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Delimitation of Maritime Spaces Between Spain and Morocco

José Antonio de Yturriaga Barberán*

Abstract: In its first part, the article describes the regulation of the maritime spaces of the States in accordance with International Law and, in particular, with the 1982 UN Convention on the Law of the Sea. The second part deals with the delimitation of the territorial sea, the EEZ and the continental shelf between Spain and Morocco, both in the Mediterranean Sea and in the Atlantic Ocean. The author considers it unnecessary to negotiate with Morocco the delimitation of the maritime spaces between the Canary Islands and Western Sahara, given that this country does not legally exercise its sovereignty over the land territory and the adjacent waters of the former Spanish colony.

Keywords: Western Sahara, Spain, Morocco, European Union, Delimitation

(A) INTRODUCTION

The delimitation of the maritime spaces of the States was one of the crucial questions dealt with by the delegations participating in the Third United Nations Conference on the Law of the Sea (UNCLOS), which could not be solved until the last moments of its XI session, after exhausting negotiations held between the two main interest groups -the "Equidistance Group" and the" Equitable Group"-, respectively led by Ambassador José Manuel Lacleta -Spain- and Ambassador Mahon Hayes Ireland .

The issue of the delimitation of the territorial sea and of the contiguous zone was quickly solved by the Conference, but this was not the case of the delimitation of the continental shelf and of the exclusive economic zone EEZ .

Among its neighboring States, Spain has only agreed the delimitation of its territorial sea and its continental shelf with France in the Gulf of Biscay[1], and of its continental shelf with Italy[2]. It has also agreed, in principle, the delimitation of its territorial sea and its continental shelf with Portugal in the Iberian Peninsula[3], but has failed to agree upon the delimitation of its EEZ and of its continental shelf in the Southern Atlantic, due to the Portuguese demand to draw the median line, not between Madeira and the

* Ambassador of Spain.

1 Convenio entre España y Francia sobre delimitación del mar territorial y de la plataforma continental en el Golfo de Vizcaya. Paris, 29 January 1974 (*Boletín Oficial del Estado* No. 159, of 4 July 1975)

2 Convenio entre España e Italia sobre delimitación de las plataformas continentales entre los dos Estados. Madrid, 19 February 1974 (*Boletín Oficial del Estado* No. 290, of 5 December 1978)

3 Convenio hispano-portugués de delimitación del mar territorial y de la zona contigua. Guarda, 12 February 1976 (*Boletín Oficial de las Cortes* nº 1.512, 15 June 1976)

Canary Islands, but between the Canarian archipelago and the rock of Salvajes[4]. Spain has reached no agreement with France in the Mediterranenan Sea, with Morocco both in the Mediterranean Sea and in the Atlantic Ocean, or with Great Britain in Gibraltar.

(B) DELIMITATION OF THE TERRITORIAL SEA

UNCLOS had no difficulty in reaching an agreement about the delimitation of the territorial sea and reproduced the text of the 1958 Genera Convention on the Territorial Sea and the Contiguous Zone, which stated that ,"*where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line, every point of which is equidistant from the nearest points from the baseline from which the breath of the territorial sea of each of the two States is measured*"[5]. This text has been literally reprinted in the 1982 Law of the Sea Convention (LOSC)[6] .

According to the 1958 Geneva Conventions, the islands generate territorial sea and continental shelf[7]. However, some delegations participating at UNCLOS including that of Morocco- called such a right into question or tried to reduce its scope, especially in connection with the EEZ, arguing that the islands could not have the same rights as the continental territories. Especially sensitive to the colonial problems -including the proximity to their coasts of islands under the control of colonial powers-, the African States expressed "*the need to duly define the nature of the maritime spaces of the islands*", and recommended that such a definition should be made in accordance with equitable principles, which should have in mind -among other factors- the size of the islands, their population, their contiguity to the main territory, and their geological configuration[8]. Sixteen African States submitted a proposal based on the OAU Declaration, but adding as a new factor, that is, the fact that the island be placed on the continental shelf of another State[9]. Rumania made a proposal, according to which, the small islands, uninhabited and without economic life of their own, would have no right to continental shelf or to any other maritime space of similar characteristics[10]. These proposals were rejected by the Conference which maintained the equality of rights of the islands and

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4 J.A. de Yturriaga," Ámbitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar: Una perspectiva española" (Ministerio de Asuntos Exteriores. Madrid, 1996) , at 298. Both States agreed to apply the criteria established in the Guarda Convention for the delimitation of their territorial sea and their contiguous zone, and the criterion of equidistance fixed in their national legislations for the delimitation of their EEZ and of their continental shelves .

5 Article 12-2 of the Convention on the Territorial Sea and the Contiguous Zone. Geneva, 29 April 1958. UNO. Geneva, 2005

6 Article 15 of the Law of the Sea Convention. Montego-Bay, on 10 December 1982. UNO. New York, 1983

7 Aritiicle 10-2 of the Convention on the Territorial Sea and the Contiguous Zone, and article 1-b) of the Convention on the Continental Shelf. *Supra* note 5

8 Paragraph B) of the OAU Declaration on Law of the Sea Questions. Addis-Abeba, 24 May 1973

9 Doc. A/AC138.SCII./L.40, of 16 July 1973. Report of the Seabed Committee. New York, 1973, volume III , at.25

10 Working document with respect to certain particular aspects of the regime of islands, in the context of the delimitation of maritime spaces among neighboring States. Doc. A/AC138.SCII./L.53, of 10 August 1973. (Report of the Seabed Committee. New York, 1973, volume III , at.116)

the land territories to generate maritime spaces[11]. Therefore, the LOSC established that with the exception of the rocks which could not sustain human habitation or economic life of their own- "*the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory*"[12].

(C) DELIMITATION OF THE EEZ

Given the fact that the EEZ was a new concept, UNCLOS had no previous references other than the 1958 Geneva Convention on the Continental Shelf, which concerning delimitation- provided that, where the continental shelf was adjacent to the territories of two or more States whose coasts were opposite or adjacent to each other, the boundary of the shelf appertaining to such States should be determined by agreement between them. In the absence of agreement, and unless another boundary line was justified by special circumstances, the boundary was the median line, every point of which was equidistant from the nearest points from which the breadth of the territorial sea of each State was measured[13].

In the Informal Single Negotiating Text elaborated in 1975 by the chairman of the Second Committee, ambassador Reynaldo Galindo-Pohl El Salvador-, modified the Geneva text in establishing that the delimitation of the EEZ between adjacent States should be effected by agreement in conformity with equitable principles, and using, whenever appropriate, the median or equidistance line, and taking the relevant circumstances in account. If agreement was not reached between the concerned States, they should resort to the procedures provided by the LOSC for settlement of disputes. "*If there was no agreement, no State might extend the limit of its EEZ beyond the equidistance line*"[14].

One year later, the new chairman of the Second Committee, ambassador Andrés Aguilar -Venezuela- unilaterally changed this formula in the Revised Single Negotiating Text, in spite of the fact that there had been no consensus at the Conference to this effect. The RSNT established that, pending agreement, the States concerned should enter into provisional arrangements[15]. This unjustified change tilted the balance in favor of the States which supported the subjective criterion of "equitable principles" and unchained a confrontation with the States who defended the objective criterion of "equidistance".

In 1977, the delegation of Canada proposed that the equidistance be recognized as the general principle for the delimitation and the delegation of Spain suggested the reintroduction of article 71-3 of the ISNT[16]. These proposals were embodied into a joint proposal sponsored by 17 delegations[17]. Spain distributed a *Memorandum on*

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11 J.A. de Yturriaga, *supra* n. 4, at.375-376.
12 Article 121 of LOSC, *supra* n. 6
13 Article 6 of the 1958 Geneva Convention on the Continental Shelf, *supra* note 5
14 Article 70 of the ISNT/Part II, reprinted in R. Platzöder, *Third UN Conference on the Law of the Sea Documents* (Dobbs Ferry, 1983, vol. XI) at 171.
15 Article 61(3) of the RSNT/Part II, reprinted in Platzóder, *supra* note 14, at 176.
16 Reprinted in Platzöder, *supra* note 14, at 319-320.
17 Reprinted in Platzöder, *supra* note 14, at 467.

Delimitation, which reflected the views of the "Equidistance Group". The delegation of Morocco suggested to explicit the concept of "*special circumstances*" and the factors to be considered in order to effect the delimitation of maritime spaces[18], and other 11 delegations including that of Morocco- submitted a proposal aimed at suppressing any mention of the equidistance[19]. Consolidated both interest Groups, there were endless informal negotiation between them and their leaders Lacleta and Hayes-, until a compromise was reached at the last session of UNCLOS under the pressure of its president, Tommy Koh[20].

The LOSC included the following provision: "1.-"*The delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of International law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution; 2.-If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. 3.-Pending agreement […] the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature*"[21].

This formula did not solve the question of the delimitation, was excessively generic and left it subject to the interpretation of the relevant provisions of International law to the States concerned and, eventually, to the courts and tribunals. It had, however, the merit that it was acceptable to everybody and, consequently, made it easy to reach a general agreement and opened the way to the approval of the Convention by UNCLOS.

(D) DELIMITATION OF THE CONTINENTAL SHELF

The Convention provides that the continental shelf of a State "*comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distances of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance […] The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof*"[22].

There are in the continental shelf, therefore, two different parts: the one reaching the 200 miles, which coincides with the seabed of the EEZ and the other which goes beyond this limit in the cases where a State is endowed by nature with a geomorphological shelf which reached up to 350 miles. In the first part, the LOSC´s regulations concerning the delimitation of the continental shelf are identical to those applicable to the delimitation of the EEZ[23].

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18 Reprinted in Platzöder, *supra* note 14, at 390.
19 Reprinted in Platzöder, *supra* note 14, at 468.
20 J. A. de Yturriaga, "Spain and the Law of the Sea: 20 Years under LOSC", *SYbIL*, vol. 21, 2007, at 170-171.
21 Article 76 of LOSC, *supra* note 6.
22 Paragraphs 1 and 3 of article 76 of the LOSC, *supra* note 6.
23 Article 83 of the LOSC, *supra* note 6.

In the second part of the continental shelf, the provisions established for the first part may be also applicable, but there should be no confusion between the recognition of a State´s shelf extending up to 350 miles and the delimitation of such shelf between the States concerned. The first question is to be solved by the Commission of the Limits of the Continental Shelf (CLCS), to which the coastal States have to submit their demands, and the Commission shall make recommendations to the coastal States on matters related to the establishment of the outer limit of their continental shelves[24], but the delimitation of the respective shelves falls under the competence of the States concerned.

(E) DELIMITATION BETWEEN SPAIN AND MOROCCO

As neighbouring States, Spain and Morocco have spaces to delimit, both in the Mediterranean Sea and in the Atlantic Ocean, but,-for political reasons- the two States have been unable to reach agreement on any delimitation.

(1) Territorial Sea

A Morocco has claimed sovereignty over several territories in North Africa which belong to Spain, such as Ceuta, Melilla and the Islands of Chafarinas, Alborán, Alhucemas and Vélez de la Gomera. Due to these claims, Spain and Morocco have never held negotiations in order to delimit their territorial sea in the Mediterranean. Morocco even established straight baselines in 1975, which provoked the inclusion within its internal waters of some maritime areas which belonged to Spain, what has been the cause of numerous incidents between the two countries[25]. For this reason, the Spanish Government submitted diplomatic Notes of protest.

The delimitation of the territorial sea between Spain and Morocco has, however, been solved thanks to the application of the national legislation of each country, which coincide in the regulation of the subject. According to the 1977 Spanish Law on the Territorial Sea, unless there is agreement to the contrary, the territorial sea of Spain could not be extended beyond the median line between the Spanish coasts and the coasts of the States opposite or adjacent to them, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of the States concerned is measured, drawn in conformity with International Law[26] . The last sentence of the provision was included to take into account the fact that Morocco had drawn straight baselines in the area against the rules of International Law, encroaching in this way in the sovereignty of Spain over its territorial sea.

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[24] Article 76-8 of the LOSC, *supra* note 6.

[25] Decree No. 2-75-211, of 21 July 1975, establishing the closing lines in the Moroccan coasts and geographical coordinates of the limit of the Moroccan territorial sea and the exclusive fishing zone. (*Bulletin Officiel*, 13 August 1975).

[26] Article 4 of the Ley 10/1977, de 4 de Enero, sobre Mar Territorial. (*Boletín Oficial del Estado* No.46, of 23 February 1978).

The 1973 Dahir fixing the outer limit of the territorial waters and the exclusive fishing zone of Morocco included a similar provision[27]. Therefore, the delimitation line between the territorial seas of Spain and of Morocco in the Mediterranean Sea is the median or equidistant line.

(2) EEZ

There have been no negotiations between Spain and Morocco to delimit the EEZ/ Exclusive Fishing Zone between the two countries, neither in the Mediterranean Sea, nor in the Atlantic Ocean. However, between 2003 and 2005, there were conversations about delimitation of the EEZ and the continental shelf in the Atlantic area between the Canary Islands and Morocco, which soon reached a stalemate due to the radical position of Morocco, that maintained two thesis which were unacceptable to Spain: that the islands did not have the same rights as the continental territories concerning the extension of their respective maritime espaces, and that the application of the criterion of "equitable principles" should replace the criterion of "equidistance" in delimiting de EEZ between the Canary Islands and Morocco .

Both countries have, however, applied "de facto" the criterion of equidistance, although Morocco has gone at times beyond the median line in giving licenses to oil companies, in order that they may undertake activities of exploration of the seabed, which has provoked exchange of notes of protest from both sides.

The situation was complicated by the amendments introduced at the Cortes to the Spanish Law on the EEZ, according to which, in the case of archipelagoes, la median or equidistance line should be measured as from the archipelagic perimeter . The Spanish Government did not take any decision to implement this provision, but the Canarian Parliament adopted in 2010 an autonomic law on "Aguas canarias", which developed the said provision, by establishing that, in between the outstanding points of the islands that formed part of the Canarian archipelago, an archipelagic outline following the general configuration of the archipelago should be drawn. The legislators did not have a clean conscience as they Introduced an additional provision in the text providing that the establishment of this archipelagic perimeter would not alter the delimitation of the maritime spaces of the Canary Islands, in conformity with the rules of International Law . In any case, the differences between drawing the equidistance line from the normal baselines or from archipelagic baselines were negligible.

The Moroccan Law 1-87-211 of 2020, states that "la delimitation de la zone économique exclusive du Royaume de Maroc est effectuée sur la base des dispositions de la Convention des Nations Unies sur le droit de la mer, adoptée à Montego-Bay le 10 décembre 1982, en tenant dûment compte de tous les facteurs pertinents, notamment géographiques, géomorphologiques et/ou de circonstance particulières et des intérets du Royaume, aux fins de parvenir à un résultat equitable, en particulier avec les Etats dônt les côtes sont adjacents ou font face a celles du Royaume de Maroc" .

[27] Article 2 of the Dahir No. 1-73-2011, de 2 mars ,1973, "fixant les limits des eaux terrritoriales". In *U.N. Legislative Series: National Legislation and Treaties Related to the Law of the Sea.* New York, 1976, at 29.

In its 2009 judgment on the "Maritime Delimitation in the Black Sea", the Court stated that, at the initial stage of the construction of a provisional equidistance line, it was not yet concerned "with any relevant circumstance that may obtain, and the line is plotted on strictly geometrical criteria on the basis of objective data". As is stated in the 2006 Arbitral Award relating to the delimitation of the EEZ and the continental shelf between Barbados and Trinidad, "a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion" , is required. In its judgment on the "Territorial and Maritime Dispute" between Nicaragua and Colombia, the ICJ corrected the boundary line in favor of Nicaragua due to the substantial disparity in the longitude of the two coasts .

The Spanish Government is not a fanatic of the slogan "equidistance or death" and is open to take special circumstances into account, as it did in its negotiation with France on the delimitation of the continental shelves in the Gulf of Biscay, when it accepted to correct the equidistance line to the advantage of France because of the concavity of the Gulf and the longer longitude of the French shore. Spain would be ready to introduce corrections in the drawing of the equidistance line between the coasts of the Canary Islands and the Moroccan shore if special circumstances so required. However, after having closely analyzed such circumstances in the case of the delimitation of the EEZ/continental shelf between Morocco and the Canary Islands, Mariano Aznar has reached the conclusion that there is no disproportion and, therefore, a strict geometrical equidistance line between the two coasts should be drawn .

(3) EEZ

In its 2016 judgment about the dispute between Nicaragua and Colombia, the ICJ made quite clear that the role of the CLCS related only to the delineation of the outer limits of the continental shelf but not to its delimitation. The LOSC stated that the whole process of its article 76 was without prejudice of the delimitation of the continental shelf between States with opposite or adjacent coasts[28]. The Court reaffirmed that the procedure before the CLCS related only to the delineation of the outer limit of the continental shelf and confirmed the difference with its delimitation -governed by article 83-, which is implemented by agreement between the States concerned or by recourse to dispute settlement procedures[29].

In 2015, Spain submitted to the CLCS its request to extend the outer limit of its continental shelf in the Canary Islands up to 350 miles and the Commission has not yet given its recommendations on the subject. Morocco objected to the Spanish request, reserved its position and stated that it rejected any action unilaterally decided by Spain to delimit the continental shelf, which may adversely affect its rights and its interests. By a Dahir adopted in 2020, Morocco extended the outer limit of its continental shelf

[28] Article 76-10 of the LOSC. *supra* note 6.

[29] F. Armas,"The Outer Limit of the Continental Shelf in the Recent International Jurisprudence", in P. A. Fernández (Ed.), "*New Approaches to the Law of the Sea, in Honor of Ambassador José Antonio de Yturriaga-Barberán*" (Nova, New York, 2017, at 144).

up to 350 miles[30] and asked the CLCS to back its claim, presented in a preliminary submission[31]. If the Commission recognizes the right of Spain and of Morocco to extend their respective continental shelves up to 350 miles, both countries should agree upon their delimitation[32].

(F) DELIMITATION BETWEEN SPAIN AND WESTERN SAHARA

Since 1975, _ after the unilateral decision of the Spanish Government to withdraw from Western Sahara most parts of this non-self-governing territory have been militarily occupied by Morocco without any legal foundation. As the Undersecretary of the UN for Legal Affairs, Hans Corell, stated in 2002, the 1975 Madrid Agreement neither transferred the sovereignty of the Western Sahara, nor conferred to any of its signatories the condition of administrative power, since Spain by itself could not have made it. The transfer of the administration of the territory by Spain to Morocco and to Mauritania did not affect the international condition of Western Sahara as a non-self-governing territory[33].

The General Assembly expressed its concern regarding the persistent occupation of Western Sahara and asked Morocco to put an end to such occupation[34]. The Security Council adopted the resolution 690(1991), by which it stated its support to the Secretary General´s efforts to organize and supervise a referendum of self-determination in Western Sahara under UN auspices, and to this effect- it established a UN Mission for a Referendum in Western Sahara[35]. The referendum of self-determination has not been held so far due to the opposition of Morocco, which has offered the Saharauis a light autonomous regime a mere decentralization- within the Kingdom. Morocco is in no hurry since it enjoys the "*uti possidetis*" of the territory[36].

The Court of Justice of the European Union has blamed Morocco on several occasions for its behavior in Western Sahara despite the reluctance of the European institutions , especially in the question of fisheries. The European Commission tried to safeguard the possibility for fishermen from EU countries to fish in the "Saharian Shoal". The 2005 fishing Agreement between the EU and Morocco allowed the European vessels

30 Article 3 of the Law No, 1-73-211. *supra* note 31.

31 See A. Jiménez García-Carriazo, "*La ampliación de la plataforma continental más allá de las doscientas millas marinas en el marco de la Convención de las Naciones Unidas sobre el Derecho del Mar: Especial referencia a España*" (Dykinson, Madrid, 2017)

32 See E. Jiménez-Pineda, "The Pending Maritime Delimitations between Spain and Morocco: Sovereignty, Status and Feasibility", *Maritime Safety and Security Law Journal*, vol.4, 2021; and E. García Pérez, "Con la previsible ampliación de sus plataformas continentales, el difícil equilibrio entre España, Marruecos y el Sáhara Occidental", *Revista de Estudios Internacionales Mediterráneos*, vol. 26, 2019.

33 Paragraphs 6 and 7 of Corell´s Report on Western Sahara, of 29 January 2002 (doc. S.2002/161 of the same date).

34 General Assembly resolutions 34/37, of 21 November 1979, and 35/39, of 11 November 1980 (*Official Records of the General Assembly.* New York, 1980 and 1981).

35 Security Council Resolution 696(1991), of 29 April 1991 (*Official Records of the Security Council.* New York, 1991).

36 J. A. de Yturriaga, "*El Sáhara español: un conflicto aún por resolver*" (Sial/Casa de África. Madrid, 2020), at 428-429.

to fish in waters "*under Moroccan jurisdiction*"[37]. According to the EU negotiator, César Debén, the clause had been included not because the Union considered that the waters belonged to Morocco, but because they were under its administration[38].

The Polisario Front questioned the legality of the 2012 EU-Moroccan Agreement on Reciprocal Measures for the Liberalization of Commerce of Agricultural and Fishing Product and the ECJ lawyer general, Melchior Whatelet, considered that including the Western Sahara within the scope of the Agreement was not in keeping with International Law applicable to the relations between the EU and Morocco[39] and following his opinion the Court declared that the Agreement was null and void[40]. The European Commission and the European Council appealed the judgment and the Court confirmed it, stating that the Agreement could not be applied in the non-self-governing territory of Western Sahara because the territory had a condition different and separate from that of Morocco[41].

The question was raised again in connection with the Agreement on measures about the liberalization of the commerce of agricultural and fishing products, and the Court re-stated that Western Sahara could not be considered as "Morocco´s territory" and, consequently, the waters adjacent to the territory were not included within the Moroccan fishing zone[42]. In spite of the ECJ opinion, in 2019 the European Parliament authorized the modification of Protocols No. 1 and 4 of the Agreement establishing an Association between the EU and Morocco, which continued to allow the vessels of EU member States to fish in the "Sahara Shoal". The Polisario Front appealed once again against such decision because it implied the recognition of Morocco´s sovereignty over Western Sahara, and the Court maintained that the decision violated article 94 of the Association Agreement which limited its scope of application to the territory of Morocco and the waters of the Sahara did not form part of this territory[43].

The judgment made abundantly clear the ECJ´s legal position concerning the lack of sovereignty of Morocco over the territory of Western Sahara and its adjacent waters which collided with the political and economic position of the Commission and the Council, and of some of its members, including Spain. It showed the EU´s hypocrisy which gave priority to the principle of effectivity over that of legality, the fish over the rules of International Law, and the euro over the human rights[44]. After the judgment, the EU High Representative, Josep Borrell, and the Moroccan Minister of Foreign Affairs, Nasser Bourita, formulated a joint statement, in which it was stated that they would continue working to develop the multiple dimensions of their strategic association and

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37 Article 11 of the Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, *Official Journal of the European Union* , L.141/4, of 29 May 2006.

38 *Europa Press*, 28 June 2005

39 Whatelet´s Report of 13 September 2016 (doc. C-104/16P).

40 Judgment of Section 8 of the ECJ ,of 17 December 2015 (doc. C-658/34).

41 Judgment of the General Chamber of the ECJ ,of 21 December 2016 (doc. C-104/16).

42 ECJ´s judgment of 27 February 2018 (doc. C-266/16).

43 Judgment of Section of the ECJ ,of 29 September 2021 (doc. C-658/34).

44 J.A. de Yturriaga, "Varapalo del TJUE a la UE y a Marruecos por la pesca en el Sáhara Occidental", in *Facetas de política española, 2021* Editorial Académica Española, Berlín, 2022, at 236-237.

restore the Pact In that way, the Union was implicitly recognizing Morocco´s sovereignty over Western Sahara[45].

Morocco has violated International Law in adopting a law regulating the maritime spaces of Western Sahara territorial sea sea, EEZ and continental shelf-. It has not adopted a law "*ad hoc*", but included the Sahara waters within the scope of application of the laws adopted by its Parliament concerning the Moroccan waters. Bourita, declared that his country had the right to "delimit" its maritime spaces in accordance with International Law[46] . The Moroccan shore in the Atlantic Ocean spread from Tangier to La Guaira -in the border with Mauritania-, and the laws adopted constituted an essential pillar for the consolidation of the Moroccan sovereignty over its maritime spaces, and the restoration of its occupied territories. Morocco was open to a dialogue with Spain, Portugal and Mauritania in order to delimit their maritime spaces in the case of overlapping[47].

The Canary Islands faces mainly the Moroccan shore, but its continental shelf overlaps to a certain extent with the continental shelf of Western Sahara and eventually with the continental shelf of Madeira, in the case that the right to generate such space was recognized to the Salvajes Islands, which are located 200 miles away from the closest point to the Moroccan coast and 80 miles from the Canary Islands[48]. I think that such recognition is not in keeping with the LOSC, whose article 121 provides that the rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf. The delimitation between Morocco and Mauritania does not affect the Canary Islands, since they do not share maritime spaces.

In the preliminary presentation made to de CLCS in 2015 claiming the establishment of a continental shelf of 350 mile in the Canary Islands, the Spanish Government mentioned *verbatim* the Western Sahara as a possible concerned entity for the delimitation, although it was a non-self-governing territory in process of decolonization. In its final proposal, this mention was dropped and reference was made to the rights of third parties which may be affected, The Spanish Govenrment engaged itself to take the said rights duly into account whenever there was in the area a State with which it may negotiate. Spain would be ready to negotiate an equitable solution, in accordance with International Law, with the entity which exercised sovereign control over the territory of Western Sahara, once the decolonization process was completed[49].

The legal position of Morocco was very weak until recently because although it occupied "*de facto*" most of the territory of Western Sahara, no State had recognized the legality of its occupation. However, at the end of 2020, the president of the United State, Donald Trump fully recognized the legality of the Moroccan occupation and stated that the proposal an autonomous regimen for Western Sahara submitted by Morocco was

45 Jorge Ortiz, "The EU Says that It Wants to Maintain Its Agreements with Morocco" (Reprinted from "*Atalayar*", 16 March 2022)

46 I supposed that he meant to say "establish" rather than "delimit"

47 José Antonio de Yturriaga, "Expansionismo marroquí a las aguas saharianas, de las que dispone a su antojo" (In "*Nuevas facetas de política española*" (Editorial Académica Española, Beau Bassin, 2021) at 422-427.

48 Aznar, supra note 35. See A. Sereno, "The New Maritime Map of Portugal", *REEI*, vol., 28, 2014.

49 UN Doc.CLCS/90, 1 October 2015, at 16.

the only feasible solution to end the conflict. After this recognition, other 19 countries followed suit and expressed recognition of the annexation of Western Sahara by Morocco, either explicitly or implicitly, by opening Consulates in the territory.

The president of the Spanish Government, Pedro Sánchez, joined the ranks, although not fully so far, when in a secret letter sent to Mohamed VI- he changed unexpectedly the traditional position of Spain over its former colony and praised the Moroccan offer of autonomy, as "*serious, credible and realistic*". Sanchez repeated verbatim Trump´s words in qualifying the Moroccan proposal in such a way, but he stopped there and did not follow the "*Trumpanian*" step to "*recognize Morocco´s sovereignty over the whole territory of Western Sahara*"[50]. Sanchez´s decision was politically wrong, but legally impeccable, since the integration in a third State is one of the options offered by the UN to end a colonial *status*[51]. The relevant fact is that such a decision should be freely condoned by the Sahara people. If Sánchez does not give Trump´s additional step and does not deny the Saharauis their right to self-determination, Spain would have not recognized de legality of the Moroccan occupation of Western Sahara and the Spanish Government will have no need to negotiate the delimitation of the continental shelf of the Canary Islands with Morocco.

(G) CONCLUSIONS

Spain and Morocco have never celebrated formal negotiations to delimit their maritime spaces, due mainly to political reasons in the Mediterranean Sea and to legal reasons in the Atlantic Ocean. Morocco´s claim of sovereignty over Ceuta, Melilla and the Islands of Chafarinas, Alhucemas, Vélez de la Gomera and Alboran have made the negotiations impossible. Morocco has denied the right of these territories to have their own maritime spaces and closed some of the bays in the area with straight lines, with the effect of including part of Spanish waters within its internal waters, which has provoked the remittance by the Spanish Government of diplomatic notes of protest

Curiously enough, the question of the delimitation of the territorial sea between Spain and Morocco in the Mediterranean Sea has "*de facto*" been solved by the combined application of the national legislation of both countries, which establish that -in the absence of an agreement to the contrary- the States concerned are not allowed to extend the outer limit of their territorial sea beyond the median or equidistant line between the coasts of the two countries.

The main obstacle for the delimitation of the EEZ and the continental shelf between the Canary Islands and Morocco is mainly of legal nature. In spite of the fact that Spain and Morocco are Parties to the LOSC, they interpret it in a different way in the matter of delimitation. Morocco maintains that continental territories do not have the same

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[50] J.A. de Yturriaga, "Apoyo continuado de Estados Unidos a la anexión del Sáhara Occidental por parte de Marruecos", *Sevillainfo*, 12 May 2021.

[51] Assembly General Resolution 1541(XV), 5 December 1950, on the principles which should guide member States about their obligation to send the information required in article 73 of the Charter (*Official Records of the General Assembly* XV session. New York, 1950). See J. A. de Yturriaga. "Non-Self-Governing Territories: The Law and Practice of the United Nations", *The Yearbook of World Affairs*, vol. 18, 1964, at 197.

rights as far as the generation of maritime spaces is concerned, despite the provisions of the Convention to the contrary. Morocco tolerates "*de facto*" the equidistant line as the delimitation line between the Canary Islands and its shore, but sometimes, it has gone beyond that line, especially in the case of concessions to oil companies in order that they may explore the seabed in the area.

Concerning the continental shelf outside the 200 miles, both countries have requested the CLCS to authorize them to extend their shelves up to 350 miles in the area, but the Commission has not given yet an answer to their requests. There is, therefore, no overlapping of shelves so far and, consequently, no need for delimitation. In connection with the delimitation of the continental shelf within de 200 miles, the situation is exactly the same as the delimitation of the EEZ.

Morocco which illegally occupies most parts of the territory of Western Sahara, including its whole shore- has signed several Agreements with the CEE/EU, which allowed the vessels of the member States of the Union to fish in the waters of Western Sahara. The ECJ has declared the nullity of these Agreements in various judgments, because Western Sahara does not belong to Morocco, but the European Commission continues with its illegal practice. Both the Commission and the European Council have submitted an appeal against the last Court´s judgment of 2021 and, in the meantime, the controversial Agreements continues to be applied.

In spite of the illegality of its occupation of Western Sahara, Morocco has established and regulated the maritime spaces of the occupied territory. Although Pedro Sánchez has changed the traditional Spanish position "*vis-à-vis*" the decolonization of the non-self-governing territory of Western Sahara, Spain has not recognized so far the legality of the Moroccan occupation. Therefore, there is no need to negotiate with Morocco the delimitation of the maritime spaces between the Canary Islands and Western Sahara. Spain will have to do it in due time when -once de decolonization is completed- there will be a State with whom to negotiate the said delimitation.