DISSENTING OPINION OF JUDGE OWADA

1. I have voted in favour of all the conclusions of the Court relating to the merits of the dispute as contained in the operative paragraph of the Judgment (paragraph 251, subparagraph (1) and subparagraphs (3) through (6)). However, I have been unable to vote in favour of subparagraph (2) of the operative paragraph that relates to the issue of admissibility of the claim by Nicaragua contained in its final submission I (3). I wish to explain why I believe that the conclusion of the Court on this point is not in line with the criterion for judging admissibility of a claim as developed by the Court and not right as a matter of principle.

2. Nicaragua as Applicant, in its original submission contained in the Application of 6 December 2001, stated *inter alia* that:

> "Accordingly, the Court is asked to adjudge and declare:
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> . . . . . .
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> *Second*, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary." (Application, p. 8, para. 8.)

It maintained the same formulation in its Memorial submitted on 28 April 2003 (Memorial of Nicaragua, para. 3.39; Submissions at pp. 265-267). It, however, changed its submissions in its Reply of 18 September 2009 (submission I (3)). The final submissions of the Applicant, as read out at the conclusion of the oral proceedings held on 1 May 2012, specifies its claim as follows:

> "I. *May it please the Court to adjudge and declare that*:
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> . . . . . .
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> (3) The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties." (Judgment, para. 17.)

3. Colombia as Respondent lodged its objection to this, charging that "Nicaragua's maritime claims, and the basis on which those claims have been formulated, have undergone a radical change at a very late stage

of these proceedings" and that "this has fundamentally changed the subject-matter of the dispute which Nicaragua originally asked the Court to decide" (CR 2012/12, p. 44, para. 2). It elaborated its contention of inadmissibility of the new claim of the Applicant by stating that "Nicaragua has not simply reformulated its claim; it has changed the very subject-matter of the case" (*ibid.*, p. 45, para. 10). It thus suggests that this new position that the Applicant takes in the present case is contrary to Article 40 of the Statute and Article 38 of the Rules of Court (*ibid.*, p. 49, para. 32).

In its final submission read out at the conclusion of the oral proceedings on 4 May 2012, the Respondent stated as follows:

> ". . . Colombia requests the Court to adjudge and declare:
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> *(a)* That Nicaragua's new continental shelf claim is inadmissible and that, consequently, Nicaragua's Submission I (3) is rejected." (Judgment, para. 17.)

4. In this situation the Court, before proceeding to the examination on the merits of the respective claims of the Parties, had to determine as a preliminary issue whether this newly formulated submission of the claim made by the Applicant in its final submission I (3) was admissible.

5. Both the Applicant and the Respondent cite the jurisprudence of this Court principally on the basis of two recent cases before the Court — that is, the case concerning *Certain Phosphate Lands in Nauru* and the case concerning *Ahmadou Sadio Diallo* — in order to determine whether or not this allegedly newly formulated claim of the Applicant can be considered admissible. For this purpose, both Parties developed their arguments on the basis of the criteria developed by the Court in its jurisprudence on admissibility of a new claim — that is, either the new claim has been implicit in the Application or it arises directly out of the question which is the subject-matter of the Application.

6. In my view it is doubtful whether either of these two cases is strictly pertinent to the present case. In each of these recent cases the alleged new claim advanced at a later stage of the proceedings by the Applicant was, in its essential character, a new *additional claim* which had not expressly been included in the original Application but which the Applicant claimed — and the Respondent denied — to have been covered by the original claim formulated in the original Application. It is submitted that such is not the situation in the present case. An automatic and mechanical application of these precedents thus could miss the essence of the present case.

The essence of the situation in the present case is that the Applicant attempted to *replace* the original formulation of the claim submitted to the Court in its Application by a newly formulated, ostensibly different, claim relating to the existing dispute. In this sense, the present case is unique and has no exact jurisprudential precedent of the Court.

7. If we try to find an analogous situation in the jurisprudence of the Court, the case which is more akin to the situation in the present case would

be the case concerning *Société commerciale de Belgique (Judgment, 1939, P.C.I.J., Series A/B, No. 78)*, between Belgium and Greece, which came before the Permanent Court of International Justice in 1939. In this case, the original claim of the Applicant, the Belgian Government, contained in its Application, asked the Court to declare that "the Greek Government, by refusing to carry out the arbitral awards in favour of the Belgian Company, had violated its international obligations" (*ibid.*, p. 170). In its Counter-Memorial, the Respondent disputed this allegation that it had refused to carry out the arbitral awards. It advanced the contention that it had neither refused to carry out the awards nor disregarded the acquired rights of the Belgian company, and claimed that it had committed no act which was contrary to international law. Thereupon, the Applicant decided to treat these declarations of the Greek Government as changing the character of the dispute between the two Parties, and, at the conclusion of the oral pleadings, the final submissions of the Belgian Government were given a new form. It now asked the Court to rule that "all the provisions of the awards were binding on the Greek Government without reserve" (*ibid.*, p. 171). No objection was raised by the Respondent to this abandonment by the Applicant of its original submissions which had asked the Court to declare that "the Greek Government . . . had violated its international obligations" (*ibid.*, p. 170) by refusing to pay the arbitral awards in favour of the Belgian company.

8. It was under these unusual circumstances that the Court made the following pronouncement:

> "The Court has not failed to consider the question whether the Statute and Rules of Court authorize the parties to transform the character of a case as profoundly as the Belgian Government has done in this case.
>
> It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. The Court has not hitherto had occasion to determine the limits of this liberty, but it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction." (*Ibid.*, p. 173.)

Under these exceptional special circumstances of the case, the Court, after thus stating the general principles governing this issue, nevertheless accepted in the end this "transformation". It declared that

> "[t]he Court, however, considers that *the special circumstances of this case* as set out above, and *more especially the absence of any objection on the part of the Agent for the Greek Government*, render it advisable that it should take a broad view and not regard the present proceedings as irregular" (*P.C.I.J., Series A/B, No. 78*, p. 173; emphasis added).

9. By comparison, it is not possible to find in the present case any such exceptional special circumstances that could justify the drastic change in the character of the claim. What is more pertinent and crucial, the Respondent in the present case raised a strong objection to this novel formulation of the claim advanced by the Applicant at that late stage of the proceedings.

10. One could only surmise the background of this change of position from what the Applicant explained before the Court:

> "Once the Court had upheld '[Colombia's] first preliminary objection . . . in so far as it concern[ed] the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina' in its Judgment of 13 December 2007, Nicaragua could only accept that decision and adjust its submissions (and its line of argument) accordingly." (CR 2012/15, p. 38, para. 11.)

11. Whatever may be the background, what is essential for our assessment of the situation is that, contrary to the case concerning *Société Commerciale de Belgique*, the 2007 Judgment of the Court did not produce any such fundamental change in the objective legal situation surrounding the maritime delimitation of the area in question, as to require the Applicant to give up its original position and to drastically change its principal claim as well as its legal basis.

12. The present Judgment accepts that

> "from a formal point of view, the claim made in Nicaragua's final submission I (3) (requesting the Court to effect a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties) is a new claim in relation to the claims presented in the Application and the Memorial" (Judgment, para. 108).

It however rejects the contention of Colombia that this revised claim transforms the subject-matter of the dispute, arguing that "[t]he fact that Nicaragua's claim to an extended continental shelf is a new claim . . . does not, in itself, render the claim inadmissible" (*ibid.*, para. 109). It cites a dictum from its own Judgment in the case concerning *Ahmadou Sadio Diallo* that "the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings" *(ibid.)*. Relying largely upon the argument of the Applicant, the

Judgment states that "the Application defined the dispute as 'a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation'" (Judgment, para. 111). On the basis of this understanding, the Judgment concludes that "the [revised] claim . . . falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute" *(ibid.)*. I respectfully differ from this perception of the Court about the nature and the subject-matter of the dispute as submitted to the Court by the Applicant.

13. In its nature, this sudden change of position on the part of the Applicant cannot but be described as anything but a radical transformation of the subject-matter of the dispute itself. If the jurisprudence of the Court for admissibility of a new claim were to be applicable to the present case, it would be difficult to justify this newly formulated claim as a claim "[that] must have been implicit in the application . . . or must arise 'directly out of the question which is the subject-matter of that Application'" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

14. The Applicant argues that the legal situation after this newly reformulated submission replaced its original submission remains no different from the legal situation that had existed before; that the subject of the dispute has thus not been modified. It is argued that the issue of the subject of the dispute was, and still is, nothing else than "to obtain declarations concerning title and the determination of maritime boundaries [between Nicaragua and Colombia]" as paragraph 9 of the Application makes clear and "should not be confused with the means by which it is suggested to resolve it" (CR 2012/15, p. 37, para. 9). I am unable to agree with this position. The legal character of a continental shelf based on the distance criterion and that of a continental shelf based on the natural prolongation criterion are quite distinct; thus the rules applicable for determining the continental margin boundary on the basis of the principle of natural prolongation extending beyond the 200 mile limit of the continental shelf as against the continental shelf determined by the distance criterion of 200 nautical miles from the coast of the land territory (United Nations Convention on the Law of the Sea, Art. 76) are entirely distinct and different from the rules applicable for determining the extent of the continental shelf between the opposite or adjacent states (*ibid.*, Art. 83).

15. In effect, what is proposed by the Applicant by way of its newly reformulated submission I (3) is not something that can be characterized as relating only to "the *means* by which it is suggested to resolve [the dispute]" (CR 2012/15, p. 37, para. 9; emphasis added).

16. With regard to the subject-matter of the "dispute", for the resolution of which the newly reformulated claim of an extended continental shelf of Nicaragua is purportedly being advanced, replacing the original request for "a single maritime boundary" (Application, para. 8), it is to be noted that there is no express definition in the Application to indicate

what exactly in the view of the Applicant constitutes the dispute being submitted by the Applicant in the present case, except for several general references to "the dispute", such as that "[t]he dispute [submitted to the Court] consists of a group of related legal issues . . . concerning title to territory and maritime delimitation" (Application, para. 1). Nowhere in the Application is to be seen what concretely is the dispute that the Applicant is envisaging to refer to the Court.

It is only when we come to the crucial part of the Application which deals with concrete requests for the Court to adjudge and declare in the present case (*ibid.*, para. 8), that the Application specifically states that:

> "in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary".

This language could not be clearer; its purport is to identify a very specific objective that the Applicant seeks to attain by the Judgment, that is, the determination of the course of a single maritime boundary constituting both the continental shelf boundary and the economic zone boundary. It cannot be read as merely indicating one possible means to be employed by the Court for achieving the general objective of demarcating maritime areas lying between the two Parties.

17. If this were a case submitted jointly by the disputing parties through a special agreement, such language as is used in this Application would undoubtedly have constituted a binding agreement of the parties setting out the framework of the task assigned to the Court, from which the Court could not derogate. While it is true that such is not the case in the present proceedings, this Application, which the other Party not only did not contest with regard to the existence and the contents of this dispute but which it positively acted upon as defining the framework and the scope of the dispute in the present proceedings, should be regarded as constituting the agreed basis of the framework of the case before the Court.

In this sense it must be said that the present situation is qualitatively different from the situation where parties are free to choose, modify or even discard the *means* through which they argue their respective cases on a defined point at issue.

18. It may be accepted that the "principal purpose of this Application" seeking the judicial settlement of the dispute may have been "to obtain declarations concerning title and the determination of maritime boundaries" (CR 2012/15, p. 35, para. 6). Nonetheless, the specific request submitted by the Applicant to the Court for achieving this general purpose was for the Court "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone apper-

taining respectively to Nicaragua and Colombia" (Application, para. 8), and not such a generally formulated request that "whatever method or procedure is adopted by the Court to effect the delimitation . . . the decision [of the Court] leaves no more maritime areas pending delimitation between Nicaragua and Colombia" (CR 2012/8, p. 25, para. 44).

19. Having discussed so far in terms of the concrete context of the case, I wish to turn now to what in my view is an even more important point — namely, the consideration of judicial policy of this Court. The present instance of what I believe to be a transformation of the dispute already before the Court into another dispute is different in character from the normal case of procedural irregularities, to which the Court, being an international jurisdiction, can sometimes take a more flexible position. The present case in my view is not a mere matter of procedural formality with only a limited impact on the procedural fairness of the case in issue.

20. In the case concerning *Certain Phosphate Lands in Nauru*, the Court took the view that from a formal point of view the additional claim relating to certain outside assets that appeared in the Nauruan Memorial was a new claim as compared with the original claim presented in the Application. Nevertheless, it took the position that it should consider whether, although formally a new claim, this claim could be considered as included in the original claim in substance. In considering this point, the Court took careful account of the position enunciated by the Permanent Court of International Justice in an earlier case that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). After an extensive consideration of this point, the Court nonetheless came to the conclusion that "the Nauruan claim . . . is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 70).

21. In the present case the same consideration should apply. If the Court were to accept this radical change in the Applicant's submission, then the whole issue of maritime delimitation would acquire a totally different legal character, not only in form but also in substance. Depending upon whether the Court is deciding on the issue of maritime demarcation between the two States in relation to the sea areas covering both continental shelf and exclusive economic zone, or the issue of the delimitation of the continental shelf alone of the two States respectively based on totally different theoretical grounds, the legal character of the issue involved can be totally different. The latter issue would involve an examination of such basic questions as the following: one fundamental point to be clarified in relation to the latter issue, which does not exist in the for-

mer issue, relates to the question of geological or geomorphological features of the maritime areas involved, including the geological nature of the relevant islands, islets, cays and other maritime features in the area. Another difficult question will arise in relation to the unsettled doctrine of how to effect a maritime delimitation of overlapping areas of continental shelf entitlements between two States claimed on the strength of different legal bases by each Party — one claim based on the criterion of natural prolongation extending beyond 200 nautical miles from the baseline of the coast, the other based on the criterion of pure distance. No State practice has developed and no jurisprudence exists on this point. Yet another difficulty the Court will have to face is the question of applicability *vel non* of the relevant prescriptive conditions contained in UNCLOS, especially its Article 76, to the extent that one of the Parties, Colombia, is not a party to the Convention.

22. These are not issues which were envisaged by the Parties or by the Court when the original submission of the Applicant was made in its Application and its Memorial; nor were they argued in full at the last stage of the written proceedings or at the stage of oral proceedings by both of the Parties. The contradiction inherent in the position of the Applicant is well illustrated in the following confirmatory statement in the Memorial of the Applicant itself:

> "The Relevance of Geology and Geomorphology
>
> The position of the Government of Nicaragua is that geological and geomorphological factors have no relevance for the delimitation of a single maritime boundary within the delimitation area." (Memorial of Nicaragua, p. 215, para. 3.58.)

23. One important point for the Court to consider is that this radical change in the Applicant's position took its concrete form only in late 2007, ostensibly in connection with the 2007 Judgment of the Court on the Preliminary Objections phase of the case (13 December 2007), more than six years after the dispute had been submitted in its original form in 2001. The rationale of the prohibition of the transformation of the dispute into a new dispute is solidly founded on the consideration of fair administration of justice to be applied to both parties and the consideration of legal stability and predictability. This to my mind is an essential point of principle to be emphasized in the present setting as a matter of judicial policy of the Court.

24. In light of this situation, it should be no source of surprise to find that the Court in the present Judgment has found, while accepting that the newly reformulated claim of the Applicant is procedurally admissible, that it nonetheless could not entertain the examination of the substantive claim of the Applicant on this point. What the Court decided to do in this Judgment, after upholding the *procedural admissibility* of submission I (3) of the Application, was to engage in the analysis of the essential legal nature of this claim (Part IV), treating it separately from the more general exami-

nation of the original claim of the Applicant relating to the delimitation of the relevant maritime area between the two opposing States (Part V). Clearly the Court has concluded that the issue now raised by Nicaragua in its final submission I (3) was of such a nature that the Court at this stage of the proceedings should not address it as if it were part and parcel of the general basket of issues relating to the maritime delimitation raised in the Application of Nicaragua. It is in my view for this reason that the Court did not proceed to dispose of this Nicaraguan submission I (3) by simply rejecting it on the basis of inadequacy of evidence produced by Nicaragua. More than the issue of evidence is involved, as is revealed in the treatment of the problem involved in Part IV of the Judgment.

25. Reflecting this anomalous situation the present Judgment, while accepting that the reformulated claim of the Applicant is procedurally admissible, analyses the essential legal nature of this claim in an independent Part IV, in between Part III (which deals with the procedural issue of admissibility of the reformulated claim of the Applicant in I (3) of its final submissions) and Part V (which discusses the general issues of maritime delimitation). The Judgment treats this as a separate issue from either of the other two issues, arriving at the conclusion that this claim had to be rejected. For this reason, among others, Part IV is kept separate from Part III and Part V.

26. This approach adopted in the Judgment would seem to reflect the awareness on the part of the Court of the differences that exist in the legal nature of the two different issues involved in relation to the regions of the continental shelf, as described in paragraph 21 above. This to me is one more reason why the Court should have distanced itself from this newly reformulated claim of Nicaragua by declaring it to be inadmissible in the present proceedings.

(Signed) Hisashi OWADA.