GOVERNMENT OF JAMAICA

INTERVENTION BY

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ON THE REPORT OF THE INTERNATIONAL COURT OF JUSTICE (ICJ) TO THE UNITED NATIONS GENERAL ASSEMBLY

IN THE MARGINS OF THE INTERNATIONAL LAW WEEK OF THE 74TH UNITED NATIONS GENERAL ASSEMBLY

30TH OCTOBER 2019

Mr. President,

Jamaica is pleased to join in the annual discussion of the ICJ report, in the margins of the International Law Week of the United Nations General Assembly. We express gratitude to the ICJ for its report which highlights the diverse geographical spread of cases illustrative of the universal character of the Court's jurisdiction, and also the wide variety of subject-matters addressed, illustrating the general character of the Court's jurisdiction.

The growth in the Court's workload is notable as well as the very demanding schedule of hearings and deliberations, facilitating the consideration of several cases simultaneously. The Report points out that despite the complexity of the cases involved, the average period between the closure of the oral proceedings and the delivery of a judgment or an advisory opinion by the Court does not exceed six months. This is certainly highly commendable and something that we would all wish to see emulated in our domestic courts.

Among the pending contentious proceedings during the period under review, the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) and the Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) are particularly notable given the unsettled nature of some of the issues raised as evidenced in the strong dissenting views expressed by some of the Court's members. Indeed in the Nicaragua v Colombia case the Court was evenly split on the issue of *res judicata* as reflected in Articles 59 and 60 of the Statute of the Court. The decision was reached with the casting vote of the President.

The decision of the Court to assume jurisdiction in the Nicaragua v Colombia case concerning the delimitation of the outer continental shelf, forces one to recall the Court's earlier judgment in 2012 which drew the maritime boundary between Nicaragua v Colombia as well as the decision of the Court in the case concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea. In both instances the Court declined to delimit the maritime boundary extending more than 200 nm from the baselines from which the breadth of the territorial sea is measured.

The International Tribunal on the Law of the Sea adopted a contrary position in the Bangladesh v Myanmar case. In declining to draw a distinction between the inner-continental shelf and the outer-continental shelf, ITLOS noted that given the decisions of the Commission on the Limits of the Continental Shelf to defer the consideration of the submissions of Bangladesh and Myanmar in light of their competing claims, should ITLOS decline to delimit the continental shelf beyond 200 nm under article 83 of the UNCLOS, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the UNCLOS may remain unresolved which would not be conducive to the efficient operation of the Convention. It would be contrary to the object and purpose of the Convention not to resolve the existing impasse. The ITLOS underscored its responsibility as a creature of the UNCLOS to ensure the effective implementation of its provisions.

The Bangladesh/Myanmar case concerned two States Parties to the UNCLOS. Thus the question as to whether the customary regime on the outer-continental shelf is reflected in the provisions of UNCLOS did not arise. The question is particularly relevant given the requirements of article 82 for payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and the limit of 350 nm established in article 76(6) of the UNCLOS.

Where either or both States to a dispute are not parties to the UNCLOS, this will be an issue. Should States Parties to the UNCLOS to be disadvantaged vis-à-vis non-parties in having to make payments or contributions through the International Seabed Authority, which shall distribute them to States Parties to the Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them in accordance with article 82(4) of the UNCLOS? A decision that would disadvantage States Parties to the UNCLOS would certainly undermine this "Constitution of the oceans".

This sort of dispute would only come before the ICJ and not ITLOS, as only State Parties to the UNCLOS and certain entities specified under the Convention may access the ITLOS under article 291. Indeed, such a dispute is now before the ICJ in round 2 of the Nicaragua v Colombia case.

The ICJ decisions in the second Nicaragua/Colombia case and the Somalia v Kenya case could suggest some convergence in the Court's and ITLOS' approach to the law on the continental shelf and on how each court views itself.

In the Somalia v Kenya case the Court noted the importance of ensuring that the dispute is subject to a method of dispute settlement which "gives effect to the intent reflected in Kenya's declaration" (paragraph 132). As such, the Court did not wish to decline jurisdiction in favour of a tribunal that may be established under the UNCLOS dispute settlement procedures when such tribunal may possibly determine that it had no jurisdiction despite the reservation made by Kenya to its optional clause declaration under Article 36(2) of the Court's Statute.

In support of its view, the Court cited the observation of the Permanent Court of International Justice that

> "the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice" [Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 30].

Thus the possibility of a negative conflict of jurisdiction creating a situation in which the other tribunal either fails or is not given an opportunity to exercise its jurisdiction impels the Court to assume jurisdiction once it is seized of a matter even where the States Parties have opted for an alternative mechanism for settling their maritime dispute under the UNCLOS.

The Court has thus accorded itself default jurisdiction under the UNCLOS where States have made a declaration even with a reservation under the optional clause of Article 36(2) of the Court's Statute. At the same time the ITLOS, as stated in the Bangladesh/Myanmar case, being a creature of the Convention, attributes to itself a special role in dispute settlement in promoting the objects and purposes of the Convention.

The architecture of UNCLOS Part XV positions an Annex VII Tribunal as the default mechanism for the settlement of disputes concerning the interpretation or application of the Convention; this seemingly is the result of a lack of consensus between designating the ICJ, the principal judicial organ of the UN as the appropriate forum or the creation of a new specialized tribunal, ITLOS. Ultimately flexibility prevailed. An Annex VII Tribunal could, of course, include both ITLOS and ICJ judges.

The overlapping nature of the jurisdiction of the Court and ITLOS in disputes involving the law of the sea suggests that the development of the law would likely benefit from close collaboration between these two judicial bodies.

The Report of the ICJ to the General Assembly, however, provides no information on this. Chapter VI, titled, "Visits to the Court and other activities", makes no mention of ITLOS. Nor has my delegation detected a reference to ITLOS in any other section of the Report. It would seem beneficial to both the Court and ITLOS and States Parties to the UNCLOS that the Court and ITLOS exchange perspectives on developments in the law from time to time. This is something that my delegation would encourage. We would wish to see reports of such exchanges in the ICJ's annual reports to the General Assembly in the future.

Thank you.