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Annex I to the Rules of Procedure of the Commission: Solution to a Problem or Problem without a Solution?

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Is there a problem?

- Annex I to the Rules of Procedure of the CLCS may lead to prolonged uncertainty about the location of the outer limits continental shelf of a coastal State
- Currently an issue for 17 submissions to the CLCS
- Uncertainty about the extent of the continental shelf may also negatively affect the delimitation of the continental shelf between neighboring states
- Both issues may affect the possibilities of coastal States to take full benefit of their sovereign rights over the continental shelf
- How did we get here?
- What alternatives are available for the CLCS and coastal States?

Defining the continental shelf

- Two aspects
 - Determination of outer limits of the continental shelf
 - Delimitation of the continental shelf between neighboring States
- Relation of the two processes as defined in the Convention
 - The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts (Convention, article 76(10))
 - The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts (Convention, Annex II, article 9)
 - Article 83 on the delimitation of the continental shelf between neighboring States does not indicate its relationship to article 76
 - Delimitation of the shelf does not absolve coastal States from their obligations under article 76 of the Convention

Article 76(10) of the Convention

- The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts
 - Ensures that determination of final and binding outer limits of the continental shelf in accordance with article 76 does not affect the rights of neighboring States with overlapping entitlements
 - Implementation of article 76 will create certainty over the extent of overlapping entitlements, which should facilitate delimitation

Article 9 of Annex II to the Convention

- The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts
 - Does not indicate that the actions of the CLCS are without prejudice to these matters
 - Instructs the CLCS to ensure that no such prejudice results from its actions
- Article 9 has been implemented by the CLCS through Rule 46 of and Annex I to its Rules of Procedure
- Annex I among others provides that
 - In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute (para. 5(a))
- Has been invoked in relation to 17 submissions

Absence of recommendations and delimitation

- *Bangladesh/Myanmar*
 - Both States had made submissions by CLCS that could not be considered by the CLCS due to absence of prior consent in accordance with paragraph 5(a) of Annex I to the Rules of Procedure
 - Delimitation dispute submitted to the ITLOS
 - Parties differed as to whether the ITLOS could determine the continental shelf boundary beyond 200 M in the absence of recommendations of the CLCS
- 443. Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the *Tribunal 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 in question* (emphasis provided)
- 444. In this regard, the Tribunal notes that the Bay of Bengal presents a unique situation, as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea.

Implications of *Bangladesh/Myanmar* for delimitation

- ITLOS applies a high threshold for refraining from delimitation
 - “significant uncertainty as to the existence of a continental margin in the area in question”
- Bay of Bengal presented an “easy” case
- There may be cases in which a court or tribunal may conclude that there is significant uncertainty
 - If the ITLOS would be followed in such cases the court or tribunal concerned might not proceed with delimitation of the continental shelf beyond 200 M
 - This leads to a continued impasse as both the CLCS and a court or tribunal cannot proceed

Implications of *Bangladesh/Myanmar* and Annex I

- Absence of sufficient certainty about extent continental margin/outer limits may lead to a court or tribunal not proceeding with the delimitation of the continental shelf
- This absence of sufficient certainty is caused by the absence of recommendations of the CLCS, which is the consequence of paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS
- Conclusion has to be that paragraph 5(a) does not ensure that the “actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts” as is required by article 9 to Annex II to the Convention

Two interpretations of Article 9 of Annex II

- The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts
 - Paragraph 5(a) of Annex I to the Rules of Procedure seems to consider that such prejudice might result from the consideration by the Commission of the data and other material contained in a submission
 - Another interpretation would be that the Commission in considering such matters should not take any actions that result in such prejudice
- Latter interpretation would ensure that the Commission can carry out its functions as defined in the Convention and ensures that article 76 will be implemented for all coastal States
- Also furthers one of the basic objectives of the Convention of creating certainty about the final limits between national jurisdiction and the Area

Alternative to paragraph 5(a) provided by the CLCS

- Recommendations of the CLCS to Japan in relation to Okinotorishima
 - Position on outer limits continental shelf Okinotorishima (“paragraph 5(a) approach”)
 - “The Commission considers that it will not be in a position to take action to make recommendations on the Southern Kyushu-Palau Ridge Region (KPR) until such time as the matters referred to in the notes verbales [of China and Korea invoking paragraph 5(a)] have been resolved” (para. 20)
 - Recommendations also indicate:
 - “The Recommendations of the Commission only deal with issues related to article 76 and Annex II to the Convention and are without prejudice to matters relating to delimitation between States, or implementation of other parts of the Convention or any other treaties.” (para. 13)
 - Latter approach makes paragraph 5(a) superfluous

Options for coastal State whose submission has been deadlocked under the current situation

- Do nothing
 - Coastal State has complied with its obligations under article 76 to the extent possible
 - Results in continued uncertainty about the outer limits of the continental shelf
- Reach understanding with States concerned that will lead to giving prior consent to consideration of submission by the Commission
- Use Part XV of the Convention to arrive at a resolution of the Annex I dispute
- Apply provisional limits on the basis of submitted information or, where relevant, recommendations of a subcommission
 - Assumption that the coastal State has implemented article 76 in good faith
 - Might lead to impression of not complying with the LOSC
 - Could contribute to triggering non-compliance of other States on other aspects of the Convention
- These options do not seem to offer a completely satisfactory answer to the problem posed by para. 5(a) of Annex I