

DECLARATION OF JUDGE IWASAWA

Article 33, paragraph 1, of UNCLOS reflects customary international law on the contiguous zone in respect of the powers that a coastal State may exercise in that zone — It is significant that, at the Third United Nations Conference on the Law of the Sea, there were no proposals to add other matters to the list in Article 33, paragraph 1.

Article 56, paragraph 1, of UNCLOS provides that, in the exclusive economic zone, the coastal State has (a) sovereign rights over natural resources and (b) jurisdiction with regard to the protection of the marine environment — In addition, paragraph 1 (c) indicates that the coastal State has “other rights” provided for in UNCLOS — Nicaragua has freedom of navigation in its exclusive economic zone — Colombia’s integral contiguous zone infringes not only on Nicaragua’s sovereign rights and jurisdiction but also on Nicaragua’s freedom of navigation in its exclusive economic zone.

1. In this declaration, I offer my views on Colombia’s integral contiguous zone and the Court’s reasoning in that regard.

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2. The Court finds that Article 33, paragraph 1, of UNCLOS reflects customary international law on the contiguous zone in respect of the powers that a coastal State may exercise in that zone (Judgment, para. 155). Thus, the powers that a coastal State may exercise in its contiguous zone are confined to those set out in that provision, namely “customs”, “fiscal”, “immigration”, and “sanitary” matters. A coastal State may not exercise, in its contiguous zone, control with respect to security matters (*ibid.*, para. 154).

3. In support of the above conclusions, the Court notes that a Polish proposal to add “security” to the list of matters was rejected at the First United Nations Conference on the Law of the Sea in 1958, and that the wording of Article 24, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone was adopted in Article 33, paragraph 1, of UNCLOS “without any change as regards the matters in respect of which the coastal State may exercise control” (*ibid.*, para. 153).

4. In my view, it is also significant that, at the Third United Nations Conference on the Law of the Sea, there were no proposals to add other matters to the list. Of the more than 80 proposals submitted to the Conference’s Second Committee, which dealt with a broad range of items,

only two proposals concerned the contiguous zone¹. Neither of them was a proposal to add other matters to the list. It was on this basis that Article 33, paragraph 1, of UNCLOS adopted the wording of Article 24, paragraph 1, of the 1958 Convention without any change as regards the matters in respect of which the coastal State may exercise control in its contiguous zone.

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5. Nicaragua contends that Colombia's integral contiguous zone established by Presidential Decree 1946 "is not consistent with international law", first, because the limits of the integral contiguous zone exceed the maximum breadth allowed by international law, and secondly, because the powers Colombia grants itself in the contiguous zone "exceed what international law allows"².

6. The Court finds that Colombia's integral contiguous zone is indeed "not in conformity with customary international law" (Judgment, paras. 187, 194, 196, and 261 (5)) in two respects. First, the geographical extent of the integral contiguous zone contravenes the 24-nautical-mile rule for the establishment of the contiguous zone. Secondly, certain powers conferred on Colombia by Presidential Decree 1946 extend to matters that are not permitted by customary international law as reflected in Article 33, paragraph 1, of UNCLOS (*ibid.*, para. 187).

7. With regard to the second respect, the Court further finds that the integral contiguous zone infringes upon Nicaragua's "sovereign rights and jurisdiction" in its exclusive economic zone (*ibid.*, paras. 194 and 196).

8. Article 56, paragraph 1, of UNCLOS provides that, in the exclusive economic zone, the coastal State has (*a*) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources and (*b*) jurisdiction with regard to such matters as marine scientific research and the protection and preservation of the marine environment. Paragraph 1 (*c*) further indicates that the coastal State also has "other rights and duties provided for in this Convention".

¹ (1) United Nations, *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. III (Documents of the Conference, First and Second Sessions), Byelorussian Soviet Socialist Republic, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland and Union of Soviet Socialist Republics: draft Article on the contiguous zone, 29 July 1974, UN doc. A/CONF.62/C.2/L.27, p. 205 (a draft Article which reproduced Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone); (2) *ibid.*, Egypt, Honduras, India, Iran, Kuwait, Liberia, Libyan Arab Republic, Mexico, Morocco, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen: draft Article on the economic and contiguous zone, 23 August 1974, UN doc. A/CONF.62/C.2/L.78, p. 239 (a proposal to repackage the contiguous zone as the economic zone).

² Reply of Nicaragua, Chap. III, Secs. A.1 and A.2.

9. There is no doubt that the coastal State has freedom of navigation in its exclusive economic zone. Article 87, paragraph 1, of UNCLOS provides that “[t]he high seas are open to all States, whether coastal or landlocked” and that “[f]reedom of the high seas . . . comprises . . . (a) freedom of navigation”. Article 90 of UNCLOS provides that “[e]very State . . . has the right to sail ships flying its flag on the high seas”. The coastal State can establish its exclusive economic zone up to 200 nautical miles from its baselines. That area is subject to a specific legal régime, which confers additional rights and duties on the coastal State. However, the freedoms the coastal State had on the high seas before establishing its exclusive economic zone continue to exist in that zone. In *The “Enrica Lexie” Incident* case, India argued that it had freedom of navigation in its exclusive economic zone “pursuant to Article 87, paragraph 1, subparagraph (a) and Article 90” of UNCLOS³, and the arbitral tribunal confirmed that Articles 87 and 90 “apply equally to the exclusive economic zone”⁴.

10. The Court finds that the scope of Colombia’s powers within its integral contiguous zone to prevent and control infringements of laws and regulations, as set out in Article 5 (3) of Presidential Decree 1946, “is much broader than the material scope of the powers enumerated in Article 33, paragraph 1, of UNCLOS” (Judgment, para. 176).

11. The Court observes that the power to protect “national maritime interests” in Article 5 (3), through its broad wording alone, “appears to encroach on the sovereign rights and jurisdiction of Nicaragua” (*ibid.*, para. 178). As regards the power for “the preservation of the environment” in Article 5 (3), the Court finds that it is contrary to Article 56, paragraph 1(b) (iii), of UNCLOS, which grants Nicaragua jurisdiction with regard to the “protection and preservation of the marine environment” (*ibid.*).

12. With respect to the power to prevent and control infringements relating to the “integral security of the State”, including drug trafficking,

³ *The “Enrica Lexie” Incident (Italy v. India)*, Award of 21 May 2020, Permanent Court of Arbitration (PCA) Case No. 2015-28, para. 1017; see also paras. 72 and 987.

⁴ *Ibid.*, para. 1036. The arbitral tribunal stated that Articles 87 and 90 apply to the exclusive economic zone “by virtue of Article 58, paragraph 2” of UNCLOS. See also A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Oxford, Hart Publishing, 2017, p. 690 (Article 90: Right of navigation). Article 58, paragraph 2, provides that “Articles 88 to 115 . . . apply to the exclusive economic zone in so far as they are not incompatible with this Part”. In the context of *The “Enrica Lexie” Incident* case, however, the arbitral tribunal’s explanation that Articles 87 and 90 apply to the exclusive economic zone “by virtue of Article 58, paragraph 2” may be questionable. The heading of Article 58 reads “Rights and duties of *other* States in the exclusive economic zone” (emphasis added), which may suggest that Article 58, including paragraph 2, concerns the rights and duties of States *other than* the coastal State (in that case, India).

and “conduct contrary to security in the sea”, Nicaragua argues that “[n]either of these matters is covered by customary international law” and that Article 5 (3) therefore “is inconsistent with international law”⁵. The Court finds that “[t]he inclusion of security in the material scope of Colombia’s powers” is indeed “not in conformity with the relevant customary rule” (Judgment, para. 177). However, the Court refrains from finding that this power encroaches on Nicaragua’s “sovereign rights and jurisdiction” in its exclusive economic zone. This is appropriate because this power does not, in itself, affect Nicaragua’s sovereign rights over natural resources or jurisdiction with regard to the protection and preservation of the marine environment. However, it unquestionably encroaches on Nicaragua’s freedom of navigation in its exclusive economic zone.

13. In its final submissions, Nicaragua requests the Court to adjudge and declare that,

“[b]y its conduct, the Republic of Colombia has breached its international obligation to respect Nicaragua’s *maritime zones* as delimited in . . . the Court Judgment of 19 November 2012, *as well as* Nicaragua’s *sovereign rights and jurisdiction* in these zones” (*ibid.*, para. 24; emphasis added).

The first part of this request of Nicaragua is made in broader terms than the second part.

14. In respect of Colombia’s integral contiguous zone, Nicaragua contends that “Colombia has infringed and is infringing upon Nicaragua’s *maritime zone* while implementing its integral contiguous zone”⁶. Some incidents alleged by Nicaragua in support of this contention point to Colombia’s encroachment on Nicaragua’s freedom of navigation rather than its sovereign rights and jurisdiction. For example, according to Nicaragua, a Colombian naval vessel intercepted a Nicaraguan coast guard vessel on patrol and demanded that it withdraw from Colombia’s integral contiguous zone, claiming that it was in Colombian waters⁷. These incidents did not necessarily affect Nicaragua’s sovereign rights over natural resources or jurisdiction with regard to the protection and preservation of the marine environment, but they certainly encroached on Nicaragua’s freedom of navigation in its exclusive economic zone.

15. Notwithstanding the foregoing, in its pleadings on Colombia’s integral contiguous zone, Nicaragua focused primarily upon Colombia’s violations of Nicaragua’s “sovereign rights and jurisdiction”. In light of these pleadings by Nicaragua, the Court characterizes Nicaragua’s argu-

⁵ Reply of Nicaragua, paras. 3.41 and 3.45.

⁶ *Ibid.*, para. 3.61 (emphasis added).

⁷ See Memorial of Nicaragua, para. 2.43 (alleged incident of 2 January 2014). See also *ibid.*, Annex 23B (alleged incident of 2 February 2014).

ments as such (Judgment, para. 189) and concludes that Colombia's integral contiguous zone infringes upon Nicaragua's "sovereign rights and jurisdiction" in its exclusive economic zone (*ibid.*, paras. 194 and 196). However, in my view, Colombia's integral contiguous zone infringes not only on Nicaragua's sovereign rights and jurisdiction but also on Nicaragua's freedom of navigation in its exclusive economic zone.

16. As regards appropriate remedies in this respect, the Court finds that Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946, "in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua" (*ibid.*, paras. 196 and 261 (6)). The Court indicates a remedy in this form in response to Nicaragua's request in its final submissions (*ibid.*, para. 24).

(Signed) IWASAWA Yuji.
