SEPARATE OPINION OF JUDGE XUE

TABLE OF CONTENTS

1. I have voted in favour of the operative paragraph of the Judgment but on entirely different legal grounds. I have serious reservations about the Court's findings on the applicable law in the present case. The legal ramifications it may exert on the régime of continental shelf are hard to tell. I am obligated to place my position on the record.

I. Procedural Fairness for the Good Administration of Justice

2. My reservation about the procedural fairness in the organization of oral proceedings has been largely reflected in the joint declaration appended to the Order of 4 October 2022 in the present case (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022, I.C.J. Reports 2022 (II)*, joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov, p. 566). With this final decision settling the case, the oral proceedings on the merits were closed and, consequently, 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.

3. According to Article 48 of the Statute, the Court shall make orders for the conduct of the case and decide the form and time in which each party must conclude its arguments. This power, however, must be exercised in accordance with the principle of juridical propriety for the good administration of justice. Article 31 of the Rules of Court provides that "[i]n every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure". Procedurally, the Court must ensure that each party is free to choose and follow its own judicial strategy and to fully develop all its arguments. In this regard, the Court should exercise great caution when controlling the oral proceedings so as to avoid jeopardizing the rights of the parties (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, *Order of 4 October 2022, I.C.J. Reports 2022 (II)*, joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov, p. 569, para. 11, n. 3, citing Mohammed Bedjaoui, "The 'Manufacture' of Judgments at the International Court of Justice", *Pace Yearbook of International Law*, 1991, Vol. 3, p. 44; Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, 1973, Vol. 67 (1), p. 7).

4. In its final written pleadings, Nicaragua has made three submissions. The first submission concerns maritime delimitation between the continental shelf beyond 200 nautical miles (also referred to as the "extended continental shelf") as claimed by Nicaragua and Colombia's maritime area within 200 nautical miles from Colombia's mainland baselines. The second and third submissions relate to the maritime entitlements of Colombia's maritime features that may overlap with Nicaragua's entitlement to an extended continental shelf. Apparently, Nicaragua's submissions concern both maritime entitlements of the Parties and delimitation. The legal questions posed by the Court in the 4 October 2022 Order primarily address the issue of entitlement. Without hearing the Parties on all the issues, both in law and in fact, and without making the entire case file accessible to the public, the judicial process did not fully run its course. This is particularly questionable when the Applicant has specifically requested the Court to proceed to a hearing on the merits.

5. Procedurally, even supposing that the answers to the legal questions were decisive for the resolution of the whole case, the present approach adopted by the Court at this phase should still be called into question. As the Applicant indicated, the legal questions posed by the Court had already been substantially argued by the Parties in the course of the written proceedings of this case and during the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*) case.

6. The first legal question posed by the Court initially arose from Nicaragua's submission I (3) in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case, where Nicaragua requested the Court to define "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties", which means that Nicaragua's claim to a continental shelf extends beyond 200 nautical miles, as the distance between the mainland coasts of the Parties extends more than 400 nautical miles (*Judgment, I.C.J. Reports 2012 (II)* (hereinafter the "2012 Judgment"), p. 636, para. 17). The Court rejected Nicaragua's request for the delimitation of its extended continental shelf with Colombia's maritime entitlements on the ground that Nicaragua had not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast. The Court stated that it was not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it (*ibid*., p. 669. para. 129). In this regard, the Court especially mentioned that it saw no need to address the issue raised by the Parties as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one State can affect a 200-nautical-mile entitlement to the continental shelf of another State (*ibid*., pp. 669-670, paras. 129-130), a legal question that the Court now considers has been answered by customary international law.

7. Moreover, during the oral proceedings in that case, Judge Bennouna posed the following questions to the Parties:

— "Is the legal régime of the continental shelf for the portion located within the 200-nautical-mile limit different from that for the portion located beyond this limit?"
— "Can the rules laid down in Article 76 of the 1982 United Nations Convention on the Law of the Sea concerning the determination of the outer limit of the continental shelf beyond 200 nautical miles today be considered as rules of customary international law?"

In answering Judge Bennouna's questions, the Parties went some way in answering the first question posed by the Court in the Order of 4 October 2022 and gave their views on the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles.

8. At the preliminary objections phase in the present case, Colombia contended that Nicaragua's first submission was a "reincarnation" of Nicaragua's claim contained in its final submission I (3) in the *Territorial and Maritime Dispute* case, in so far as it concerned delimitation of extended continental shelf. It argued that, by virtue of *res judicata*, the Court was prevented from

entertaining it in the present case. The Court rejected Colombia's objections, including its claim based on *res judicata*, and upheld the admissibility of Nicaragua's first submission. During the written proceedings, the Parties significantly developed their arguments on Nicaragua's entitlement to an extended continental shelf and its relationship with Colombia's entitlements within 200 nautical miles.

9. From a procedural point of view, there seems to be 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. 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, as recalled above, the matter should have been resolved much earlier for the sake of judicial economy. As a judicial organ, the Court is supposed to know the law — *iura novit curia* — and apply it to settle a dispute whenever it is called for. If the Court considers that, under customary international law, maritime entitlements within 200 nautical miles of one State take precedence over an extended continental shelf of another State, it should have decided, either in the 2012 Judgment in the *Territorial and Maritime Dispute* case or in the Judgment of 17 March 2016 on preliminary objections in the present case (hereinafter the "2016 Judgment"), that, by virtue of customary international law, Nicaragua's claim of an extended continental shelf should be rejected outright because Nicaragua is not entitled to such a claim and consequently no issue of delimitation arises between the Parties. The dispute would thus have been settled there. Having unduly prolonged the judicial process and having left unexamined all the technical and scientific evidence submitted by the Parties, the Court's approach, for whatever reason, cannot be deemed in conformity with the principles of judicial propriety and has doubtfully facilitated judicial economy.

II. Substantive Issues in the Present Case

10. I agree with the majority that the negotiation and conclusion of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") has, to a large extent, codified and contributed to the progressive development of customary international law of the sea. However, I do not share the reasoning given in the Judgment 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. It

bears on the fundamental concept of natural prolongation in contemporary customary international law and the "package deal" that was negotiated and eventually worked out at the Third United Nations Conference on the Law of the Sea (hereinafter the "Law of the Sea Conference"). The reasoning of the Judgment on the current state of the law, in my view, is neither persuasive nor reflective of general State practice and *opinio juris*.

A. Continental Shelf under Customary International Law as Reflected in Article 76

11. The first question that the Court posed to the Parties in the Order of 4 October 2022 (hereinafter the "first question") reads 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?"

This question basically asks an issue of entitlement on the basis of the relationship between two criteria as set forth in Article 76, paragraph 1, of UNCLOS. If the two criteria are of equal applicability, Nicaragua may be *entitled* to an extended continental shelf which overlaps with Colombia's entitlements within 200 nautical miles, provided its physical existence is established. The case then calls for delimitation. If the answer to the question is in the negative, it means that the distance criterion takes precedence over natural prolongation. Colombia's 200-nautical-mile entitlements prevail over Nicaragua's claim; Nicaragua is *not entitled* to an extended continental shelf that extends within 200 nautical miles of Colombia. Consequently, there is no issue of delimitation between the Parties. The answer to the first question apparently has to be found in customary international law.

12. Under customary international law, the continental shelf régime originates from the concept of natural prolongation. The doctrine of the continental shelf was first recalled by the Court in the *North Sea Continental Shelf* cases (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 32-33, para. 47), in which the Court considered that the essential basis of the continental shelf is the extended sovereign rights of the coastal State over the natural prolongation or continuation of its land territory under the sea. Such rights exist *ipso facto* and *ab initio* (*ibid.*, p. 22, para. 19). This pronouncement was reiterated by the Court in subsequent cases. In the *Tunisia/Libyan Arab Jamahiriya* case, for example, the Court stated that

> "[t]he concept of natural prolongation . . . was and remains a concept to be examined within the context of customary law and State practice. While the term 'natural prolongation' may have been novel in 1969, the idea to which it gave expression was already a part of existing customary law as the basis of the title of the coastal State." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 46, para. 43.)

13. Admittedly, contemporary customary international law on the definition of the continental shelf was much influenced by the negotiations of the Law of the Sea Conference that lasted for nine years. Not long after the Court delivered its Judgment in the *North Sea Continental Shelf* cases, the United Nations General Assembly adopted a resolution in which it was stated

> "that the definition of the continental shelf contained in the Convention on the Continental Shelf of . . . 1958 does not define with sufficient precision the limits of the area over which a coastal State exercises sovereign rights for the purpose of exploration and exploitation of natural resources, and that *customary international law on the subject is inconclusive*" (resolution 2574 (XXIV) of 15 December 1969, adopted with 65 votes in favour, 12 against, and 30 abstentions; emphasis added).

This resolution was adopted against the backdrop of the upcoming negotiations on the law of the sea and growing concern over the prospects of deep seabed mining. The definition found in Article 1 of the 1958 Convention did not provide a definitive limit of continental margin, leaving it open to technical exploitability. The relevant article reads as follows:

> "For the purpose of these articles, the term 'continental shelf' is used as referring *(a)* to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

Apparently, when the United Nations General Assembly disapproved of this definition as imprecise, the focus of its attention was on *the limits* of the continental shelf but not its foundation; it was feared that by recognizing an exploitability criterion, coastal States may, with the continuous advancement of technology and science, extend their claim unrestrictedly, thus encroaching upon the common area of the deep seabed and its resources, which were subsequently proclaimed as the "common heritage of mankind" at the Law of the Sea Conference. It was this common interest that eventu-

ally led to the new regulation of the continental shelf régime under Part VI of UNCLOS.

14. The outcome of the negotiations on Part VI of UNCLOS is a balanced solution between the individual interest of coastal States and the common interest of the international community. From the text of Part VI, it is not difficult to observe 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 a distance criterion, the criterion applicable to the régime of the exclusive economic zone. 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 (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 96, para. 361; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXXII, p. 38, para. 77; the present Judgment, para. 75).

15. 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 (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118).

Article 76, paragraph 1, provides:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

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 respectively to two

distinct parts of the continental shelf, that is to say, that the distance criterion applies to the continental shelf within 200 nautical miles while natural prolongation criterion is only applicable to the extended continental shelf, as suggested in the Judgment (para. 75). 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 (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), Award of 14 February 1985, RIAA*, Vol. XIX, p. 191, para. 116). 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. Apparently, no such understanding can be found in the text of Article 76.

16. In analysing the terms of the continental shelf under Article 76, the Court infers an assumption of negotiating States from the mechanism established under 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", hence denying the possibility that an extended continental shelf of one State may extend within 200 nautical miles from the baselines of another State (Judgment, para. 76). In this regard, it refers to Article 82 on payments and contributions to the International Seabed Authority in respect of exploitation of the non-living resources of the extended continental shelf and states that

> "[s]uch 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".

Furthermore, it observes that the issue before the Court with regard to the extended continental shelf of one State extending within 200 nautical miles of another State "was not debated" during the Law of the Sea Conference (*ibid.*).

17. 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 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 Law of the Sea Conference 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,

> "[t]he establishment of a maritime area in which the States 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 the maritime zones of another." (*Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, pp. 148-149, para. 507.)

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 this regard,

> "two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77; see also Conclusions 2 and 9 of the Draft conclusions on identification of customary international law, with commentaries, adopted by the International Law Commission in 2018 (hereinafter "ILC Conclusions", UN doc. A/73/10, pp. 122-156).

18. In determining the existence and content of a customary rule that may have evolved from a treaty rule, the Court in the *North Sea Continental Shelf*

cases highlighted an indispensable requirement for the consideration of the State practice under the treaty rule concerned, according to which,

> "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74).

In assessing the evidence, regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found (Conclusion 3 of the ILC Conclusions).

19. 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 Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or "Commission"). It is this part of the reasoning that I find most unpersuasive and problematic. It flies in the face of State practice and well-settled jurisprudence of the Court.

B. Relationship between the Régimes of the Continental Shelf and of the Exclusive Economic Zone

20. In recalling the negotiating history of UNCLOS, the Court refers to the relationship between the régimes of the exclusive economic zone and of the continental shelf. In the Court's view, since a coastal State enjoys in the exclusive economic zone, *inter alia*, sovereign rights over the non-living resources in the seabed and subsoil within 200 nautical miles and since such rights shall be exercised in accordance with the rules applicable to the continental shelf, the two régimes are interrelated. Based on that link, the Court assumed that the entitlement to an extended continental shelf may not extend within 200 nautical miles because such an extension would encroach on the attendant exclusive economic zone of the coastal State. This inference, in my view, overstates the import of Article 56, paragraph 3.

21. First of all, 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 seabed within 200 nautical miles may be delimited separately. Among scholars, views on the subject-matter also vary greatly[1]. This is indeed an area that the "package deal" was ambiguous about. On the relationship between the two régimes, one analysis of Article 56, paragraph 3, is pertinent in the present context:

> "The text of Article 56 (3) is a clear indication of the applicable law, which might result from the idea that the continental shelf and the EEZ are essentially dealing with different natural resources. Whereas the continental shelf confers on coastal States exclusive rights over the exploration and exploitation of the non-living resources and sedentary resources in the seabed and subsoil, the EEZ is more concerned with living resources in the water column, in particular fisheries. It is therefore in line with the functional purposes of the two regimes if the continental shelf regime applies to the seabed and subsoil, even if the area is within the reach of the EEZ."[2]

This understanding is consistent with the concept of a single continental shelf. The continental shelf régime applies to the seabed and subsoil irrespective of the basis of the entitlement, natural prolongation or distance. While the inclusion of the sovereign rights over the seabed and subsoil in the régime of the exclusive economic zone may reinforce the continental shelf entitlement within 200 nautical miles, Article 56, by its own terms, only concerns the content and exercise of substantive rights.

22. Judicial and arbitral decisions generally recognize the autonomy and distinction of the two régimes. In the present case, however, the Court draws a different reading from its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, where the Court observed that, "[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf" (*Judgment, I.C.J. Reports 1985*, p. 33, para. 34). Based on this

[1] Malcolm D. Evans, "Delimitation and the Common Maritime Boundary", *British Yearbook of International Law*, 1994, Vol. 64 (1), p. 283; Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?", *The International Journal of Marine and Coastal Law*, 2018, Vol. 33, pp. 105-110.

[2] Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?", *The International Journal of Marine and Coastal Law*, 2018, Vol. 33, pp. 106-107.

statement, the Court now considers that, with the distance criterion as the sole basis of entitlement of the coastal State to both the exclusive economic zone and the continental shelf within 200 nautical miles, an extended continental shelf of one State may not extend within 200 nautical miles of another State.

23. This finding, first of all, implies that, with the distance criterion applicable to both régimes, the concept of the continental shelf within 200 nautical miles has been absorbed by that of the exclusive economic zone under the contemporary law of the sea, an implication that the Court categorically rejected in the same Judgment (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 33). Following the above statement cited by the Court, the Court in that case went on stating that,

> "for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this quite apart from the provision as to distance in paragraph 1 of Article 76. *This is not to suggest that the idea of natural prolongation is now superseded by that of distance.* What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation . . . is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and *both remain essential elements in the juridical concept of the continental shelf*." (*Ibid.*, para. 34; emphasis added.)

This statement shows that the interrelationship between the two régimes as defined in Article 56, paragraph 3, is not conclusive on the question that the Court is dealing with in the present case, namely, whether there is priority accorded to the entitlement within 200 nautical miles over an extended continental shelf. Moreover, the factual situation of that case is entirely different from the present one. In the former, the distance between the parties is less than 400 nautical miles, where geographical or geophysical factors could be disregarded, while in the latter, the Applicant's claim to an extended continental shelf depends on the technical and scientific evidence that may establish the existence of the natural prolongation of its land territory. Once the natural prolongation is established, the Applicant is entitled to the extended continental shelf. What the Court stated in the context of the *Libyan Arab Jamahiriya/Malta* case did not address the question of entitlement but of delimitation. At the time of that case, with UNCLOS not yet in force and the customary status of Article 76, paragraph 1, with regard to the distance criterion still in doubt, the Court took the legally permissible extent of the exclusive economic zone appertaining to a given State as "*one of the relevant circumstances to be taken into account for the delimitation of*

the continental shelf" of that State (*ibid*., para. 33; emphasis added). By granting greater importance to the element of distance, which is common to both régimes, in the delimitation of continental shelf within 200 nautical miles, the Court only tried to reach an equitable solution but not to pronounce a general rule restricting natural prolongation.

24. Even supposing that the Court's statement in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case did constitute a general legal pronouncement, one may still wonder when the putative rule as identified by the Court in this case formed part of customary international law, 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.

25. In the *Bay of Bengal* cases, the International Tribunal for the Law of the Sea (ITLOS) and the arbitral tribunal established under Annex VII of UNCLOS respectively delimited the maritime boundary including the extended continental shelf between the parties to each case. The adjustment of the provisional equidistance line resulted in a "grey area" of limited size in both cases, which is located within the 200-nautical-mile limit of the coast of one party but on the other party's side of the line that delimits the parties' continental shelves (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 119, para. 463; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014, RIAA*, Vol. XXXII, p. 147, para. 498). The Court dismisses the Applicant's argument based on these cases, which it considers irrelevant for the consideration of the present case, because, in its view, the grey area is "an incidental result" of the adjustment of the provisional equidistance line and the circumstances in those cases are distinct from the situation in the present case (Judgment, para. 72).

26. In *Somalia* v. *Kenya* — a case it has recently adjudicated — the Court observed that if the delimitation line, as determined, continues on the course beyond 200 nautical miles, it 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, thus resulting in a similar "grey area" as in the *Bay of Bengal* cases (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197). The Court again dismisses the relevance of the case, stating that the grey area is merely a possibility and that, therefore, there is no need to take it into account (Judgment, para. 73).

27. This approach taken by the Court appears hasty and evasive. In these three cases, the "grey area", albeit incidental in nature and small in size, is in itself a piece of hard evidence that disproves at least the inseparability of the two zones in the maritime delimitation. Convenient or not, it evinces that the

exclusive economic zone does not dictate the delimitation of the continental shelf. As ITLOS observed in the *Bangladesh/Myanmar* case,

> "the legal regime of the continental shelf has always coexisted with another legal regime in the same area. Initially that other regime was that of the high seas and the other States concerned were those exercising high seas freedoms. Under the Convention, as a result of maritime delimitation, there may also be concurrent exclusive economic zone rights of another coastal State." (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 121, para. 475.)

Evidently, these judicial and arbitral organs do not consider that there existed a customary rule by which an extended continental shelf of one State may not extend within the exclusive economic zone of another State, as a matter of entitlement. When an overlap of entitlements occurs, the matter is one of delimitation. Article 83 of UNCLOS, on purpose, leaves sufficient room for the relevant circumstances of each case to be considered in the delimitation process.

28. In practice, States not only claim an entitlement to an extended continental shelf that may extend within 200 nautical miles of another State, but also draw maritime boundaries by agreement that delimit the exclusive economic zone and the continental shelf separately. They do it either by separate agreements dealing with different zones, or simply by drawing different boundary lines within the same agreement.

29. Australia and Indonesia, for example, concluded an agreement on the continental shelf boundary in the Timor and Arafura Seas in 1972 (Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, concluded 9 October 1972, entered into force 8 November 1973, United Nations, *Treaty Series (UNTS)*, Vol. 974, p. 319). In 1997, the two States concluded another agreement on the exclusive economic zone boundary and the western extension of the seabed boundary (Agreement between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, concluded 14 March 1997, not yet in force, *International Legal Materials*, 1997, Vol. 36, p. 1053). The latter agreement drew the continental shelf boundary on the basis of the geological and geophysical factors of the Timor Trough, while the boundary of the exclusive economic zone was drawn on the basis of distance; the former line is closer to the Indonesian side. As a result of these two agreements, there are several overlapping areas where Australia's extended continental shelf is

subjacent to Indonesia's exclusive economic zone (see illustrative map 1, p. 497). For the purpose of management, the Agreement contains a specific provision regulating, *inter alia*, the rights and obligations of each party in the areas of overlapping jurisdiction. It affirms Indonesia's sovereign rights of exclusive economic zone in the water column and Australia's sovereign rights of continental shelf in the seabed[3]. Although the Agreement has not yet entered into force, it manifests that the parties did not consider there existed a customary rule by which Australia could not, by law, claim its entitlement to an extended continental shelf that extends within Indonesia's 200 nautical miles from its baselines.

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[3] Article 7 of the Agreement reads as follows:

"Areas of overlapping jurisdiction

In those areas where the areas of exclusive economic zone adjacent to and appertaining to a Party (the First Party) overlap the areas of seabed adjacent to and appertaining to a Party being the other Party (the Second Party):

(a) the First Party may exercise exclusive economic zone sovereign rights and jurisdiction provided for in the 1982 Convention in relation to the water column;

(b) the Second Party may exercise continental shelf sovereign rights and jurisdiction provided for in the 1982 Convention in relation to the seabed;

(c) the construction of an artificial island shall be subject to the agreement of both Parties. An 'artificial island' for the purposes of this Article is an area of land, surrounded by water, which is above water at high tide by reason of human intervention;

(d) the Second Party shall give the First Party three months notice of the proposed grant of exploration or exploitation rights;

(e) the construction of installations and structures shall be the subject of due notice and a permanent means of giving warning of their presence must be maintained;

(f) (i) any installation or structure which is abandoned or disused shall be removed by the Party which authorised its construction in order to ensure the safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organisation;

(ii) such removal shall also have due regard to fishing and to the protection of the marine environment. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed;

(g) the construction of a fish aggregating device shall be the subject of due notice;

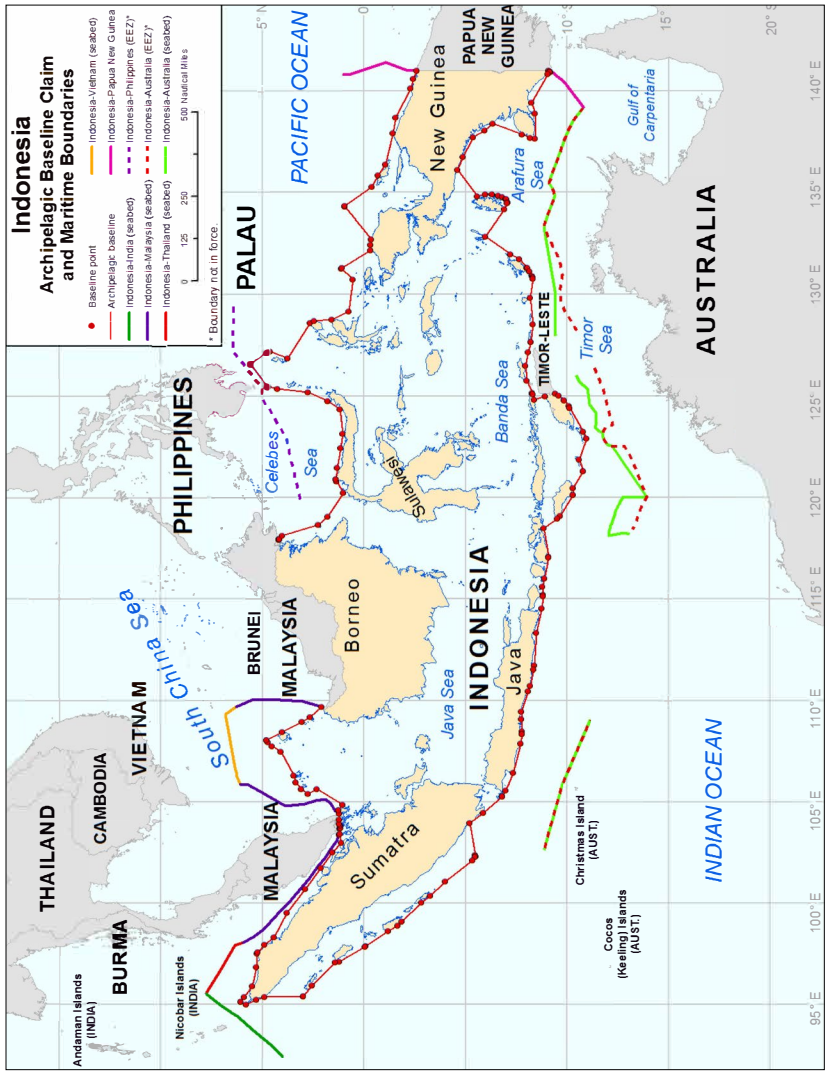
(h) the Party constructing an artificial island, installation, structure or fish aggregating device shall have exclusive jurisdiction over it;

(i) marine scientific research shall be carried out or authorised by a Party in accordance with the 1982 Convention and such research shall be notified to the other Party;

(j) the Parties shall take effective measures as may be necessary to prevent, reduce and control pollution of the marine environment;

(k) each Party shall be liable in accordance with international law for pollution of the marine environment caused by activities under its jurisdiction;

(l) any island within the meaning of Article 121.1 of the 1982 Convention which emerges after the entry into force of this Treaty shall be the subject of consultations between the Parties with a view to determining its status;



ILLUSTRATIVE MAP 1

(*Source:* Department of State of the United States of America, "Limits in the Seas (No. 141) — Indonesia: Archipelagic and other Maritime Claims and Boundaries", September 2014[4].)

(m) neither Party shall exercise its rights and jurisdiction in a manner which unduly inhibits the exercise of the rights and jurisdiction of the other Party; and

(n) the Parties shall cooperate with each other in relation to the exercise of their respective rights and jurisdiction."

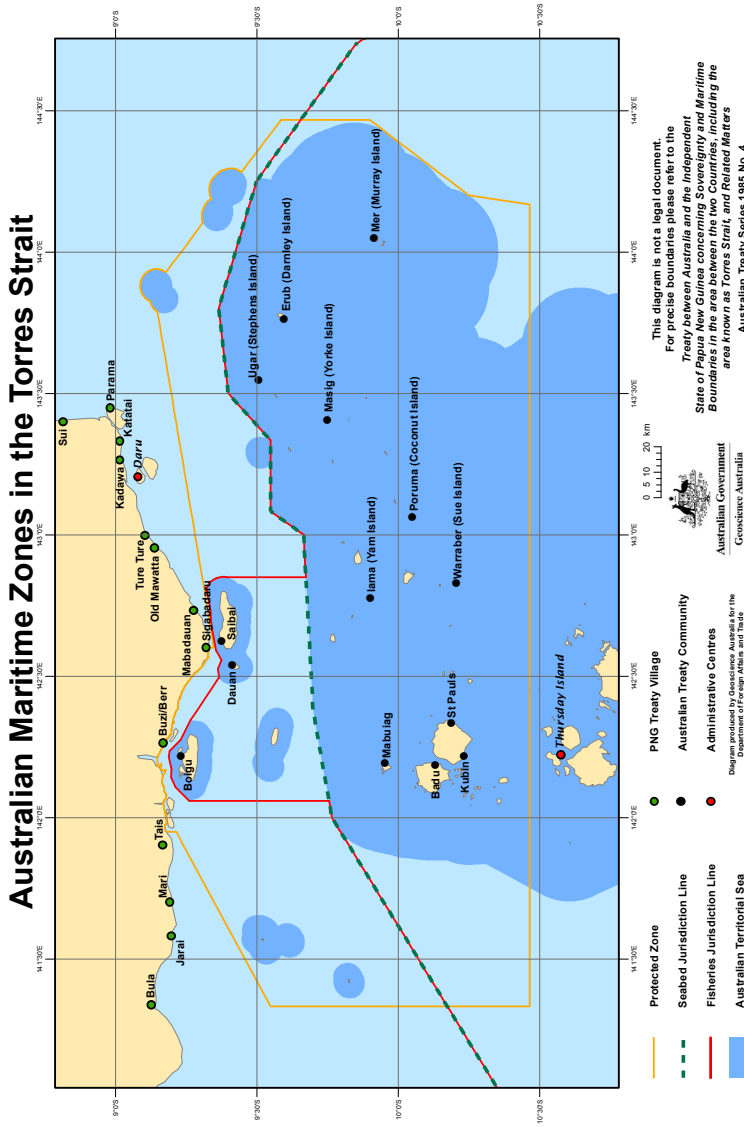
[4] Available at https://www.state.gov/wp-content/uploads/2020/02/LIS-141.pdf, p. 12.

30. The agreement on maritime boundaries concluded between Australia and Papua New Guinea is another example (Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, concluded 18 December 1978, entered into force 15 February 1985, *UNTS*, Vol. 1429, p. 207). Under Article 4 of this Treaty, two maritime boundaries are established between the two States. The first line is the continental shelf boundary concerning "seabed jurisdiction", which is defined as "sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law"[5]. The second line is the boundary relating to fisheries jurisdiction, defined as "sovereign rights or the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species"[6]. Based on the co-ordinates of the two boundaries, it is shown that, while the two boundaries in the eastern and western sections coincide, the two boundaries are separate in the middle section in the area known as the Torres Strait (see illustrative map 2, p. 499). Papua New Guinea, like Indonesia, accepted Australia's position without any reservation. This treaty remains in force to date.

31. Australia reiterated its position on the natural prolongation criterion during the *Timor Sea Conciliation* with Timor-Leste on the basis of Article 76, paragraph 1, of UNCLOS in light of the geological and geomorphological situation of the Timor Trough in the Timor Sea (*Timor-Leste* v. *Australia*, Permanent Court of Arbitration, Case Number 2016-10, Opening Session Transcript, 29 August 2016, p. 91). Although the parties ultimately reached a delimitation agreement establishing a single maritime boundary for both the exclusive economic zone and the continental shelf, the Preamble of the Treaty expressly states that "the settlement contained in this Treaty is based on a mutual accommodation between the Parties *without prejudice to their respective legal positions*" (Treaty between the Democratic Republic of Timor-Leste and Australia establishing their maritime boundaries in the Timor Sea, concluded 6 March 2018, entered into force 30 August 2019, *Australian Treaty Series* No. 16, 2019; emphasis added).

32. A more recent example is the delimitation agreement between Indonesia and the Philippines concerning the delimitation of the exclusive economic zone in the Celebes Sea concluded in 2014 (Agreement between the Government of the Republic of Indonesia and the Government of the Republic of the Philippines concerning the delimitation of the exclusive economic zone boundary, concluded 23 May 2014, entered into force 1 August 2019, *UNTS*, Vol. 3324, p. 1). The distance between the parties in the area in

[5] Article 1 (1) *(i)* and Article 4 (1).
[6] Article 1 (1) *(b)* and Article 4 (2).



Illustrative Map 2
(*Source:* Department of Foreign Affairs and Trade of Australia, "Guidelines for Traditional Visitors Travelling under the Torres Strait Treaty"[7].)

[7] Available at https://www.dfat.gov.au/geo/torres-strait/guidelines-for-traditional-visitors-travelling-under-the-torres-strait-treaty.

the Celebes Sea is less than 400 nautical miles. In delimiting the boundary of exclusive economic zones between the two States, the parties took account of the provisions of UNCLOS and the principles applicable to delimitation. The Agreement specifically provides that "[t]his Agreement shall not prejudice any rights or positions of the Contracting Parties with regard to the delimitation of the Continental Shelf boundary"[8]. Apparently, the parties to the Agreement do not consider that the boundary of the exclusive economic zone is decisive for the delimitation of the continental shelf boundary within 200 nautical miles.

33. Similar practice can also be found in other regions. Denmark and the United Kingdom, for instance, reached an agreement on the maritime delimitation in the area between the Faroe Islands and the United Kingdom in 1999 (Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to the Maritime Delimitation in the area between the Faroe Islands and the United Kingdom, concluded 18 May 1999, entered into force 21 July 1999, *United Kingdom Treaty Series (UKTS)*, 1999, No. 76). Under the Agreement, the parties delimited the continental shelf in the area and the waters superjacent to the continental shelf in part of the area and established a special régime, called "the Special Area", in the remaining part. The parties made special arrangements for the exercise of fisheries jurisdiction and rights in the Special Area. In a subsequent protocol concluded in 2012 to the Agreement, the parties established exclusive economic zones in the waters as previously delimited and decided to retain the previous boundaries and the Special Area as drawn in the Agreement (*UKTS*, 2014, No. 22). From the maritime boundary shown in illustrative map 3 reproduced below (p. 501), one can see that the Special Area as a water column is separated from the continental shelf of either party.

34. There are other bilateral maritime delimitation agreements, where one party's extended continental shelf overlaps with the exclusive economic zone of another party (see Agreement between the United States of America and the Union of Soviet Socialist Republics on the maritime boundary, concluded 1 June 1990, applied provisionally since 1 June 1990, *Law of the Sea Bulletin*, No. 17, April 1991, p. 15; Treaty between the Kingdom of Norway and the Russian Federation concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean, concluded 15 September 2010, entered into force 7 July 2011, *Law of the Sea Bulletin*, No. 77, 2012, p. 24)[9].

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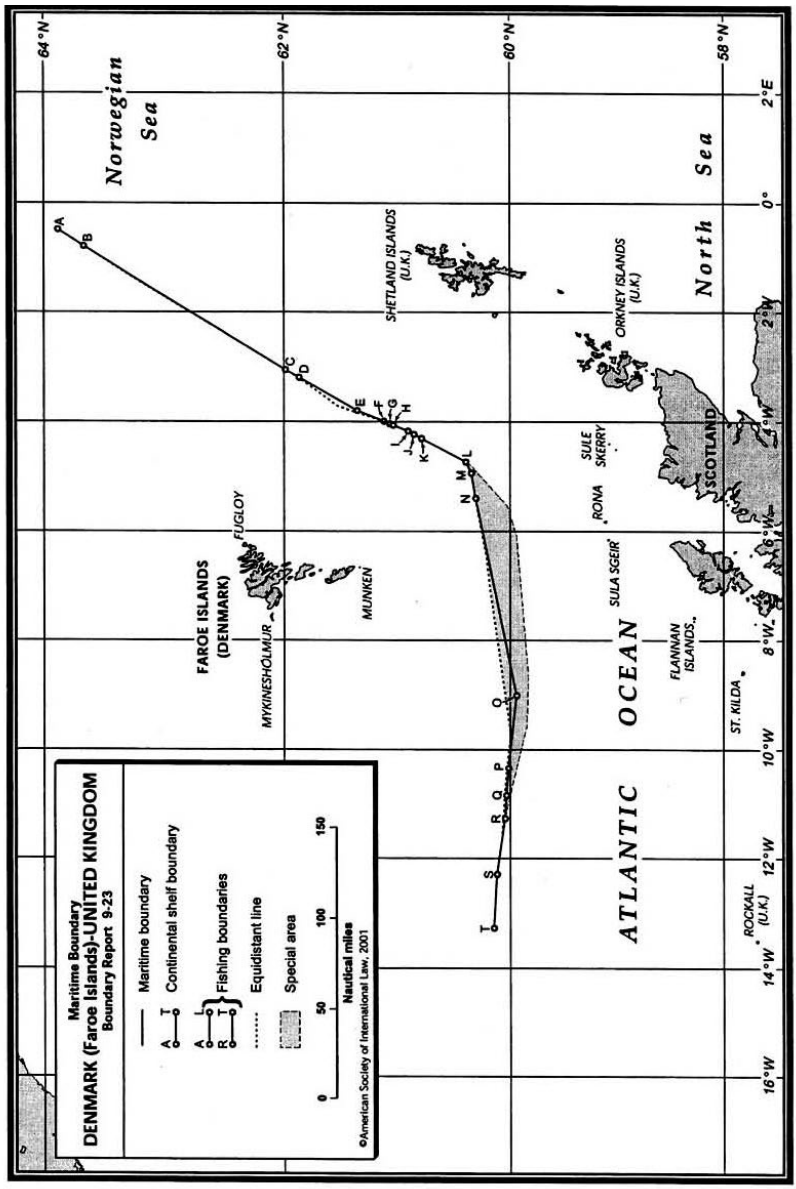
[8] Article 1, paragraph 3, of the Agreement.

[9] In the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Delimitation, the boundary line as determined results in two areas, so-called "special areas", in which one party's exclusive economic zone is superjacent to the continental shelf of the other party. Pursuant to Article 3, each party permits the other party to exercise "the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction" that the other party would otherwise be entitled to exercise under international law. To



ILLUSTRATIVE MAP 3

(*Source:* Jonathan I. Charney and Robert W. Smith (eds.), *International Maritime Boundaries*, 2002, Vol. IV, p. 2955.)

35. In support of its claim, the Respondent refers to Article 2, paragraph 3, of the Treaty between the Federated States of Micronesia and the Republic of Palau concerning maritime boundaries and cooperation on related matters, which provides that "no Party shall claim an extended continental shelf that intrudes into the Exclusive Economic Zone . . . of the other Party" (concluded 16 July 2006, entered into force 16 February 2016, *UNTS*, Vol. 3210, p. 1). This evidence, contrary to the position of the Respondent, proves that these two States do not consider that there is a customary rule that prohibits an extended continental shelf from extending within 200 nautical miles from the coast of another State, because otherwise such a clause would be unnecessary.

36. Admittedly, 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 of 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 to the extended continental shelf.

C. State Practice with regard to CLCS Submissions

37. With regard to the submissions of States to the CLCS, the Court notes 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" (Judgment, para. 77). Recalling some inconsistent practice of "a small number of States", the Court takes the view that, "[t]aken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the iden-

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put it in more simple terms, they transfer their EEZ rights to each other without changing the maritime title of the respective areas. In the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, the maritime boundary line also produces a "Special Area" which lies within 200 nautical miles of Norway and beyond 200 nautical miles of the Russian Federation. Article 3 of the Treaty provides that the Russian Federation shall be entitled to exercise EEZ rights and jurisdiction that Norway would otherwise be entitled to exercise under international law. It also provides, however, that the Russian Federation's exercise of such rights and jurisdiction "*derives from the agreement of the parties and does not constitute an extension of its exclusive economic zone*" (emphasis added). Legally speaking, therefore, the Russian Federation's extended continental shelf is subjacent to the exclusive economic zone of Norway.

tification 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* (*ibid*.). 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*.

38. First of all, it is necessary to examine the character of the State submissions to the CLCS. Article 76, paragraph 10, of UNCLOS states that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Accordingly, 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. This understanding is supported by the terms of the CLCS's mandate and State practice. 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 where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute, unless prior consent is given by all the parties to the dispute. Understandably, in order to have their submissions considered and qualified by the Commission, States may refrain from extending their continental shelf entitlement within 200 nautical miles from the coast of other States with a view to avoiding a dispute. Such restraint may be exercised because of an agreement of the States concerned, a prior unilateral commitment, or a special arrangement. Some States have made several submissions to the CLCS in respect of their separate territorial areas. Their claims to an extended continental shelf with respect to those areas do not consistently refrain from encroaching upon the 200-nautical-mile entitlement of another State. For instance, France's submissions in respect of the areas of French Guiana and New Caledonia and in respect of French Polynesia stop at 200 nautical miles from the coasts of neighbouring States, but its submission concerning Saint Pierre and Miquelon extends within 200 nautical miles from the coast of Canada. When Canada raised its objection to the latter submission on the ground that the maritime zones of Saint Pierre and Miquelon had been definitely settled by arbitration, France maintained that the arbitral tribunal declared that the question (of an entitlement to a continental shelf beyond 200 nautical miles) did not fall within its competence. It further underscored that "*those claims do not run counter to the United Nations Convention on the Law of the Sea or any rule of international law*" (Note Verbale from the Permanent Mission of France to the United Nations, dated 17 December 2014; emphasis added). Evidently, no consistent State practice can be identified from States' submissions to the CLCS.

39. 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 do not reach the 200-nautical-mile limit of another States and, therefore, are irrelevant. 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; in its view, only four States have made the claim encroaching upon the entitlement within 200 nautical miles of another State[10]. At first sight, this looks overwhelmingly persuasive. For the purpose of the present case, however, that practice obviously needs further scrutiny.

40. Notwithstanding Article 76, paragraph 10, of UNCLOS and the above-mentioned CLCS rules, studies show 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 bilateral agreements with their neighbouring States on maritime delimitation within 200 nautical miles. That fact may have a direct bearing on the States' decision to exercise restraint in their CLCS submissions. Moreover, as mentioned above, 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.

41. In the *Mauritius/Maldives* case before an ITLOS Special Chamber, the Maldives claims an extended continental shelf that extends within 200 nautical miles from the baselines of the Chagos Archipelago (Mauritius). While this is not immediately apparent from the publicly available Executive Summary of July 2010 of the Maldives' Submission to the CLCS and the accompanying maps, the ITLOS Special Chamber noted the existence of such an overlap (*Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment of 28 January 2021*, para. 332; *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 257). The Maldives itself "confirm[ed] its position that the Maldives' entitlement to the continental shelf beyond 200 nautical miles from its baseline can be . . . extended [within the 200-nautical-mile limit of Mauritius]" (ITLOS/PV.22/C.28/4/Rev.1, p. 7). Mauritius claimed that the Maldives cannot extend its continental shelf into the exclusive economic zone of Mauritius, because it had undertaken a specific commitment not to do so (*Dispute concerning Delimitation of the Maritime Boundary between Mauritius and*

[10] These four States include China, the Republic of Korea, Nicaragua and Somalia.

Maldives in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023, para. 260). Indeed, Mauritius itself contended that,

> "if Maldives were entitled to claim an outer continental shelf within 200 Miles of the baselines of Mauritius, so too could Mauritius, correspondingly, claim an outer continental shelf that encroaches within 200 Miles of Maldives" (ITLOS/PV.22/C28/6/Rev.1, p. 29).

Ultimately, for reasons concerning the circumstances of that case, the Special Chamber considered that it was

> "not required to address the question whether the Maldives has an entitlement to a continental shelf beyond 200 nm in the relevant area or the question whether the Maldives' entitlement to a continental shelf beyond 200 nm may extend within the 200 nm limit of Mauritius" (*Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 275).

The practice of both Mauritius and the Maldives in relation to the latter's extended continental shelf reduces the weight of the evidence presented by Colombia. The Maldives' "restraint" is not based on a legal obligation derived from a customary rule, nor is Mauritius's objection to the submission of the Maldives to the CLCS based on customary international law.

42. Responses to the submissions of the four States that are said by Colombia to have encroached on the 200-nautical-mile entitlements of other States are also worth noting. In its communications sent to the United Nations in response to the submissions of China and the Republic of Korea to the CLCS, Japan, while objecting to the submissions, emphasized the need for delimitation between the States concerned. With regard to China, Japan states that

> "[t]he distance between the opposite coasts of Japan and the People's Republic of China in the area with regard to the submission is less than 400 nautical miles[.] The delimitation of the continental shelf in this area shall be effected by agreement between the States concerned in accordance with Article 83 of the United Nations Convention on the Law of the Sea (hereinafter referred to as 'the Convention'). It is, thus, indisputable that the People's Republic of China cannot unilaterally establish the outer limits of the continental shelf in this area." (Note Verbale from the Permanent Mission of Japan to the United Nations, dated 28 December 2012.)

43. Japan made a similar response to the submission by the Republic of Korea. In its reply to Japan's objection, the Republic of Korea stated the following:

> "Nothing in the text of the United Nations Convention on the Law of the Sea (hereinafter referred to as 'the Convention') supports the suggestion that the establishment of the outer limits of the continental shelf beyond 200 nautical miles in an area where the distance between States with opposite coasts is less than 400 nautical miles cannot be accomplished under the provisions of the Convention. The Convention establishes two distinct bases of entitlement in the continental shelf: (1) distance from the coast; and (2) the geomorphological criteria stated in paragraph 4 of Article 76. *Neither basis is afforded priority over the other under the Convention.* Japan, therefore, cannot use its entitlement based on the distance criterion to negate Korea's entitlement based on geomorphological considerations, or to block the Commission from issuing recommendations with regard to the existence and limits of the continental shelf in the East China Sea. Accordingly, the Partial Submission of the Government of the Republic of Korea to the Commission constitutes a legitimate undertaking in conformity with and in satisfaction of its obligations under the Convention, as well as the relevant provisions of the Rules of Procedures and the Scientific and Technical Guidelines of the Commission." (Note Verbale from the Permanent Mission of the Republic of Korea to the United Nations, dated 23 January 2013; emphasis added.)

44. In the case of Somalia, Somalia in its 2014 submission claimed that there was an overlap between Somali and Yemeni claims as regards the areas of the continental shelf beyond 200 nautical miles and that the delimitation of the continental shelf between the two countries had not yet been resolved. It indicated that it was ready to enter into consultation with Yemen with a view to reaching an agreement or understanding which would allow the Commission to consider and make recommendations on submissions by each of the two coastal States. In its communication to the Secretary-General, Yemen first objected to the consideration by the CLCS of Somalia's submission (Note Verbale from the Permanent Mission of the Republic of Yemen to the United Nations, dated 10 December 2014). Somalia amended its submission in 2015, which resulted in an overlap of its claim with part of Yemen's entitlements within 200 nautical miles from the coast of Yemen. Afterwards, Yemen, while reaffirming that there was no agreement or understanding between the two States regarding the potential overlap of maritime zones beyond 200 nautical miles, indicated that

> "in the interests of advancing the establishments of maritime limits for itself and its neighbours in the Northwest Indian Ocean, it proposes to remove its objection to the Article 76 submission by the Federal Govern-

> ment of Somalia, with immediate effect, provided that a reciprocal obligation was made by Somalia that it no longer has an objection to the Commission on the Limits of the Continental Shelf examining the submissions of The Republic of Yemen" (Note Verbale from the Permanent Mission of the Republic of Yemen to the United Nations, dated 7 August 2019).

Apparently, Yemen has left the matter for delimitation.

45. Kenya initially objected to Somalia's 2014 submission on the ground that a significant part of Somalia's continental shelf beyond 200 nautical miles "is appurtenant to an EEZ that is under Kenya's jurisdiction". Subsequently, in withdrawing its objection, Kenya states that,

> "as longs [*sic*] as the Commission is aware of the area of overlapping claims, and that, in respect of that area, it gives all due consideration to the submissions made by both States, the Commission may proceed to make recommendations concerning the outer limits of the continental shelf off the coasts of Somalia and Kenya" (Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations, dated 30 June 2015).

Kenya's statement to the CLCS apparently did not suggest that Somalia was not entitled to the continental shelf but asserted that there was an overlap of entitlements.

46. In the western Caribbean region, Colombia, Costa Rica, Jamaica and Panama, individually or jointly, opposed Nicaragua's submission on the ground that Nicaragua's claim encroached upon their respective maritime areas. They rejected Nicaragua's assertion that its submission is "without prejudice to the delimitation of the continental shelf between Colombia, Costa Rica and Panama" and reaffirmed their respective positions with respect to Nicaragua's submission (Communication from the Ministers for Foreign Affairs of Colombia, Costa Rica and Panama, dated 5 February 2014, referring to the Note Verbale from the Permanent Mission of Nicaragua to the United Nations, dated 20 December 2013). In denying Nicaragua's claim, these States objected to the Commission's consideration and ruling on Nicaragua's submission. Colombia in its response dated 5 February 2014 referred to the existing maritime boundaries that it had agreed with its neighbouring States, asserting that the submarine areas in the Caribbean Sea that Nicaragua claimed in its submission belong to Colombia under international law. As a non-party to UNCLOS, it dismissed the opposability of Nicaragua's submission to Colombia. In none of the above communications did these States explicitly claim that, as a matter of

principle, an extended continental shelf may not extend within 200 nautical miles of another State. Colombia's claim is primarily based on an argument of established boundaries and the entitlement of its islands.

47. The above discussion shows 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 (Conclusion 7 of the ILC Conclusions). Moreover, the other constitutive element for the identification of the alleged rule — *opinio juris* — must be determined separately (ILC Conclusions, Conclusion 3, comment 7). 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. In any event, the 51 submissions, which the Court considers as reflecting "the practice of the vast majority of States parties", in fact, do not truly reflect the positions of the States parties on the issue in question. As discussed above, States such as Australia, Indonesia, Papua New Guinea, France, the Maldives, and others, whose submissions are included in the 51 submissions, clearly take a different view on the entitlement to an extended continental shelf that encroaches on the 200-nautical-mile limit of another State.

48. Taking into account all the available practice of States and assessing it as a whole, it can be said that there exists neither a general practice nor *opinio juris* that denies the entitlement of a State to an extended continental shelf that extends within 200 nautical miles from the coast of another State. As many States affirm and have done, when such an overlap of entitlements occurs, the matter shall be settled through the delimitation process in accordance with the rule reflected in Article 83 of UNCLOS.

49. 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 is unpredictable, particularly in respect of the existing treaties and recommendations of the CLCS that have already accepted the entitlement to an extended continental shelf that extends within 200 nautical miles of another State. The CLCS may thus be placed at a crossroads as to what to do with those "problematic" submissions.

III. Nicaragua's Submissions on an Extended Continental Shelf

50. Having considered the state of the law, I am 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.

51. Procedurally, the expert reports produced by the Parties were not further examined at the oral proceedings because of the way in which the hearing was organized. From the written pleadings, technical and scientific evidence produced by Nicaragua seems to prove that its continental shelf, the Nicaraguan Rise, extends far enough to reach within 200 nautical miles from the mainland coast of Colombia. At the same time, however, Colombia's expert reports, in challenging the information contained in Nicaragua's submission to the CLCS with regard to the edge of the natural prolongation of the Nicaraguan land territory in the Caribbean Sea, also seem technically tenable. 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 I believe 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.

52. Notwithstanding my serious reservations regarding the reasoning of the Court, there are two major considerations that led me to vote in favour of the Court's decision.

53. As a technical matter, the Parties are deeply divided over the scientific and technical facts of Nicaragua's extended continental shelf. Nicaragua claims that the Nicaraguan landmass extends eastwards underwater to form the dominant feature in the southwest Caribbean: the Nicaraguan Rise, which is said to stretch over 500 nautical miles from the Nicaraguan landmass in the southwest to Jamaica and Haiti in the north-east. The Nicaraguan

Rise, as is shown, is separated from the oceanic abyssal plain of the Colombian Basin to the south by a linear feature: the Hess Escarpment. Its northern edge is formed by the Cayman Trough, a deep ocean trench lying to the north of Honduras, running between Guatemala and the north coast of Jamaica, approximately parallel to the Hess Escarpment. Nicaragua further asserts that the Nicaraguan Rise is divided into two halves: to the north the Nicaraguan Rise proper and — separated from it by the Pedro Bank Fracture Zone — the Lower Nicaraguan Rise to the south. The Nicaraguan Rise is about 150 nautical miles wide (i.e. north-south) and extends from the land territory of Nicaragua in the west to Haiti in the east.

54. Contesting Nicaragua's claim, Colombia's expert reports present the analyses of the scientific evidence collected from public sources and the Colombian Navy on the natural prolongation of the seabed and subsoil from the Nicaraguan land territory into and under the Caribbean Sea. The key finding of the reports which is relevant to the present case is that the edge of the natural prolongation of the Nicaraguan land territory in the Caribbean Sea is not the Hess Escarpment (the southern limit of the Nicaraguan Rise as assumed by the Applicant), but the Pedro Bank Escarpment-Providencia Trough Lineament, which separates the southern edge of the Nicaraguan Rise proper from the Lower Nicaraguan Rise. According to Colombia's experts, the scope of Nicaragua's continental margin is much smaller than Nicaragua's experts suggest and, consequently, Nicaragua's landmass does not extend within 200 nautical miles from the mainland coast of Colombia.

55. The technical characterization of Nicaragua's continental margin must be left to scientific and technical experts. Divergent as they are, the expert reports of the Parties, at the least, 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.

56. First, the relationship between Nicaragua's continental margin and Colombia's mainland coast remains highly uncertain. Even relying on Nicaragua's evidence, the outer limit of the Lower Nicaraguan Rise in the northeast, as defined by Nicaragua, seems overexpansive. 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.

57. Additionally, the Court has never dealt with such 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 nevertheless 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 meth-

odology 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.

58. Moreover, 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, situated on the Nicaraguan Rise, alongside Nicaragua, are Colombia's Archipelago of San Andrés, Providencia and Santa Catalina, Jamaica and Haiti. 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 a 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 that Nicaragua might 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.

59. In the 2012 Judgment, the Court clearly 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 (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159). In rejecting Nicaragua's proposal to draw a series of enclaves around each of Colombia's islands, the Court underscored the requirement not to produce cut-off effect in the delimitation. It considered, in particular, that

> "[e]ven if each island were to be given an enclave of 12 nautical miles, and not 3 nautical miles as suggested by Nicaragua, the effect would be to cut off Colombia from the substantial areas to the east of the principal islands, where those islands generate an entitlement to a continental shelf and exclusive economic zone. In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area." (*Ibid*., p. 708, para. 230.)

The Court, by implication, 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 Nicaragua had made in the *Territorial and Maritime Dispute* 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.

60. Based on the foregoing considerations, I come to the conclusion that Nicaragua's submissions should not be upheld.

(Signed) XUE Hanqin.