



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [Twitter Account](#) [YouTube](#) [LinkedIn](#)

Summary

Unofficial

Summary 2023/5

13 July 2023

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)

The Court recalls that, in its Application of 16 September 2013, Nicaragua instituted proceedings against Colombia with regard to a dispute concerning

“the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia”.

The request contained in Nicaragua’s first submission, which was presented in the Memorial and reiterated in the Reply, proposes co-ordinates for the continental shelf boundary between Nicaragua and Colombia in the area beyond 200 nautical miles from the baselines of Nicaragua’s coast but within 200 nautical miles from the baselines of Colombia’s mainland coast.

The request contained in Nicaragua’s second submission, which was presented in the Memorial and reiterated in the Reply, proposes co-ordinates to delimit the area of the continental shelf in which, according to Nicaragua, its entitlement to an extended continental shelf overlaps with Colombia’s entitlement to a continental shelf within 200 nautical miles from the baselines of the coasts of San Andrés and Providencia.

The request contained in Nicaragua’s third submission, as presented in its Reply, concerns the maritime entitlements of Serranilla, Bajo Nuevo and Serrana. Specifically, Nicaragua requests the Court to declare that “Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles, and [that] Serrana is enclaved as per the Court’s November 2012 Judgment”.

In its Order of 4 October 2022, the Court considered that, in the circumstances of the case, before proceeding to any consideration of technical and scientific questions in relation to the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured, it was necessary to decide on certain questions of law, after hearing the Parties thereon. Consequently, Nicaragua and Colombia were asked to confine the arguments in their pleadings to two questions.

In its Judgment, the Court considers the first (I) and second (II) questions, before addressing the requests contained in Nicaragua’s submissions (III).

I. FIRST QUESTION FORMULATED IN THE ORDER OF 4 OCTOBER 2022 (PARAS. 35-79)

The Court recalls that the first question formulated in the Order of 4 October 2022 is worded as follows:

“Under customary international law, may a State’s entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?”

A. The preliminary character of the first question (paras. 37-45)

The Court observes that determining whether there is any area of overlap between the entitlements of two States, each founded on a distinct legal title, is the first step in any maritime delimitation, because “the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned”. Therefore, the first question has a preliminary character in the sense that it must be answered in order to ascertain whether the Court may proceed to the delimitation requested by Nicaragua and, consequently, whether it is necessary to consider the scientific and technical questions that would arise for the purposes of such a delimitation.

The Court notes that it asked the Parties to base their arguments on customary international law, which is applicable to the present case because, unlike Nicaragua, Colombia is not a party to the 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or the “Convention”). The Court thus turns to the customary international law applicable to the maritime areas at issue, namely the exclusive economic zone and the continental shelf.

B. The customary international law applicable to the maritime areas at issue (paras. 46-53)

The Court recalls that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, and that multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

The Court notes that UNCLOS was drawn up at the Third United Nations Conference on the Law of the Sea. As is indicated in its preamble, the objective of the Convention was to achieve “the codification and progressive development of the law of the sea”. Even prior to the conclusion of the negotiations, certain aspects of the legal régimes governing the maritime areas of coastal States, notably the continental shelf and the exclusive economic zone, were reflected in State practice, primarily through declarations, laws and regulations. This practice was taken into account during the drafting of the Convention. A very large number of States have since become parties to UNCLOS, which has significantly contributed to the crystallization of certain customary rules.

As recognized in the preamble to the Convention, “the problems of ocean space are closely related and need to be considered as a whole”. The method of negotiation at the Conference was designed against this background and had the aim of achieving consensus through a series of provisional and interdependent texts on the various questions at issue that resulted in a comprehensive and integrated text forming a package deal.

Referring to its relevant jurisprudence on the matter, the Court recalls that Article 56 of the Convention reflects customary rules on the rights and duties in the exclusive economic zone of

coastal States and that the definition of the continental shelf under Article 76 forms part of customary international law.

C. Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State? (paras. 54-79)

The Court observes that the Parties disagree as to whether a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may extend within 200 nautical miles from the baselines of another State.

The Court recalls that the régime that governs the exclusive economic zone set out in UNCLOS confers exclusively on the coastal State the sovereign rights of exploration, exploitation, conservation and management of natural resources within 200 nautical miles of its coast, while specifying certain duties on the part of the coastal State (Article 56), as well as the rights and duties of other States in that zone (Article 58). The Court has stated that the rights and duties of coastal States and other States in the exclusive economic zone set out in Articles 56, 58, 61, 62 and 73 of UNCLOS reflect customary international law.

As stated above, the legal régimes governing the exclusive economic zone and the continental shelf of the coastal State within 200 nautical miles from its baselines are interrelated. Indeed, within the exclusive economic zone, the rights with respect to the sea-bed and subsoil are to be exercised in accordance with the legal régime that governs the continental shelf (UNCLOS, Article 56, paragraph 3), and the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources (UNCLOS, Article 77, paragraphs 1 and 2).

The Court observes that, in the two *Bay of Bengal* cases, one between Bangladesh and Myanmar before the International Tribunal for the Law of the Sea and the other between Bangladesh and India before an arbitral tribunal, the use of an adjusted equidistance line in a delimitation between adjacent States gave rise to a "grey area" as an incidental result of that adjustment. The circumstances in those cases are distinct from the situation in the present case, in which one State claims an extended continental shelf that lies within 200 nautical miles from the baselines of one or more other States. The Court considers that the aforementioned decisions are of no assistance in answering the first question posed in the present case.

In the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case, the Court adopted an adjusted equidistance line as the single maritime boundary within the parties' 200-nautical-mile zones. The delimitation line continued on that course beyond 200 nautical miles from the baselines of both parties. The Court observed that the delimitation might give rise to an area of limited size lying within 200 nautical miles of the coast of Somalia but on the Kenyan side of the boundary. However, unlike the situation in the two *Bay of Bengal* cases, the Court considered that the existence of a "grey area" was only a possibility, depending on the extent of Kenya's entitlement to an extended continental shelf. The Court therefore did not consider it necessary to pronounce on the legal régime that would apply in that possible "grey area".

The Court turns next to certain considerations relevant to the régime that governs the extended continental shelf.

The Court notes that, in contemporary customary international law, there is a single continental shelf in the sense that the substantive rights of a coastal State over its continental shelf are generally the same within and beyond 200 nautical miles from its baselines. However, the basis for the entitlement to a continental shelf within 200 nautical miles from a State's baselines differs from the

basis for entitlement beyond 200 nautical miles. Indeed, in customary international law, as reflected in Article 76, paragraph 1, of the Convention, a State's entitlement to a continental shelf is determined in two different ways: the distance criterion, within 200 nautical miles of its coast, and the natural prolongation criterion, beyond 200 nautical miles, with the outer limits to be established on the basis of scientific and technical criteria.

The Court further notes that the substantive and procedural conditions for determining the outer limits of the continental shelf beyond 200 nautical miles were the result of a compromise reached during the final sessions of the Third United Nations Conference on the Law of the Sea. The aim was to avoid undue encroachment on the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, considered the "common heritage of mankind" and referred to in UNCLOS as the "Area" (Article 1, paragraph 1, of the Convention). The text of Article 76 of UNCLOS, in particular the rules in paragraphs 4 to 7 thereof, the role given to the CLCS in paragraph 8, and the obligation to deposit charts and relevant information in paragraph 9, suggests that the States participating in the negotiations assumed that the extended continental shelf would only extend into maritime areas that would otherwise be located in the Area. Article 82, paragraph 1, of the Convention, for its part, makes provision for payments or contributions to be made through the International Seabed Authority 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". Such a payment would not serve the purpose of this provision in a situation where the extended continental shelf of one State extended within 200 nautical miles from the baselines of another State.

The Court notes that, in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf that extend within 200 nautical miles of the baselines of another State. The Court considers that the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation. Furthermore, the Court is aware of only a small number of States that have asserted in their submissions a right to an extended continental shelf encroaching on maritime areas within 200 nautical miles of other States, and in those instances the States concerned have objected to those submissions. Among the small number of coastal States that are not States parties to the Convention, the Court is not aware of any that has claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State. Taken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law. In addition, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*, which is a constitutive element of customary international law. Indeed, this element may be demonstrated "by induction based on the analysis of a sufficiently extensive and convincing practice".

The Court notes that the reasoning set out above is premised on the relationship between, on the one hand, the extended continental shelf of a State and, on the other hand, the exclusive economic zone and continental shelf, within 200 nautical miles from the baselines of another State.

In view of the foregoing, the Court concludes that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State.

II. SECOND QUESTION FORMULATED IN THE ORDER OF 4 OCTOBER 2022 (PARAS. 80-82)

The Court recalls that the second question formulated in the Order of 4 October 2022 is worded as follows:

“What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?”

It follows from the Court’s conclusion on the first question that, regardless of the criteria that determine the outer limit of the extended continental shelf to which a State is entitled, its extended continental shelf cannot overlap with the area of continental shelf within 200 nautical miles from the baselines of another State. In the absence of overlapping entitlements over the same maritime areas, the Court cannot proceed to a maritime delimitation. Consequently, there is no need for the Court to address the second question.

III. CONSIDERATION OF NICARAGUA’S SUBMISSIONS (PARAS. 83-103)

Based on the conclusion reached above, the Court now turns to the requests contained in Nicaragua’s submissions and set out in its written pleadings.

A. The request contained in the first submission made by Nicaragua (paras. 85-87)

As regards the request contained in Nicaragua’s first submission, the substance of which is recalled in the introduction to this summary, the Court considers that it follows from the conclusion it reached on the first question that, irrespective of any scientific and technical considerations, Nicaragua is not entitled to an extended continental shelf within 200 nautical miles from the baselines of Colombia’s mainland coast. Accordingly, within 200 nautical miles from the baselines of Colombia’s mainland coast, there is no area of overlapping entitlement to be delimited in the present case.

For these reasons, the request contained in Nicaragua’s first submission — that the Court delimit, along the co-ordinates Nicaragua has proposed which are recalled in paragraph 19 of the Judgment, the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the baselines of Nicaragua’s coast but within 200 nautical miles from the baselines of Colombia’s mainland coast — cannot be upheld.

B. The request contained in the second submission made by Nicaragua (paras. 88-92)

As regards the request contained in Nicaragua’s second submission, the substance of which is recalled in the introduction to this summary, the Court notes that Nicaragua accepts that, in principle, San Andrés and Providencia are each entitled to a continental shelf extending at least up to 200 nautical miles. It contends, however, that the continental shelf of these islands should not extend east of the 200-nautical-mile limit of Nicaragua’s exclusive economic zone, due to their small size and their already “much more than adequate” maritime areas resulting from the 2012 Judgment.

In its 2012 Judgment, the Court observed that the Parties agreed on the potential maritime entitlements of San Andrés, Providencia and Santa Catalina, in particular on the fact that those islands “are entitled to a territorial sea, exclusive economic zone and continental shelf”. The Court added that, “[i]n principle, that entitlement is capable of extending up to 200 nautical miles in each direction” and, in particular, that it extends to the east “to an area which lies beyond a line

200 nautical miles from the Nicaraguan baselines”. In the present case, Nicaragua claims that this area lies within its extended continental shelf.

The Court notes that the maritime entitlements of San Andrés and Providencia extend to the east beyond 200 nautical miles from Nicaragua’s baselines and therefore into the area within which Nicaragua claims an extended continental shelf. Yet, it follows from the Court’s conclusion on the first question that Nicaragua is not entitled to an extended continental shelf within 200 nautical miles from the baselines of San Andrés and Providencia. Accordingly, within 200 nautical miles from the baselines of San Andrés and Providencia, there is no area of overlapping entitlement to be delimited in the present case.

For these reasons, the request contained in Nicaragua’s second submission — that the Court delimit, along the co-ordinates Nicaragua has proposed which are recalled in paragraph 19 of the Judgment, the area of the continental shelf in which, according to Nicaragua, its entitlement to an extended continental shelf overlaps with Colombia’s entitlement to a continental shelf within 200 nautical miles from the baselines of the coasts of San Andrés and Providencia — cannot be upheld.

C. The request contained in the third submission made by Nicaragua (paras. 93-102)

As regards the request contained in Nicaragua’s third submission, the substance of which is recalled in the introduction to this summary, the Court recalls that, in its 2012 Judgment, it found that Colombia has sovereignty over the islands at Serranilla, Bajo Nuevo and Serrana. It also observes that, through the request presented in its Application, as further specified in its written pleadings, Nicaragua sought the delimitation of the maritime boundary between the Parties in the areas of the continental shelf that appertain to each of them beyond the boundaries determined by the Court in the 2012 Judgment. Therefore, Nicaragua’s third submission, which it described as adding precision to the delimitation request contained in its Application, must be understood as seeking a specific finding regarding the effect, if any, that the maritime entitlements of Serranilla, Bajo Nuevo and Serrana would have on any maritime delimitation between the Parties.

The Court observes that there are two possibilities with regard to the potential maritime entitlements of Serranilla and Bajo Nuevo. If Serranilla and Bajo Nuevo are entitled to exclusive economic zones and continental shelves, then, in view of the Court’s conclusion above, any extended continental shelf that Nicaragua claims may not extend within the 200-nautical-mile maritime entitlements of these islands. If, on the other hand, Serranilla or Bajo Nuevo are not entitled to exclusive economic zones or continental shelves, then they do not generate any maritime entitlements in the area in which Nicaragua claims an extended continental shelf. In either case, as a consequence of the Court’s conclusion in relation to the first question, within 200 nautical miles from the baselines of Serranilla and Bajo Nuevo, there can be no area of overlapping entitlement to a continental shelf to be delimited in the present proceedings. The Court therefore considers that it does not need to determine the scope of the entitlements of Serranilla and Bajo Nuevo in order to settle the dispute submitted by Nicaragua in its Application.

The Court further recalls that the 2012 Judgment has already determined the effect produced by Serrana’s maritime entitlements. In the operative paragraph of that Judgment, the Court decided that the maritime boundary between the Parties around Serrana followed a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity. As the effect produced by Serrana’s maritime entitlements was determined conclusively in the 2012 Judgment, there is no need for the Court to reaffirm it in the present case.

For these reasons, the request contained in Nicaragua’s third submission — that the Court declare that “Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical

miles, and [that] Serrana is enclaved as per the Court's November 2012 Judgment" — cannot be upheld.

IV. OPERATIVE CLAUSE (PARA. 104)

For these reasons,

THE COURT,

(1) By thirteen votes to four,

Rejects the request made by the Republic of Nicaragua that the Court adjudge and declare that the maritime boundary between the Republic of Nicaragua and the Republic of Colombia in the areas of the continental shelf which, according to the Republic of Nicaragua, appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012 follows geodetic lines connecting the points 1 to 8, the co-ordinates of which are referred to in paragraph 19 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Brant; *Judge ad hoc* McRae;

AGAINST: *Judges* Tomka, Robinson, Charlesworth; *Judge ad hoc* Skotnikov;

(2) By thirteen votes to four,

Rejects the request made by the Republic of Nicaragua that the Court adjudge and declare that the islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200-nautical-mile arcs from the baselines from which the breadth of the territorial sea of Nicaragua is measured connecting the points A, C and B, the co-ordinates of which are referred to in paragraph 19 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Brant; *Judge ad hoc* McRae;

AGAINST: *Judges* Tomka, Robinson, Charlesworth; *Judge ad hoc* Skotnikov;

(3) By twelve votes to five,

Rejects the request made by the Republic of Nicaragua with respect to the maritime entitlements of Serranilla and Bajo Nuevo.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Brant; *Judge ad hoc* McRae;

AGAINST: *Judges* Tomka, Robinson, Nolte, Charlesworth; *Judge ad hoc* Skotnikov.

*

Judge TOMKA appends a dissenting opinion to the Judgment of the Court; Judge XUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a declaration to the Judgment of the Court; Judge ROBINSON appends a dissenting opinion to the Judgment of the Court; Judges IWASAWA and NOLTE append separate opinions to the Judgment of the Court;

Judge CHARLESWORTH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* SKOTNIKOV appends a dissenting opinion to the Judgment of the Court.

Dissenting opinion of Judge Tomka

Judge Tomka considers the Judgment disquieting since it has been arrived at by an irregular procedure which prevented the Applicant from presenting its case in full as provided for in the Rules of Court. Instead, the Court formulated two general legal questions and directed the Parties to address exclusively these two questions during the hearings. He notes that, in its 2012 Judgment in the *Territorial and Maritime Dispute* case between Nicaragua and Colombia, the Court did not dismiss Nicaragua's claim to a continental shelf beyond 200 nautical miles on the basis of what the Court now considers to be a "customary rule of international law" but rather, as confirmed in its Judgment on jurisdiction rendered in 2016 in the present case, because Nicaragua as a party to the 1982 United Nations Convention on the Law of the Sea (the "Convention" or "UNCLOS") had not yet presented in 2012 its full submission to the Commission on the Limits of the Continental Shelf ("CLCS"), in accordance with Article 76, paragraph 8, of the Convention. The Court has thus allowed a further decade of litigation between the Parties only to come in 2023 to the conclusion it could have arrived at in 2012, had it been convinced that such a rule of customary international law existed. No explanation is provided in today's Judgment as to why this happened. As the Court stated in 1974, "the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".

Judge Tomka disagrees with the Court's conclusion that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State. In his view, this conclusion is at odds with UNCLOS, the practice of States, and the jurisprudence of international courts and tribunals, including that of the Court and the International Tribunal for the Law of the Sea ("ITLOS").

He notes that the issue whether a State's entitlement to a continental shelf beyond 200 nautical miles from its coast may extend within 200 nautical miles from the baselines of another State was not debated during the Third United Nations Conference on the Law of the Sea. Nor does the Convention provide that a State's continental shelf beyond 200 nautical miles may not overlap with another State's continental shelf. In the absence of a limitation to this effect, it must be concluded that the existence and the breadth of a continental shelf entitlement beyond 200 nautical miles both depend solely on the geological and geomorphological criteria set out in the Convention.

In his view, this conclusion is consistent with the jurisprudence of international courts and tribunals, which have accepted that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State. This includes the Judgment of the Court in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case, the judgment of ITLOS in the *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* case, as well as the Award rendered by an Annex VII arbitral tribunal in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* case.

According to the Court's consistent jurisprudence, the existence of a rule of customary international law requires that there be a general practice together with *opinio juris*. Neither of these requirements are satisfied in the present case. Judge Tomka regrets that the Court has not taken its task of identifying customary international law very seriously. The Court's Judgment devotes only a single paragraph to its "analysis" of State practice.

Judge Tomka accepts that some States, in their submissions to the CLCS, have limited their claims to a continental shelf entitlement beyond 200 nautical miles so as not to extend them within 200 nautical miles from the baselines of another State. He questions, however, whether there is a "general practice" in support of the alleged rule of customary international law. He notes that several States in their submissions to the CLCS have claimed a continental shelf entitlement beyond 200 nautical miles that extends within 200 nautical miles from another State's baselines. In addition,

several States have made such claims before international courts and tribunals in delimitation cases. In Judge Tomka's considered view, such practice seems capable of seriously calling into question the element of a "general practice". The Court's Judgment, however, does not deal with this practice.

He also questions whether there is *opinio juris* in support of the alleged rule of customary international law. He notes that the Judgment does not identify any expressions of *opinio juris* but rather seeks to infer *opinio juris* from the negative practice of some States. In his opinion, such an inference is not justified. He adds that expressions of *opinio juris* can be found in support of the view that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from another State's baselines.

Separate opinion of Judge Xue

While voting in favour of the operative paragraph of the Judgment, Judge Xue wishes to express her serious reservations about the Court's findings on the applicable law in the present case. Referring to the joint declaration appended to the Order of 4 October 2022, Judge Xue expresses her regrets that the Parties did not have an oral hearing to make their final arguments on all the issues that still divided them and to submit their final submissions to the Court. Procedurally, this practice is unprecedented in the Court's judicial history.

Judge Xue emphasizes that the power of the Court under Article 48 of the Statute to make orders for the conduct of the case and to decide the form and time in which each party must conclude its arguments must be exercised in accordance with the principle of juridical propriety for the good administration of justice. From a procedural point of view, Judge Xue sees no sound reason for the Court to depart from its established practice by holding an oral proceeding to hear the views of the Parties only on two legal questions. In her view, the Parties could have addressed them together with the factual and other legal aspects of the case during the oral proceedings on the merits. If the settlement of the dispute between the Parties on Nicaragua's entitlement to an extended continental shelf indeed hinges entirely on the answers to the legal questions, she considers that the matter should have been resolved much earlier for the sake of judicial economy.

On the substance of the case, Judge Xue does not share the Court's position on the contemporary régime of the continental shelf. The legal issue before the Court ultimately boils down to a question that often arises in continental shelf delimitation, namely the relationship between the extended continental shelf of one State and maritime entitlements within 200 nautical miles from the baselines of another State. She considers that the reasoning of the Judgment on the current state of the law is neither persuasive nor reflective of general State practice and *opinio juris*.

By reference to the Court's jurisprudence, Judge Xue recalls that, under customary international law, the continental shelf régime originates from the concept of natural prolongation. She acknowledges that contemporary customary international law on the definition of the continental shelf was much influenced by the negotiations of the Third United Nations Conference on the Law of the Sea. However, Judge Xue considers that the fundamental basis of the continental shelf régime remains intact under the "package deal"; natural prolongation as the physical criterion for the determination of the continental shelf is not replaced by the distance criterion. There is no basis in customary international law to suggest that restrictions imposed on the extent and use of the continental shelf beyond 200 nautical miles imply that the continental shelf is now under two régimes: the régime of continental shelf within 200 nautical miles and the régime of the extended continental shelf. Either based on the natural prolongation of its land territory or a distance of 200 nautical miles, every coastal State is entitled to a single continental shelf; the substantive rights of the coastal State in the continental shelf within and beyond 200 nautical miles from the baselines are generally the same, which is affirmed by subsequent judicial and arbitral decisions, including the present Judgment.

Judge Xue states that the equal relationship between the two criteria can be further observed from the text of Article 76, paragraph 1, which is considered by the Court as reflective of customary international law. By virtue of this provision, a distance criterion is added alongside the natural prolongation criterion to the definition of the continental shelf. A coastal State whose continental margin does not extend up to 200 nautical miles may extend its entitlement to 200 nautical miles, irrespective of geological and other geophysical conditions. This entitlement provision, by its ordinary meaning, nowhere indicates that the two criteria apply to inner continental shelf and outer continental shelf respectively, as suggested in the Judgment. For any single continental shelf, it may be defined by either one of the criteria, depending on the physical circumstances of the continental margin concerned. Between the two criteria, there is neither priority nor precedence. If the distance criterion were indeed given precedence over natural prolongation within 200 nautical miles, the text of Article 76, paragraph 1, must have been written differently to indicate such a hierarchy, because it would otherwise annul the entitlement to certain extended continental shelves that coastal States enjoy *ipso facto* and *ab initio* and would fundamentally change the basis of continental shelf entitlements under customary international law.

Judge Xue points out that, in analysing the terms of the continental shelf under Article 76, the Court infers an assumption of negotiating States on the basis of Article 76, paragraph 8, of UNCLOS that an extended continental shelf would only extend into maritime areas that would otherwise be located in the Area. In the present case, Nicaragua's claim obviously does not concern the Area, nor did the Parties refer to it during the proceedings. It is true that the limitation on the continental shelf beyond 200 nautical miles and the Article 82 mechanism are designed to protect the Area and its resources as the common heritage of mankind, but they are irrelevant to the present situation. It is questionable whether an inference could be drawn from this treaty mechanism that the distance criterion was provided as the primary entitlement to a continental shelf within 200 nautical miles to trump an overlapping entitlement based on natural prolongation. The assumption inferred from Articles 76 and 82 of UNCLOS, even if established, does not necessarily lead to the conclusion that the mechanism under Article 82 has the consequential effect of restricting a State's entitlement to an extended continental shelf from extending within 200 nautical miles of another State. What has been agreed by the States parties to UNCLOS in the "package deal" remains in the text of the treaty. What is not included should continue to be governed by customary international law. The absence of discussions of the issue during the negotiations at the Third United Nations Conference on the Law of the Sea does not reinforce the Court's reasoning. On the contrary, that fact weakens it. The negotiating parties did not debate the issue simply because they saw no need to do so. As is observed by the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar*, "the establishment of a maritime area in which the State concerned have shared rights is not unknown under the Convention. The Convention is replete with provisions that recognize to a greater or lesser degree the rights of one State within a maritime zone of another State".

Judge Xue observes that overlapping continental shelf entitlements based on different criteria could well have been envisaged when the distance criterion was introduced into Article 76, paragraph 1. Unless otherwise provided, a hierarchical relationship between the two criteria cannot be construed from the simple fact that there are a very large number of States parties to UNCLOS. Moreover, to what extent the relevant treaty rules have passed into the corpus of customary international law is still a question to be determined under customary international law. In other words, the Court has to ascertain whether there is a general State practice and acceptance of such practice as law (*opinio juris*) that support a customary rule as identified by the Court.

In assessing these two constitutive elements for the identification of a customary rule, the Court relies heavily on the relationship of the régimes of the exclusive economic zone and of the continental shelf as provided for in Article 56, paragraph 3, of UNCLOS and on States parties' submissions to the CLCS. It is this part of the reasoning that Judge Xue finds most unpersuasive and problematic.

First of all, Judge Xue considers that the interrelationship between the régimes of the exclusive economic zone and of the continental shelf as provided for in Article 56 does not give a prevailing effect to the exclusive economic zone over the continental shelf. While Article 56, paragraph 3, links the two zones, it does not go so far as to say that the two zones are inseparable in maritime delimitation and that maritime entitlements within 200 nautical miles by their very nature shall take precedence over an extended continental shelf entitlement. States' positions as well as their practice are divided on the question whether the two criteria under Article 76, paragraph 1, are of equal applicability or hierarchical in effect. They differ as to whether the water column and the sea-bed within 200 nautical miles may be delimited separately. Among scholars, views on the subject-matter also vary greatly. This is indeed an area about which the "package deal" was ambiguous. In the view of Judge Xue, the continental shelf régime applies to the sea-bed and subsoil irrespective of the basis of the entitlement, natural prolongation or distance. Judicial and arbitral decisions generally recognize the autonomy and distinction of the two régimes. She considers that the Court's reading of its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case does not withstand scrutiny, because the judicial and arbitral decisions and State practice on the delimitation of continental shelf subsequent to the 1985 Judgment do not support such a proposition.

Judge Xue reviews a number of bilateral agreements, by which States have delimited the exclusive economic zone and the continental shelf separately. Based on the practice of States, Judge Xue observes that States may make special arrangements through bilateral agreements, not necessarily guided by generally applicable law. Nonetheless, such practice supports the settled jurisprudence that the régimes of the exclusive economic zone and the continental shelf, though interrelated, are distinct and may be delimited separately. Although a single maritime boundary is generally preferred for the convenience of management, that rationale for the delimitation does not have a restrictive effect on the entitlement of the extended continental shelf.

With regard to the submissions of States to the CLCS, Judge Xue notes that the Court considers that the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert therein limits that extend within 200 nautical miles from the baselines of another State. Without any examination of the submissions of the "vast majority of those States", the Court considers that "the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation". Recalling some inconsistent practice of "a small number of States", the Court takes the view that, "the practice, taken as a whole, may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law". It further states that, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*. In the view of Judge Xue, this is a rather loose statement on the practice of States. The Court did not even bother to address exactly what practice amounts to an expression of *opinio juris*.

Judge Xue first considers the nature of the State submissions to the CLCS. By virtue of Article 76, paragraph 10, of UNCLOS, the claim that a State has made in its submission to the CLCS may not be final and binding on its position with regard to the questions of entitlement and delimitation; a State may leave out a certain portion of its claim in its submission if it deems it necessary, which does not affect that State's position in the delimitation. Pursuant to Rule 46 of the Rules of Procedure of the CLCS and paragraph 5 (a) of Annex I to the Rules of Procedure, in the case of a maritime or territorial dispute, the CLCS shall not consider the submission. In order to avoid a dispute, States may exercise restraint in their submissions not to claim continental shelf entitlement within 200 nautical miles from the coast of other States. Such restraint may be exercised because of a prior agreement between the States concerned, a unilateral commitment, or a special arrangement. Judge Xue notes that some States hold different claims of extended continental shelf in their separate submissions in respect of different areas.

Judge Xue states that, when the Court affirms the practice of the "vast majority of States parties" for the determination of the customary rule, it primarily relies on the 93 submissions from 73 States and the Cook Islands received by the CLCS so far. According to Colombia, among those

93 submissions, 38 of them are irrelevant as they do not involve any claim of overlapping entitlements within 200 nautical miles of other States. Of the remaining 55 submissions, 51 are said by Colombia to have chosen not to extend the continental shelf within 200 nautical miles from the coast of other States; therefore, only four States have made encroaching claims within 200 nautical miles of another State.

Judge Xue considers that this information needs further scrutiny. She observes that the practice of States is not as certain and consistent as is suggested. Individually, almost one third of the States that are said to have chosen not to claim their extended continental shelf within 200 nautical miles of another State have already concluded with their neighbouring States bilateral agreements on maritime delimitation within 200 nautical miles, which may have a direct bearing on their restraint in their CLCS submissions. Moreover, some of the said States have indeed claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State in the delimitation. In this regard, the most illustrative example is the recent case between Mauritius and the Maldives, in which the Maldives claimed an extended continental shelf that encroached upon Mauritius' 200-nautical-mile limit. The Maldives' "restraint" is not based on a legal obligation derived from a customary rule, nor is Mauritius' objection to the Maldives' submission based on a general rule of customary international law; the Maldives has allegedly undertaken a unilateral commitment not to claim its extended continental shelf within 200 nautical miles of Mauritius. The *Mauritius/Maldives* case reduces the weight of the evidence adduced by Colombia.

Judge Xue further refers to the responses to the submissions by the four States that are said by Colombia to have encroached on the 200-nautical-mile entitlements of other States. In this regard, she provides details of the responses to each of these submissions, evincing that none of those States concerned had indicated that, as a matter of principle, an extended continental shelf may not extend within 200 nautical miles of another State. Indeed, they generally emphasized the need for delimitation between the States concerned.

In conclusion, Judge Xue states that, even though many States parties in their submissions to the CLCS have refrained from claiming a continental shelf that extends within the 200-nautical-mile maritime zones of another State, they have done so for various reasons; there is no consistent practice among those States. The subsequent practice of many of them varies from their position in the submissions, which seriously weakens the evidentiary value of the submissions. Moreover, the other constitutive element for the identification of the alleged rule — *opinio juris* — must be determined separately. There is no evidence shown in the Judgment that those States parties, when restricting their claim in the submissions, believed that such restraint was required by a legal obligation or guided by law. The practice of States, particularly those States whose interests are directly or would likely be affected by such practice, is neither widespread nor consistent. More importantly, no single case can be found where a State has explicitly given up its entitlement to an extended continental shelf, on the ground that it believes that its continental shelf may not extend within 200 nautical miles of another State under international law.

Judge Xue considers the potential impact of the present Judgment on the existing State practice, the stability and security of treaties, the work of the CLCS and States' submissions to be unpredictable, particularly in respect of the existing treaties and recommendations of the CLCS that have already accepted the entitlement of extended continental shelf that extends within 200 nautical miles of another State.

Having considered the state of the law, Judge Xue is of the view that Nicaragua is entitled to an extended continental shelf, provided the existence and outer limit of its continental margin is proven. As a precondition for delimitation, Nicaragua has to first prove that its continental margin overlaps with the entitlements of Colombia. For that purpose, the technical and scientific evidence adduced by the Parties must first be examined. Judge Xue recalls that the expert reports produced by the Parties were not further examined at the oral proceedings because of the way the hearing was organized. She considers that without hearing from the Parties on those reports and without the

assistance of experts appointed by the Court, it is difficult to assess the weight of each piece of evidence. This underscores the value and indispensability of the recommendations from the CLCS. In hindsight Judge Xue believes that, in such a technically complicated case, it is a necessity for the Parties to obtain the recommendations of the CLCS before proceeding to delimitation.

Notwithstanding her serious reservations about the reasoning of the Court, there are two major considerations that lead Judge Xue to vote in favour of the Court's decision.

In her view, divergent as they are, the expert reports of the Parties inform the Court of some basic facts that are crucial for the consideration of Nicaragua's submissions to the Court for adjudication in the present case.

First, the relationship between Nicaragua's continental margin and Colombia's mainland coast remains highly uncertain. In her view, the materials submitted by Nicaragua are not sufficient for the Court to ascertain whether and to what extent Nicaragua's continental shelf extends within 200 nautical miles of Colombia.

In addition, the Court has never dealt with a case where the delimitation involves the extended continental shelf of only one party. Even assuming that the Nicaraguan Rise is southbound by the Hess Escarpment, as asserted by Nicaragua, and that Nicaragua's entitlement is established and overlaps with Colombia's entitlements within 200 nautical miles from its mainland coast, the question remains as to what methodology the Court should adopt to delimit the boundary between the Parties in the area. It seems highly problematic to apply the three-stage delimitation methodology that is usually used for maritime delimitation within 200 nautical miles; the relevant considerations for achieving an equitable solution may be quite different in the present situation.

Moreover, in the view of Judge Xue, the Court should not lose sight of the overall geographical context in which Nicaragua's purported continental shelf is located. As is shown on the maps presented by the Parties, Colombia's San Andrés and Providencia Archipelago, Jamaica and Haiti are situated on the Nicaraguan Rise, alongside Nicaragua. In the western Caribbean, there is Jamaica to the north and Panama to the south. Notwithstanding the existing delimitation treaties between each of these States and Colombia, which are not opposable to Nicaragua, *res inter alios acta*, the entitlements of those States to continental shelf within 200 nautical miles would likely overlap with any extended continental shelf Nicaragua may have. Therefore, it is doubtful that any extended continental shelf Nicaragua may have established could be given its full effect to the extent that Nicaragua claims. As between the Parties, it is Colombia's islands that are situated in the middle of the mainland coasts of the two States that prove crucial for the delimitation between the Parties.

In the 2012 Judgment, the Court did not delimit the maritime area eastward beyond the relevant area as identified for the delimitation of the maritime boundary between the Parties within 200 nautical miles from the mainland coast of Nicaragua. The Court, by implication, nevertheless recognized that Colombia's islands are entitled to their continental shelves under customary international law. In the present case, should Nicaragua's second and third submissions — similar to the request it had made in the *Territorial and Maritime Delimitation* case — be upheld, it would produce a cut-off effect between the islands and the mainland of Colombia. Indeed, it would not be conducive to an orderly management of the maritime area and a coherent relationship among the coastal States in the western Caribbean. As Colombia's islands in the east face the mainland coast of Colombia, their entitlements to an exclusive economic zone and continental shelf should be given full effect. Furthermore, they are situated on the landmass constituting part of the continental shelf claimed by Nicaragua. Under the circumstances, it is questionable whether Nicaragua could still make a good case for its claim.

Based on the foregoing considerations, Judge Xue concludes that Nicaragua's submissions should not be upheld.

Declaration of Judge Bhandari

In his declaration, Judge Bhandari states that it would not have been necessary to include the passage concerning the notion of a single continental shelf in paragraph 75 of the Court's Judgment.

Judge Bhandari states that this notion has been a source of disagreement and confusion in these proceedings. He adds that it is, moreover, not entirely clear, without further specification, what it means to say, as stated in paragraph 75, that substantive rights of the coastal State are "generally the same" within and beyond 200 nautical miles. He notes that the statement as formulated risks perpetuating uncertainty about the practical consequences of the notion of a single continental shelf.

Dissenting opinion of Judge Robinson

1. In his dissenting opinion, Judge Robinson explains his disagreement with the conclusion of the majority, in paragraph 79 of the Judgment, that under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State.

2. Judge Robinson takes the view that the majority fails to substantiate the conclusion that an extended continental shelf of one State may not extend within 200 nautical miles from the baselines of another State. He considers that this conclusion finds no support in either UNCLOS or in customary international law. In his view, the Judgment fails to identify any quality or element in title to a distance-determined continental shelf that would make it prevail over title to a shelf based on natural prolongation. According to Judge Robinson, under customary international law, there is no inherent limitation on the extent of a State's continental shelf beyond 200 nautical miles such that it cannot extend into a neighbouring coastal State's exclusive economic zone with its attendant continental shelf.

3. Judge Robinson stresses that under Article 76 of UNCLOS, which reflects customary international law, title to a continental shelf based on natural prolongation is co-equal with title to a continental shelf based on distance. Therefore, he believes that a continental shelf based on natural prolongation that overlaps with a shelf based on distance is as amenable to delimitation as overlapping continental shelves based on natural prolongation or distance. In his view, there is nothing in Article 83 of UNCLOS to indicate that it is not applicable to delimitation of the maritime boundary between the continental shelf of a coastal State beyond 200 nautical miles from the relevant baselines and the continental shelf of another State within 200 nautical miles from the relevant baselines.

4. The dissenting opinion also comments on the two main arguments advanced by the majority to support the conclusion in paragraph 79: (i) that there is a rule in customary international law prohibiting a State's outer continental shelf from extending within 200 nautical miles from the baselines of another State (para. 77); and (ii) that Article 82 of UNCLOS would lose its meaning, if not its *raison d'être*, if the entitlement of a State to an outer continental shelf were allowed to extend within 200 nautical miles of the baselines of another State (para. 76).

5. In respect of the first main argument of the majority, Judge Robinson recalls that the evidence before the Court is that 55 submissions have been made to the Commission on the Limits of the Continental Shelf (CLCS) in which coastal States could have, on geological or geomorphological grounds, extended their continental shelves within the 200-nautical-mile zones of other States; of that number, 51 submissions made by 39 States refrained from asserting limits that

extended within 200 nautical miles of the baselines of another State. He acknowledges that there is a basis for the conclusion these CLCS submissions are evidence of State practice as they can be considered sufficiently widespread and uniform. However, he disagrees with the majority's conclusion that the practice before the CLCS "is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation" (para. 77). According to Judge Robinson, this conclusion is unsafe, because of the possibility that the practice in question was motivated by considerations other than a sense of legal obligation. He notes that it is likely that the reason for the self-constraint of States — demonstrated in the CLCS submissions of the 39 States — is the very real possibility that the claim to an outer continental shelf which extends within 200 nautical miles of the baselines of another State would lead to a protest, giving rise to a dispute, which — under the CLCS rules of procedure — would prevent the Commission from qualifying or considering the coastal State's submission.

6. In respect of the second main argument, Judge Robinson disagrees with the conclusion of the majority that the payment under Article 82 of UNCLOS would not serve the purpose of the provision in a situation where the outer continental shelf of one State extended within 200 nautical miles from the baselines of another State. He observes that a plain reading of the title and paragraph 1 of Article 82 makes it clear that the payment is due whenever and *wherever* there is 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. Judge Robinson concludes that there is nothing in either the title or in the text of Article 82 that prohibits payments in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles when a coastal State's outer continental shelf extends within 200 nautical miles of another State. He also points out that the relationship that the majority finds between Article 82 and the principle of the common heritage of humankind is not shared by the International Seabed Authority, which concluded in a technical study that

"although Article 82 payments and contributions are for the benefit of States Parties to the Convention, they are not an application of the common heritage principle. This is because the [Outer Continental Shelf] and its resources are subject to the coastal State's sovereign rights and are separate from the common heritage principle."

7. In light of the foregoing, Judge Robinson observes that the majority has failed to establish that, under customary international law, the outer continental shelf of a State may not extend within 200 nautical miles from the baselines of another State. He believes that the Judgment has, in effect, denied a coastal State the full benefit of the natural prolongation criterion in Article 76 (1) of the Convention, which reflects customary international law. Consequently, he believes that the Court should have granted Nicaragua's request for maritime delimitation.

Separate opinion of Judge Iwasawa

In his separate opinion, Judge Iwasawa supplements the reasons for the Court's conclusions and elaborates upon some issues which are not addressed at length in the Judgment.

Some international tribunals have stated in maritime delimitation cases that there is in law a single continental shelf. However, there are important differences with regard to the legal basis for the entitlement to a continental shelf within and beyond 200 nautical miles. With respect to the continental shelf within 200 nautical miles, Judge Iwasawa stresses that only the distance criterion is relevant and that natural prolongation cannot form the legal basis for the entitlement to the continental shelf within 200 nautical miles.

Up to 200 nautical miles, the rights of the coastal State over the continental shelf derive not only from the régime of the continental shelf but also from the régime of the exclusive economic zone. The two régimes are thus interrelated. Judge Iwasawa considers that the régime of the exclusive economic zone, in particular as provided for in Article 56 of UNCLOS, affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State.

Judge Iwasawa points out that *opinio juris* may be inferred in certain circumstances from the general practice of States. He notes that, in the present case, both Parties have explicitly accepted this principle. The Court also accepts this principle, stating that, in light of its extent over a long period of time, State practice may be seen as an expression of *opinio juris*.

In his view, in their submissions to the CLCS, States have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State out of a sense of legal obligation. This is expressly indicated in the executive summaries of some submissions. He stresses that the invariable protests of States affected by submissions made by other States seeking to extend an outer continental shelf within 200 nautical miles of the baselines of the former States are also good evidence of *opinio juris*.

The Court concludes that, if Serranilla or Bajo Nuevo are not entitled to exclusive economic zones or continental shelves, there can be no area of overlapping entitlement to a continental shelf to be delimited. Judge Iwasawa points out that the Court does not answer the question whether, in such a case, Nicaragua would be entitled to an outer continental shelf in the area to the east of the 200-nautical-mile line of the Colombian islands of San Andrés, Providencia and Santa Catalina. In this area, there is a small maritime space which is outside the 200-nautical-mile entitlements of the Colombian islands, the Colombian mainland, Jamaica, Panama and Haiti. Judge Iwasawa considers that, even though this space is outside the 200-nautical-mile entitlement of any State, Nicaragua cannot legally claim an outer continental shelf there, because this space is disconnected from Nicaragua's coast and cannot be regarded as a natural prolongation of its submerged land territory. In his view, this conclusion derives from the interpretation of Article 76, paragraph 1, of UNCLOS.

Separate opinion of Judge Nolte

Judge Nolte disagrees with the Court's rejection of Nicaragua's third submission. In his view, a decision on the request contained in Nicaragua's third submission is necessary to determine the "precise course of the maritime boundary" which constitutes the subject-matter of the dispute between the two Parties. Judge Nolte considers that the dispute between the Parties is not confined to the delimitation of overlapping entitlements, and that the existence of overlapping entitlements is not a necessary precondition for the adjudication of the dispute by the Court. Judge Nolte believes that the Court should have given the Parties the opportunity to present their arguments on the questions whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles; whether the natural prolongation of Nicaragua's mainland coast actually extends to the area around the territorial sea of Serranilla and Bajo Nuevo; and whether a State's entitlement to an extended continental shelf can pass through the 200-nautical-mile zone of another State. Judge Nolte adds a remark on the identification of the rule of customary international law underlying the Court's decision on Nicaragua's first and second submissions.

Dissenting opinion of Judge Charlesworth

Judge Charlesworth explains her vote against the operative clause. In her view, the Court's reasoning allows considerations specific to this case to colour its discussion of the abstract principles set out in the questions formulated in the Order of 4 October 2022.

Judge Charlesworth notes that the first question concerns the determination of a maritime entitlement, which is distinct from a question of delimitation. She recalls that the Court has a considerable jurisprudence on maritime delimitation. In light of this jurisprudence, Judge Charlesworth argues that a coastal State's maritime entitlements are not determined with reference to the maritime entitlements of other coastal States in the vicinity. The latter, in her view, inform rather the question of delimitation.

Judge Charlesworth observes that the Court's task consists in identifying the contours of the entitlement to an extended continental shelf under customary international law. She shares the Court's view that recourse to UNCLOS can assist in that task. At the same time, she cautions against fully transposing methods of treaty interpretation to the context of the interpretation of customary international law.

Judge Charlesworth thinks that the conclusion of the Judgment is not supported by the terms of the definition of the continental shelf under customary international law, as reflected in Article 76, paragraph 1, of UNCLOS. She does not share the Court's interpretation of Article 82, paragraph 1, and of Article 76, paragraphs 4 to 9, of UNCLOS. Judge Charlesworth adds that the Court should proceed gingerly when the preparatory work evidences little or no discussion of a topic, especially where customary international law is in question.

Turning to the exclusive economic zone, Judge Charlesworth observes that it has not absorbed the institution of the continental shelf. She adds that several cases involving maritime delimitation beyond 200 nautical miles have recognized the possibility of an overlap between a State's exclusive economic zone entitlement and another State's extended continental shelf entitlement.

According to Judge Charlesworth, the practice of States provides the strongest support for the Court's conclusion. Judge Charlesworth considers that there is general practice, of coastal States refraining from claiming that they are entitled to an extended continental shelf that intrudes within 200 nautical miles from another coastal State, drawn primarily from States' executive summaries of submissions to the CLCS. She is prepared to accept that the practice is supported by legal conviction. Judge Charlesworth finds that the determination of the content of the putative rule to which the practice conforms is more complicated, however. Judge Charlesworth argues that the abundant State practice should be assessed in light of the goal to achieve "an equitable solution". According to Judge Charlesworth, coastal States refrain from claiming an extended continental shelf within 200 nautical miles from their neighbours' coasts because they hold the legal conviction that principles of maritime delimitation would eventually prevent them from exercising the sovereign rights over that maritime area. She suggests that exceptional situations might call for the adoption of a different outcome.

Judge Charlesworth concludes that the Court is not in a position today to reject the submissions that Nicaragua made in its written pleadings. In her view, the Court should have responded to both questions formulated in the Order of 4 October 2022, and it should have proceeded to hold oral proceedings to decide the remaining issues dividing the Parties in this case.

Dissenting opinion of Judge *ad hoc* Skotnikov

Judge *ad hoc* Skotnikov considers there to be a number of procedural deficiencies that bring into question any substantive findings of the Court. In this regard, he makes particular reference to Article 43, paragraphs 1 and 5, of the Statute of the Court and to Articles 60 and 61 of the Rules of Court. In his view, the way in which the Court dealt with the present case is incompatible with these provisions due to the absence of oral hearings at which the Parties could present their entire respective positions. Instead, they were required to address only two questions of pure law formulated by the Court. Yet, the Court ruled on the entire case, including on an issue manifestly unrelated to these questions. In the view of Judge *ad hoc* Skotnikov, the source of all these issues is the Court's

unprecedented Order of 4 October 2022, which was adopted without consultation of the Parties, as required by Article 31 of the Rules of Court.

As for the substance of the case, Judge *ad hoc* Skotnikov opines that the Court's Judgment of 19 November 2012 in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case and the Judgment of 17 March 2016 on preliminary objections in the present case, when read together, leave no doubt that the Court was ready to consider delimitation once Nicaragua had made full submissions to the CLCS. He considers the Court's approach in those two Judgments, but not in the Court's Order of 4 October 2022 or in the present Judgment, to be consistent with an earlier dictum by the Court. According to this dictum, the Court is

“required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”

In the view of Judge *ad hoc* Skotnikov, the Court's discussion of the questions of pure law formulated by the Court shows that there is nothing in UNCLOS, its *travaux préparatoires*, or the circumstances surrounding its conclusion to support the Court's position in the present case. Additionally, he indicates that the Court's apparent reliance on the role of the CLCS and the payments and contributions concerning exploitation of the extended continental shelf are irrelevant in the present case to which customary international law applies. As for the CLCS submissions on which the Court relies to support its conclusion, Judge *ad hoc* Skotnikov considers that State practice is not consistent and is unaccompanied by *opinio juris*. He notes that there are other, more plausible motivations for States refraining from extending their claims within 200 nautical miles from the baselines of another State.

Further, by reference to a number of specific cases from the Court and other tribunals, he indicates that the existing jurisprudence does not support the Court's conclusion.

Judge *ad hoc* Skotnikov expresses the view that the Court's finding — according to which a State's entitlement to an extended continental shelf may not extend within 200 nautical miles from the baselines of another State — is not in accordance with existing rules of international law. He indicates that, in its attempt to legislate, the Court has disregarded its function, as provided in Article 38, paragraph 1, of the Statute, and has ignored the fundamental principle that “the Court, as a court of law, cannot render judgment *sub specie legis ferendae*”.

It is the position of Judge *ad hoc* Skotnikov that the only legally sound conclusion that the Court should have drawn is that both UNCLOS and customary international law provide for an equitable solution as the guiding principle in maritime delimitations. In his view, the Court should have continued with the case in order to implement this principle.
