EMBASSY OF NICARAGUA
THE HAGUE

RESPONSE TO JUDGE BENNOUNA'S QUESTION

THE QUESTION

«Les règles posées à l'article 76 de la convention des Nations Unies de 1982 sur le droit de la mer, pour la détermination de la limite extérieure du plateau continental au-delà des 200 milles marins, peuvent-elles être considérées aujourd'hui comme ayant le caractère de règles de droit international coutumier »?

THE RESPONSE

Factual background

1. Nicaragua considers that the definition of the continental shelf set out in Article 76 (1) – (7) of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS' or 'the Convention') has the status of a rule of customary international law, and not only of a rule of treaty law. Nicaragua holds this view for the following reasons:

2. The automatic appurtenance of the continental shelf was established by the Court in the *North Sea Continental Shelf* cases.[1] The Court said:

> "19. ...the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,-namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right."[2]

3. The Court explicated this principle, pointing out that the greater proximity of an area of seabed to one State rather than another had no necessary connection with the entitlement to that area,[3] and explaining that:

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1 *ICJ Reports 1969*, p. 3.

2 *idem*, p. 3, at paragraph 19.

3 *idem*, p. 3, at paragraphs 39-42.

> "43. More fundamental than the notion of proximity appears to be the principle-constantly relied upon by all the Parties-of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because–or not only because–they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, –in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;–or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it."[4]

4. The doctrine of automatic appurtenance supposes that there is a determinable area to which the doctrine applies. That area was defined by the Court in terms of the natural prolongation of the State's land territory under the sea. That concept was regarded by the Court as a rule of customary international law reflected or crystallized in Articles 1–3 of the 1958 Convention on the Continental Shelf.[5]

5. The Third United Nations Conference on the Law of the Sea ('the Conference') took up the concept of 'natural prolongation' as one of two bases for the definition of the continental shelf, the other being a distance criterion. Developments in the Conference are summarized in volume II of the *Virginia Commentary*, at pp. 825–899.

6. The key points that are evident from the record of the Conference are:

   i. the limits of the continental shelf were regarded as insufficiently precisely defined in 1969;[6]

   ii. the Conference devoted sustained and focused effort to the task of defining the limits of the continental shelf;[7]

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4 *idem*, p. 3, at paragraph 43.

5 *idem*, p. 3, at paragraph 63.

6 See UNGA resolution 2754A (XXIV), 15 December 1969.

iii. throughout its work the Conference distinguished between, on the one hand, the 'continental shelf' or 'natural prolongation' or 'continental margin' or 'continental shelf, slope and rise', which is under national jurisdiction, and on the other hand the deep sea-bed beyond national jurisdiction;[8]

iv. the terms 'natural prolongation' and 'continental margin' and 'continental shelf, slope and rise' were used without any clear distinction being drawn between them to describe the 'physical' submarine area over which national jurisdiction exists (as opposed to the area defined by distance from the shore).

v. In 1975, seven years before the Conference adopted its final text, it was proposed by the USA that the limits of the continental margin should be defined by either (a) a formula linked to the nature of the seabed sedimentary rocks, or (b) fixed points not more than 60 nm from the foot of the continental slope;[9] and in 1976 that approach was given clear and detailed definition in a draft Article proposed by Ireland.[10]

vi. the alternative definitions in the Art. 76 (4) were intended to enable States to choose the 'foot-of-slope ('FOS') + 60 nm' line in definition (b) if they wished, for example where the geological data necessary for the geological definition (a) were not available;[11]

vii. the Article 76 (4) alternative definitions were included by consensus in subsequent drafts of the Convention, and the final text was adopted in 1982 by a vote of 130 to 4 with 17 abstentions.

7. The 'FOS + 60nm' definition, which is the applicable part of the definition in the present case, was included (along with the alternative 'thickness of sedimentary rocks' definition) in the UNCLOS as Article 76(4)(a)(ii). In 1982, 119 delegations (including Colombia) signed the Convention. As of 10 May 2012, 162 States or entities are Parties to the Convention.

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7 *Virginia Commentary*, paragraphs VI.6–VI.14, 76.1–76.17.

8 *idem.*

9 *Virginia Commentary*, p. 848, paragraph 76.6.

10 *idem*, p. 852, paragraph 76.7.

11 *idem*, pp. 855-857, paragraph 76.8–76.10.

Legal argument

8. The purpose of Article 76, particularly paragraphs (4)–(7), is to limit[12] and give greater precision to the definition of the continental shelf appertaining to each coastal State.

9. It is universally accepted that each coastal State has an entitlement to continental shelf rights over the natural prolongation of its land territory to the outer edge of its continental margin, and there is in State practice no other definition of the continental margin that contradicts or competes with the definition set out in Article 76 paragraphs (4)–(7).

10. State practice shows that this definition, and no other, is generally supported. The website of the UN Department for Ocean Affairs and the Law of the Sea carries the legislation of 151 States.[13] Of those 151 States, approximately 90 have legislation relevant to the continental shelf and its outer limits: the approximation is necessary because some references to the continental shelf are oblique, and some laws are not readily available.

11. Of those 90 or so States, some 6 merely provide for delimitation of their continental shelf on the basis of agreements with neighbouring States (eg Croatia, Bulgaria, Estonia). It appears that approximately 50 of the remaining States adopt in their domestic law a definition of the continental shelf that is in line with 76(1) UNCLOS, referring to a continental margin; some go further in defining that margin in line with 76(3) UNCLOS; some refer to the provisions of Art 76 UNCLOS in general terms; and at least 3, including a State that has neither signed nor ratified the UNCLOS (Ecuador), refer to further detailed criteria under the provisions of Article 76 (5) – (6).

12. A further 19 States adhere to the '200m isobath + exploitability' criterion used in Article 1 of the 1958 Continental Shelf Convention or simply to an exploitability criterion; but 17 of those have signed or ratified UNCLOS, and some or all of them may either have adopted legislation to implement UNCLOS domestically, or have a legal system which gives direct effect to treaties. Further, 8 of the 19 have made submissions to the CLCS.

13. A further 16 States limit their assertions of jurisdiction over the continental shelf to 200 nm. But 14 of those have signed or ratified UNCLOS, and some or all of them may either have adopted legislation to implement UNCLOS domestically, or have a legal system

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12 See Ireland's comments introducing the Irish proposal at the Conference: Virginia Commentary, pp. 855-856, paragraph 76.9.

13 http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm.

which gives direct effect to treaties. Further, 7 of the 16 have made submissions to the CLCS.

14. The conclusion is that more than 80 States of the 90 that have continental shelf legislation appear to accept the definition in Article 76 (4) – (7) either explicitly in their laws or implicitly by their acceptance of the UNCLOS.

15. Finally, of all remaining States that have no (published) legislation on the continental shelf, 28 have made submissions to the CLCS, which indicates their acceptance of the provisions in Article 76 (4) – (7).

16. Even non-Parties to UNCLOS have explicitly accepted this definition. For example, in 1987 the USA stated that:

> "... the proper definition and means of delimitation in international law are reflected in Article 76 of the 1982 United Nations Convention on the Law of the Sea. The United States has exercised and shall continue to exercise jurisdiction over its continental shelf in accordance with and to the full extent permitted by international law as reflected in Article 76, paragraphs (1), (2) and (3). At such time in the future that it is determined desirable to delimit the outer limit of the continental shelf of the United States beyond two hundred nautical miles from the baseline from which the territorial sea is measured, such delimitation shall be carried out in accordance with paragraphs (4), (5), (6) and (7)."[14]

It will be noted that the USA does not consider compliance with Article 76(8) to be necessary in this context.

17. The implementation of article 76 has been the subject of the annual United Nations General Assembly Resolutions on oceans and law of the sea. The Resolutions underline the significance of article 76 for the international community at large. The Resolution of December 2011 observes among others:

> *"Noting* the importance of the delineation of the outer limits of the continental shelf beyond 200 nautical miles and that it is in the broader interest of the international community that coastal States with a continental shelf beyond 200 nautical miles submit information on the outer limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf ("the Commission"), and welcoming the submissions to the Commission by a considerable number of States Parties on the outer limits of their continental shelf beyond 200 nautical miles, that the Commission has continued to fulfil its role, including

[14] J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, (2nd ed., 1996), pp. 201-202.

> of making recommendations to coastal States, and that the summaries of recommendations are being made publicly available."[15]

18. Further, non-UNCLOS-Party States also have a role in the work of the Commission: they are informed of submissions and have the right to comment upon them.[16] The following States have availed themselves of the possibility to submit comments, while not being a Party to the Convention: Canada (on the Submission of the Russian Federation); Denmark (on the Submission of the Russian Federation); Peru (on the Preliminary Information submitted by Chile); Timor-Leste (on the submission of Australia); the United States (on the submissions of Argentina, Australia, Brazil, Cuba, Japan and the Russian Federation) and Venezuela (on the submissions of Barbados and Guyana). All indications point to the conclusion that the States Parties, non-Party States and the Commission consider that Article 76 paragraphs (4)–(7) are entirely consistent with customary international law.

19. The very wide ratification of UNCLOS, with the result that Article 76 paragraphs (4)–(7) became binding for States Parties as a matter of treaty law, "does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties"[17] to the UNCLOS.

20. When a State claims to establish or invoke a specific legal institution, such as a continental shelf or EEZ or contiguous zone, it must be presumed to do so in the terms in which that institution is established and / or generally understood in international law. *A fortiori*, when customary international law automatically attributes a continental shelf to a State, it necessarily does so within the meaning that customary international law gives to the concept of the continental shelf.

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15 UNGA Resolution A/RES/66/231 adopted on 24 December 2011 (available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/472/68/PDF/N1147268.pdf?OpenElement).

16 Rule 50 of the Rules of Procedure of the CLCS specifies that: "The Secretary-General shall, through the appropriate channels, promptly notify the Commission and **all States Members of the United Nations, including States Parties to the Convention**, of the receipt of the submission, and make public the executive summary including all charts and coordinates referred to in paragraph 9.1.4 of the Guidelines and contained in that summary, upon completion of the translation of the executive summary referred to in rule 47, paragraph 3." (emphasis added) According to the *modus operandi* of the Commission, a State in presenting its submission shall comment on "any note verbale from other States regarding the data reflected in the executive summary including all charts and coordinates as made public by the Secretary-General in accordance with rule 50": CLCS Rules, Annex III, section II.2(a)(v).

17 *Nicaragua* v *United States of America*, *ICJ Reports 1984*, p. 392, paragraph 73.

21. The definition in Article 76 is the only definition that has general support in international law. There is no indication that States have sought to create any alternative or competing definition of the continental shelf.

IN CONCLUSION,

22. For the reasons given above, the Republic of Nicaragua considers that UNCLOS Article 76 paragraphs (1) to (7) have the status of customary international law.

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