process must be completed within five months of the date of this judgment.[15]

In his Separate Opinion,[16] Judge Schwebel found that this first judgment failed to comply with the formula established in Article 79.9 of the Rules of Court, namely, to either uphold, reject, or declare that the objection did not possess an exclusively preliminary character. Instead, the Court reserved for the future a decision on whether it had jurisdiction or not.

In his dissenting opinion Judge Oda considered that there had not been a direct exchange of letters between Qatar and Bahrain, and therefore no international agreement could have been concluded between them.[17] Yet, Judge Oda apparently overlooked the fact that the 1987 agreement had been explicitly regarded as such by the Parties.[18]

Shabtai Rosenne, in turn, considered that the task of the Court, in the jurisdiction and admissibility phase, was a double one: (i) to determine whether there was a treaty or convention in force between the Parties referring the case to the Court; and (ii) to determine whether the reference to the Court was made in conformity with the requirements of that treaty or convention.[19] Hence, according to that author, in its first judgment, the Court answered the first question in the affirmative whereas it answered the second in the negative. The author then goes on to agree with the Court on the legally binding nature of the 1990 Doha Minutes.

For Rosenne, this Judgment constituted a timely innovation,[20] especially regarding cases where the jurisdiction is based upon a framework agreement, as opposed to a *compromise*. Thus, Rosenne considered the 1989 exchange of letters and the Doha Minutes of 1990 as a framework agreement.[21] A framework agreement for that author is one that recognizes that a dispute exists without defining it with necessary precision.[22] In other words, it is "a form of agreement covering disagreement", bringing about a case the development of which "takes its place

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[15] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, para 38.

[16] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, Separate Opinion of Vice-President Schwebel, pp. 130–131.

[17] Delimitation between Qatar and Bahrain (1 July 1994), supra n. 12, Dissenting Opinion of Judge Oda, para 10.

[18] Klabbers 1995, pp. 364–365.

[19] Rosenne 1995, p. 164.

[20] Ibidem, p. 182.

[21] Ibidem, pp. 171–176.

[22] Ibid, p. 173. In this vein, the author recalls that the first case brought before the ICJ on this basis was the Asylum case concerning an agreement called the Act of Lima of 31 August 1949. See ICJ: Asylum (Colombia/Peru), Judgment (20 November 1950), p. 266.

alongside" the doctrine of "*forum prorogatum* as another factor tending to free recourse to the Court from excessive formalism".[23]

Professor Christine Chinkin has claimed that the Court might have displaced the primacy of consent by presuming the existence of a legally binding agreement despite the intention of one of the Parties.[24] She went on to say that such a decision "[o]pens the way to holding states bound by commitments however informally given".[25] In this vein, Chinkin considered the question to be whether the ruling in this case had undermined the line dividing binding and non-binding agreements,[26] one that has always been blurred and that, regretfully, has not been clarified by the ICJ ruling in this case.[27]

Yet again, this argument is contended by Salmon and Sinclair who consider that Bahrain did express its consent when signing the Doha Minutes,[28] a criterion that was finally retained by the Court.

2.2 Second Judgment on Preliminary Objections (1995)

The Parties having failed to reach an agreement before 30 November 1994 under operative para 41 of the 1994 Judgment, Qatar decided to submit to the Court the text of an "Act to comply with paragraphs 3 and 4 of operative paragraph 41 of the Judgment of the Court dated 1 July 1994" whereby it presented the whole of the dispute with Bahrain,[29] as defined by the "Bahraini formula". Qatar contended that both States had made express commitments in the agreements of December 1987 and December 1990 to refer their potential disputes to the ICJ. It then claimed that since both Parties had given their consent through the above-mentioned international agreements, the Court was in a position to establish its jurisdiction to adjudicate upon such disputes.[30]

On the contrary, Bahrain claimed once again that the 1990 Minutes did not constitute a legally binding instrument and that neither alone nor combined with the provisions of the 1987 exchanges of letters could Qatar pretend to seise the

[23] Rosenne 1995, p. 181.

[24] Chinkin 1997, p. 224.

[25] Ibidem, p. 224.

[26] Ibidem, p. 225.

[27] Ibid, p. 247.

[28] Salmon and Sinclair 2004, p. 1175.

[29] Such subjects included, according to Qatar, the Hawar Islands, including the island of Janan; Fasht al Dibal and Qit' at Jaradah; the archipelagic baselines; Zubarah; the areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries; see ICJ: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (15 February 1995), paras 9–14.

[30] Ibidem, para 16.

Court unilaterally. In other words, that the Court lacked jurisdiction to hear the case.[31]

Under these circumstances, the Court recalled that, in its Judgment of 1 July 1994, it had reserved for an ulterior decision all such matters that had not been decided in that Judgment and therefore realized that Bahrain maintained the objections it had raised with respect to Qatar's Application. Thus, the Court decided to deal with such objections.

The Court was also faced with a matter of treaty interpretation since there was a disagreement between the parties as to the meaning of the Arabic phrase "*al-tarafan*". The Court hence established:

> This conclusion [that the Bahraini formula entailed the possibility that each Party could submit distinct claims to the Court] accords with that drawn by the Court from the interpretation of the phrase "Once that period has elapsed, the two parties may submit the matter to the International Court of Justice." Consequently, it seems to the Court that the text of paragraph 2 of the Doha Minutes, interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the said Minutes, allowed the unilateral seisin of the Court (…).[32]

Summing up, the Court continued by saying:

> In its Judgment of 1 July 1994, the Court found that the exchanges of letters of December 1987 and the Minutes of December 1990 were international agreements creating rights and obligations for the Parties, and that by the terms of those agreements the Parties had undertaken to submit to it the whole of the dispute between them. In the present Judgment, the Court has noted that, at Doha, the Parties had reaffirmed their consent to its jurisdiction and determined the subject-matter of the dispute in accordance with the Bahraini formula; it has further noted that the Doha Minutes allowed unilateral seisin. The Court considers, consequently, that it has jurisdiction to adjudicate upon the dispute.[33]

It is therefore clear that in its second judgment on Preliminary Objections, the Court found that it had jurisdiction to adjudicate upon the dispute submitted to it by Qatar and that Qatar's Application was admissible. Hence, on 15 February 1995, the Court ruled, by 10 votes to 5 (Vice-President Schwebel, Judges Oda, Shahabudden, Koroma and Judge *ad hoc* Valticos dissenting), that it had jurisdiction and that Qatar's Application was admissible.[34]

In his dissenting opinion, Judge Oda considered that the unilateral method of seisin used by Qatar was inadequate and that the Court should have looked more closely at its previous decisions.[35]

All in all, it is interesting to note that the formal aspect concerning the creation of legal rights and obligations in international adjudication is not as important as it

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[31] Ibidem.

[32] Ibidem, para 40.

[33] Ibidem, para 44.

[34] Ibid., para 50.

[35] For example: Fisheries Jurisdiction case in which the UK proposed to insert: "at the request of either two Parties", see ICJ: Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment (2 February 1973), para 19.

is in domestic legal proceedings. The Court has thus proved to be quite flexible concerning this point.[36] What is more, this hallmark decision set the threshold to be met so as to speak about a treaty, regardless of its form. In the words of Professor Klabbers: "[t]he Court for the first time gave a principled account of the essentials of treaty-formation. As such, the decision has all the characteristics of a *locus classicus*".[37]

3 Land and Maritime Boundary (Cameroon v. Nigeria)[38]

On 29 March 1994, Cameroon submitted an Application[39] instituting proceedings against Nigeria and requesting the Court (i) to declare that the sovereignty over the Peninsula of Bakassi was Cameroonian; and (ii) to order the immediate withdrawal of Nigerian troops from the alleged territory of Cameroon in the disputed areas. Cameroon considered the Court's jurisdiction to be founded on the declarations made by the two Parties under Article 36. 2, of the ICJ Statute.

Nigeria decided to enter preliminary objections against Cameroon's Application, thus becoming the first African State to do so.[40] Its objections included that Cameroon had acted prematurely and in disregard of the relevant procedural rules, that Cameroon had consented to an exclusive regional dispute settlement mechanism, that the dispute did not comprise the whole land boundary, that the absence of interested third states blocked the proceedings, and that it was not possible to effect any maritime delimitation without having conducted negotiations before.

Thus, Nigeria contended, as a first preliminary objection, that it had not received a copy of Cameroon's optional clause declaration deposited with the UN Secretary-General on 3 March 1994, that therefore it had no knowledge of that fact and that Cameroon had not acted in good faith. In this respect one author recalls, concerning a certain practice among African States with respect to the optional clause system (what the author calls "*ad hoc*" declarations), that Guinea-Bissau

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[36] See, e.g. PCIJ: Legal Status of Eastern Greenland (Denmark v. Norway), Judgment (5 April 1933); ICJ: Nuclear Tests (New Zealand v. France), Judgment (20 December 1974); Aegean Sea Continental Shelf, supra n. 4; United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order (12 May 1981).

[37] Klabbers 1995, p. 376.

[38] Bekker 1998, pp. 751–755.

[39] On 6 June 1994, Cameroon filed in the Registry an Additional Application concerning the extension of the subject of the dispute to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad; and the determination of the frontier between the two States from Lake Chad to the sea. This request was not objected to by either Nigeria or the Court which, by an order so indicated (ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Order (16 June 1994).

[40] For an appraisal of the situation of the African States concerning proceedings before the ICJ, see e.g.: Perrin 1997, p. 185.

deposited its declaration only 16 days before seising the Court with an Application against Senegal while Cameroon did so only 26 days before filing its Application against Nigeria.[41]

Yet, the Court while invoking its previous decision in the *Right of Passage over Indian Territory* case[42] responded stating that under the optional clause system, any state party to the ICJ Statute when depositing a declaration is automatically subjected to a bond with any other state party having deposited its own declaration. Hence, its legal effect is not conditioned upon any subsequent action of the Secretary-General. The Court went on to say that no time period was required for the establishment of a consensual bond following such a deposit. It therefore rejected the first preliminary objection.[43]

It is interesting to note here the Dissenting Opinion of Vice President Weeramantry, who clearly stated that he was against such reasoning on the grounds of the formulation of Article 36.4 of the ICJ Statute. Such provision establishes two prerequisites for establishing the so-called consensual bond between States having made declarations under the optional clause system, namely, the deposit of the declaration with the Secretary-General and the transmission by the Secretary-General of copies to the parties to the Statute and to the Registrar of the Court.[44] In this sense, he considered the approach taken by the Court to be not in conformity with the "[e]ssential philosophy governing the Optional Clause"[45] and therefore being able to undermine the Court's jurisdiction by not fostering due compliance of Article 36.4 of the Statute.

As a second preliminary objection, Nigeria claimed that during at least 24 years prior to the filing of the Application, the Parties had in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery. It was therefore, according to Nigeria, the case of an implicit agreement establishing a bilateral framework that would prevent both States from relying on the jurisdiction of the Court to settle a given dispute.

In this respect, before rejecting this objection the Court recalled that:

> [n]either in the UN Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court and that no such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920. The Court also stated that the fact that the Parties had attempted to settle some of the boundary issues dividing them bilaterally, did not

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[41] Ibidem, p. 187.

[42] ICJ: Right of Passage over Indian Territory (Portugal v. India), Judgment (26 November 1957). The Court then prescribed: "The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement'".

[43] ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (11 June 1998), paras 41–45.

[44] Ibidem, Dissenting Opinion of Vice President Weeramantry, p. 365.

[45] Ibidem, p. 362.

imply that either one had excluded the possibility of bringing any boundary dispute concerning it before the ICJ.[46]

As a third objection, Nigeria put forward that the settlement of the maritime boundary dispute within the Lake Chad region was subject to the exclusive competence of the Lake Chad Basin Commission. However, the Court considered that the said commission did not include as one of its objectives the settlement of matters relating to the international peace and security of the region and that even if that was the case, the existence of procedures for regional negotiation could not prevent the Court from exercising its functions according to the Charter and its Statute.[47] Consequently, the Court also rejected this preliminary objection.

Nigeria advanced a fourth argument so as to challenge the jurisdiction of the Court, namely that the boundary Cameroon wanted to have determined would affect a third state, that is, the Republic of Chad. The Court stated that only when the interests of a third state were the very subject-matter of the dispute had it declined to exercise its jurisdiction. In the case at hand, the Court continued, Cameroon had requested to establish the frontier between that State and Nigeria and no other. Therefore, it went on to reject this objection, too.[48]

As a fifth preliminary objection Nigeria contended that there was no boundary delimitation dispute as such. The Court, however, dismissed this argument once again.[49] Similarly, Nigeria's sixth objection, of a rather formal character implying the alleged inaccuracy of Cameroon's Application, was also rejected by the Court on the grounds that an applicant had some leeway to determine how to present the facts and arguments to the Court.[50]

An interesting issue was raised as a seventh objection by Nigeria. It claimed that the Court could not effect a maritime delimitation without having first determined the title with respect to the Bakasi Peninsula. It then argued that the issue of maritime delimitation should not be admissible since no prior negotiations had taken place between the parties, pursuant to the provisions of UNCLOS. The Court recalled that it was up to its discretion to establish the order in which it dealt with the issues at hand and it held that it had not been seised according to Part XV (Settlement of Disputes) of UNCLOS, but on the basis of declarations made under the optional clause enshrined in Article 36.2 of the ICJ Statute, which do not contain any indication of prior negotiations having to be conducted within a certain time, before invoking the dispute settlement mechanism.[51] It then rejected this seventh preliminary objection.

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[46] Land and Maritime Boundary (Cameroon v. Nigeria) (11 June 1998), supra n. 43, paras 48–60.

[47] Ibidem, paras 67–68.

[48] Ibidem, paras 74–83.

[49] Ibidem, paras 84–94.

[50] Ibidem, paras 98–101.

[51] Ibidem, paras 103–111.

Finally, Nigeria put forward as a last objection the fact that any maritime delimitation would necessarily touch upon the rights and interests of third states. While acknowledging that the rights and interests of third states might be touched upon, especially those of Equatorial Guinea and São Tomé and Principe, the Court pointed out that it would have to deal with the merits of Cameroon's request so as to determine this. Accordingly, the Court concluded that this last preliminary objection did not possess an exclusively preliminary character and that it should be settled when dealing with the merits of the dispute.[52]

On 11 June 1998, the Court ruled, by 14 votes to 3 (Vice-President Weeramantry, Judge Koroma, and Judge *ad hoc* Ajibola dissenting), that it had jurisdiction on the basis of Article 36.2 of the Statute, and that Cameroon's Application, as amended by the Additional Application of 6 June 1994, was admissible.[53]

4 Territorial and Maritime Dispute (Nicaragua v. Colombia)[54]

On 6 December 2001, Nicaragua submitted an Application instituting proceedings against Colombia and requesting the Court to determine that the Applicant has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla, and Quitasueño keys. It also asked the Court to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law. Nicaragua, as in the case against Honduras, put forward two basis for the jurisdiction of the Court. On the one hand, Article 36.1 of the ICJ Statute, in combination with Article XXXI of the American Treaty on Pacific Settlement (Bogotá, 30 April 1948)[55] officially known, according to Article LX thereof, as the "Pact of Bogotá" signed on 30 April 1948. On the other hand, Article 36.2 of the Statute whereby jurisdiction would also exist by way of the Declarations made by the Parties.[56]

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[52] Ibidem, paras 112–117. Regarding the issue of an objection not having an exclusively preliminary character, the Court decided to amend its Rules, especially Article 79.7 in 2001 (the amendment entered into force on 1 February 2001). See, e.g.: Eisemann 1998, pp. 178–182.

[53] Land and Maritime Boundary (Cameroon v. Nigeria) (11 June 1998), supra n. 43, para 118.

[54] For an early contribution to the subject, claiming Colombia's better legal standing with respect to the merits of the dispute, see: Diemer and Šeparović 2006, pp. 167–185.

[55] Entered into force on 6 May 1949.

[56] With respect to the Declarations made by the Parties, the Court noted that they were: "(…) made (…) under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory

On 21 July 2003, Colombia filed certain preliminary objections to the jurisdiction of the Court. Therefore, according to Article 79.5 of the Rules of Court, the proceedings on the merits were suspended.[57] Colombia requested the Court, under Article 79 of the Rules of Court, to declare that under Article VI and Article XXXIV of the Pact of Bogotá it lacked jurisdiction to hear the dispute and that the dispute had ended. It maintained, referring specifically to Article VI of the Pact, that the matters raised by Nicaragua were duly settled by a treaty in force (Barcenas-Esguerra Treaty) on the date on which the Pact was concluded.

Nicaragua, in turn, requested the Court to determine that both preliminary objections, that is (i) in respect of the jurisdiction based upon the Pact of Bogotá; and (ii) in respect of the jurisdiction based upon Article 36.2 of the ICJ Statute, were invalid. Alternatively, Nicaragua contended that, pursuant to Article 79.9 of the Rules of Court, the Colombian objections did not have an exclusively preliminary character.[58]

Hence, Nicaragua claimed that the 1928 Treaty and its 1930 Protocol did not settle the whole dispute between the Parties within the meaning of Article VI of the Pact of Bogotá and even if that was not the case, that the 1928 Treaty did not comprise all the matters at stake. Furthermore, Nicaragua claimed that the Court could not deal with these issues at this stage of the proceedings since that would require an examination of the merits.

At another point, the validity of the 1928 Treaty was also advanced by Nicaragua, as a reason confirming the fact that the dispute was not settled. First, because it was concluded "in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928". Nicaragua considered that the conclusion of the 1928 Treaty violated Article 2 and Article 3 of its 1911 Constitution in force until 1939.[59] Second, because at the time of the conclusion of that Treaty, Nicaragua was under military occupation by the United States and was therefore precluded from entering into agreements that could harm the interests of the occupying power. In that sense, the Applicant claimed that Colombia, which was aware of this situation, "took advantage of the US occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty".

Colombia, in turn, claimed that even assuming that the 1928 Treaty was against the 1911 Constitution of Nicaragua or that Nicaragua's will was undermined due

(Footnote 56 continued)
jurisdiction of the present Court pursuant to Article 36, para 5, of its Statute." See ICJ: Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment (13 December 2007), para 1.

[57] Ibidem, para 6.

[58] Ibidem, para 12.

[59] Articles of the Constitution: Article 2 stipulated, inter alia, that "treaties may not be reached that oppose the independence and integrity of the nation or that in some way affect her sovereignty…". Article 3 provided that "[p]ublic officials only enjoy those powers expressly granted to them by Law. Any action of theirs that exceeds these [powers] is null.".

to the US occupation, such claims were not raised during the ratification process in 1930, nor during the following 50 years. Therefore, Colombia considers that Nicaragua was precluded from challenging the validity of the 1928 Treaty and its 1930 Protocol. The Court found that the 1928 Treaty was valid and in force on the date of the conclusion of the Pact of Bogotá in 1948.[60]

With respect to the scope of application of the 1928 Treaty, the Court found that its terms did not answer the question of which maritime features apart from the islands of San Andrés, Providencia, and Santa Catalina form part of the San Andrés Archipelago over which Colombia had sovereignty. It thus considered that the matter had not been settled within the meaning of Article VI of the Pact of Bogotá and therefore that the Court did have jurisdiction under Article XXXI of the Pact of Bogotá in so far as it concerned the question of sovereignty over the maritime features part of the San Andrés Archipelago (Roncador, Quitasueño, and Serrana),[61] except for the islands of San Andrés, Providencia, and Santa Catalina.[62]

Finally, as regards the issue of maritime delimitation, the Court concluded that the 1928 Treaty and the 1930 Protocol did not establish a general delimitation of the maritime boundary between the Parties and that the dispute was therefore not settled within the meaning of Article VI of the Pact of Bogotá. In other words, it did not uphold Colombia's first preliminary objection concerning the Court's jurisdiction on the issue of maritime delimitation.[63]

On 13 December 2007, the Court ruled unanimously that it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties other than the islands of San Andrés, Providencia, and Santa Catalina; and upon the dispute concerning maritime delimitation.[64]

5 Conclusion

It has been seen that, while still somewhat scarce, the practice of bringing a claim against another State without a special agreement is more and more frequent. Maritime delimitations, it has also been seen, are no exception to this crystallizing

[60] ICJ: Territorial and Maritime Dispute (Nicaragua v. Colombia), supra n. 56, para 81.

[61] Ibidem, para 104.

[62] Ibidem, para 97.

[63] Ibidem, para 120.

[64] Ibidem, para 142. On 19 November 2012, the Court rendered its judgement on the merits of this case, finding that Colombia has soverignty over the islands at Albuquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serranailla and deciding the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia in the Caribbean Sea.

practice, even though, after the ICJ decision in the *Nicaragua* case, some observers had put forward the elimination of the optional clause system.[65]

The author believes that the current state of international law regarding the issue of jurisdiction and admissibility, particularly in maritime delimitation cases, is the result of important developments, such as the increase in international litigation. This can only be good news for the strengthening of the rule of law in the international arena, since it gives States possibilities that not so long ago were hardly imagined, the possibility to bring to Court and settle peacefully otherwise eternal disputes.

Be that as it may, it can also be noticed that even though States can come up with different grounds so as to challenge the Court's jurisdiction or the admissibility of the other Party's claims, there seems to be a restrictive approach concerning the interpretation of previous agreements that could challenge the jurisdiction of the Court, in one way or another. Yet, on the other hand, it can also be seen that even when a State decides not to appear before the Court, for whatever reason—as was the case with Turkey in the *Aegean* case—the ICJ will have to satisfy itself that it does have jurisdiction, which could result in its finding that it indeed does not have such jurisdiction.

References

Athanasopulos H (2001) Greece Turkey and the Aegean Sea. McFarland and company, Jefferson

Antunes N (2003) Towards the conceptualization of Maritime delimitation. Legal and technical aspects of a political process. Martinus Nijhoff, Leiden

Bekker P (1998) Land and Maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria). Am J Int Law 92:387–398

Chinkin C (1997) A Mirage in the sand? distinguishing binding and non-binding relations between states. Leiden J Int Law 10:223–247

De la Fayette L (2000) The M/V 'Saiga' (N° 2) case (St. Vincent and the Grenadines v. Guinea) Judgment. Int Comp Law Q 49:467–476

Diemer C, Šeparović A (2006) Territorial questions and Maritime delimitation with regard to Nicaragua's claims to the San Andrés Archipelago. Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 66:167–186

Eisemann P-M (1998) L'affaire de la frontière terrestre et maritime entre le Cameroun et le Nigeria (Entretien), L'observateur des Nations Unies 5

Klabbers J (1995) Qatar v. Bahrain: The Concept of 'Treaty' in international law. Archiv des Völkerrechts 33:361–376

Kwiatkowska B (2002) The *Qatar v. Bahrain* Maritime delimitation and territorial questions case. Ocean Dev Int Law 33:227–262

McDorman T (2000) Dispute settlement and the Law of the sea with special reference to the Aegean sea. In: Chircop A, Gerolymatos A, Iatrides J (eds) The Aegean sea after the cold war. Macmillan Press, London

[65] For this author: "Article 36(2), the so-called optional clause, was born amid controversy and has lived amid controversy; (…) we think it should be permitted to die in peace", see: Scott and Craig 1987.

Özgür Ö (1996) The Greco-Turkish disputes over the Aegean sea. Südost-Europa 45:615–638
Perrin D (1997) L'arrêt de la C.I.J. du 11 juin 1998 dans l'affaire de la frontiere terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigeria). Exceptions préliminaires. L'observateur des Nations Unies 5
Reichel M (1997) Maritime délimitation and territorial questions between Qatar and Bahrain. Denver J Int Law Policy 26:725–744
Rosenne S (1995) The Qatar/Bahrain case: what is a treaty? A framework agreement and the seising of the court. Leiden J Int Law 8:435–443
Salmon J, Sinclair I (2004) Special features of the Qatar v. Bahrain case before the ICJ. Affaire de la delimitation maritime et des questions territoriales entre Qatar et Bahreïn. L'arrêt de la C.I.J. du 16 mars 2001. In: Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz, Tome II. Editoriale Scientifica, Napoli, pp 1167–1242
Scott GL, Carr GL (1987) The ICJ and compulsory jurisdiction: the case for closing the clause. Am J Int Law 81:57–76
Treves T (2000) Le tribunal international du droit de la mer et la multiplication des juridictions internationales. Rivista di diritto internazionale 83:726–746
Weil P (1989) The law of Maritime delimitation: reflections. Cambridge Grotius Publications Limited, Cambridge