Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta’s Report

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I would like to consider two points which Judge Marotta was kind enough to refer to in his report, concerning positions which I have taken in some of my writings or during my practical career. I will then reflect a third point which seems particularly relevant to me, which is linked to aspects of a topic that a number of speakers have mentioned and discussed in this symposium.

The first question raised by Judge Marotta, kindly recalling my observations made more than 15 years ago, is whether a state not party to the Law of the Sea Convention can make a submission to the CLCS. For instance, could the United States make such a submission?

Judge Marotta indicated that, in his view, the answer to the question “depends on whether the Convention’s rules have already acquired the nature of customary rules”. I think this may be the beginning of the answer, but not the whole answer. There are arguments indicating that the basic substantive rules set out in LOSC, Article 76 have become customary, even though it remains open how many of the details and figures set out in these rules partake in this transmigration into customary law. In the writings of 1989 and 1990, to which Judge Marotta alludes, I have prudently attempted to answer this question.1 Today, in the light of the high number of ratifications of the LOSC, perhaps the answer might be a little less restrained. In any case, what remains evident, at least to me, is that rules of the LOSC of procedural or institutional character, in particular those that regulate the role of the Commission on the limits of the continental shelf, cannot be read as conferring rights to non-parties or limit rights such non-parties may enjoy under customary law.

Commenting on an article by Tom Clingan, which (in the context of the Reagan Administration’s opposition to the LOSC) argued that states not parties to the LOSC could also submit applications to the Commission, I wrote in 1989: “As regards the possibility to submit an application to the Commission by States not parties to the Convention, there is a difficulty... in the literal formulation of Article 4 of Annex II.” This difficulty was that the provision sets a time-limit for submissions of 10 years after entry into force of the LOSC. Independently from this legal argument, I then argued that upholding the possibility that non-parties could submit applications to the Commission “would not be realistic, because it does seem unlikely that a State could wish to submit the limits of its continental shelf to a body on whose constitution it has no influence”.

Today I would add to these observations that the question should also be envisaged in terms of interest: who could have an interest in such a submission by a non-party to the LOSC? On the one hand, such interest may be that of a coastal non-party state who would perhaps obtain more support and certainty for its claim. This state would, however, also have to incur the burden of submitting to a process to which it is not privy, to a body whose members it cannot elect, and to time limits that do not make much sense for it. On the other hand, in my view, a submission to the Commission by a non-party to the LOSC would be in the interest of everybody else, probably more so than of the coastal state. Everybody has an interest in a precise definition of states’ limits, including limits of States that are not parties to the LOSC.

The second question raised by Judge Marotta concerns the rather famous dictum in the arbitral award on delimitation of the maritime area between France and Canada in the region of Saint Pierre and Miquelon, in which the Arbitral Tribunal stated that:

“Any decision by this Court recognizing or rejecting any rights of the parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, 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.”

Indeed, as Judge Nelson wrote, perhaps the dictum was “unnecessary”. In my view, nonetheless, it is significant to illustrate the issue that, regarding the

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3 T. Treves, “La Limite Extérieure, etc.”, note 1 above, p. 734, fn. 28; and “Codification, etc.”, note 1 above, p. 102, fn. 191.
4 A point conceded by Clingan, note 2 above, p. 112.
5 Arbitral Award of 10 June 1992, Canada/France, para. 78, UN Reports of International Arbitral Awards, XXI, pp. 270, 292; (1992) 31 International Legal Materials 1145, 1172.